

IN THE SUPREME COURT OF OHIO

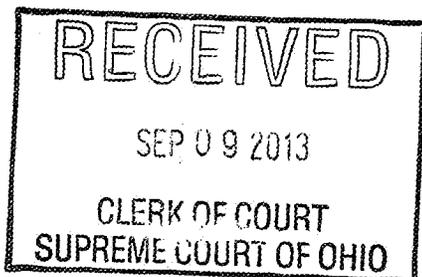
Stephanie Y. Clough :  
 Appellant : On Appeal from the Lake  
 : County Court of Appeals  
 v. : Eleventh District  
 :  
 James V. Cireddu : Court of Appeals  
 Appellee : Case No. 2012-L-103

13-1445

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MEMORANDUM IN SUPPORT OF JURISDICTION OF  
 APPELLANT STEPHAINE Y. CLOUGH

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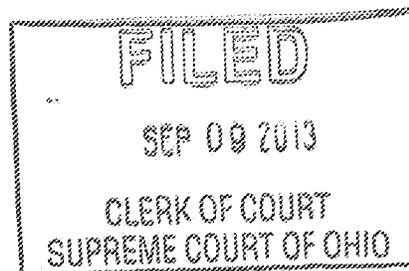
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GUARDIAN AD LITEM



**TABLE OF CONTENTS  
AND ASSIGNMENTS OF ERROR**

	Page
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE CASE.....	5
STATEMENT OF FACTS.....	5
LAW AND ARGUMENT	
APPELLANT'S FIRST ASSIGNMENT OF ERROR.....	8

**The court erred in interpreting that §O.R.C. 3109.04(E)(1)(a), specifying the requirements for a change in circumstances in order to change a previous custody decree, includes a condition that the changes must be material adverse to the children.**

AUTHORITIES:

ORC 3109.04(E)(1)(a).....	8
ORC 3109.04(B)(1)(2)(3).....	10
ORC 3109.04(B)(1)(a)(b)(c).....	9
<i>Brown v. Rehder</i> , (June 28, 1991) Geauga App. No. 90-G-1576.....	10
<i>Davis v. Flickinger</i> (1997), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159, 1997-Ohio-260.	2
<i>D.W. v. T.R.</i> , 6th Dist. NO. L-11-1099, 2012-Ohio-614.....	9, 10
<i>Haskett v. Haskett</i> , 11th Dist. No. 2011-L-155, 2013-Ohio-145.....	9
<i>In re S.M.T.</i> , 8th Dist. No. 97181, 2012-Ohio-1745.....	9
<i>Lindman v. Geissler</i> , Delaware App. No. 06CAF060036, 2007-Ohio-2003.....	10
<i>Makuch v. Bunce</i> , 11th Dist. No. 2007-L-016, 2007-Ohio-6242.....	9
<i>Preece v. Stern</i> , Madison App. Nos. CA2008-09-024 and CA2008-12-029, 2009-Ohio-2519.....	10

**TABLE OF CONTENTS AND ASSIGNMENT OF ERROR (cont'd)**

*Rohrbaugh v. Rohrbaugh*, 136 Ohio App. 3d 599, 604-605, 737 N.E. 2d 551..... 9, 10

*Schiavoni v. Antonelli*, 11th Dist. No. 92-T-4794, 1993 Ohio App. LEXUS 5891..... 9-12

*Willoughby v. Masseria*, 11th Dist. No.2002-G-2437, 2003-Ohio-2368..... 9, 10

*Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416, 445 N.E.2d 1153..... 9-12

APPELLANT'S SECOND ASSIGNMENT OF ERROR..... 12

**The appellate court erred and abused its discretion unreasonably, arbitrarily, and unconscionably by supplanting its own judgment in place of remanding back the trial courts failure to consider the extensive facts presented to find a change in circumstances in the residential parent and in the lives of the children.**

CONCLUSION..... 15

PROOF OF SERVICE..... 16

APPENDIX

1. Magistrate’s Decision June 1, 2012
2. Judgment Entry August 22, 2012
3. Court of Appeals Judgment Entry May 20, 2013
4. Court of Appeals Judgment Entry August 1, 2013

## **EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This cause presents several diversions from established trial and appellate procedures and substantive violations of law in Ohio, which, if allowed to stand, undermines the basic tenants of our judicial system. The decisions of the court of appeals makes this case one of great general and public interest because it threatens the rights and expectations of the people of Ohio. If allowed to stand the appellate court's decision would, through the doctrine of "judicial discretion", allow the courts to ignore the Ohio's State Legislature's authority to amend or modify previous statutes concerning the post decree modification of parental rights and responsibilities. In amending R.C. 3109.04 in 1990 the legislature changed the statutory guidelines to obtain a modification of parental rights and responsibilities by requiring a less specific inquiry into the "best interest" of the children. Additionally, this case involves an issue of increasing importance, i.e. does the doctrine of "judicial discretion" excuse and affirm a trial court's erroneous interpretation concerning the law and higher court case precedents. The appellate court admitted in its opinion in this case that the legislature did amend the law in 1990 but that the lower court had the absolute right to "apply controlling precedent". In retaining and imposing a stricter preexisting case precedent, the trial and appellate court's ignored the legislature's authority and intentions to lower the threshold for a "change in circumstances" in order that the children's best interests are served. To continue a practice in direct opposition of changes in the law is like saying it's okay to continue to discriminate against persons on the basis of class, gender, race, religion, or sexual preference, because it was once permitted. It is abhorrent that the court of appeals failed to recognize that a society's attitudes and beliefs can change over time. The court of appeals decision is also in defiance to this Honorable Court's case precedents that the law's intent was not to put such a high threshold or burden that the children's "best interest" is not served. This Honorable Court is on record opining that appellate

court's, "must not make the threshold for a change so high as to prevent a trial judge from modifying custody if the court finds it is necessary for the best interest of the child." *Davis v. Flickinger*, 77 Ohio St.3d at 420-421, 674 N.E.2d 1159. Furthermore, this Court went even further in its ruling stating that a court applying a higher standard than required by law is subjectively supplanting its opinion over the letter and intent of the law.

This case presents an appellate court's provocation that is driven from the impetus to affirm a lower court's ruling over the right of all Ohioans to seek readdress through an independent second review as guaranteed by the Ohio Constitution. The current appellate process in custody cases is largely superficial because this Honorable Court has allowed the appellate court's decisions to go unchallenged and unrestrained by apply a prevailing liberal program of denying jurisdictional review. This has created an atmosphere where there are no checks and balances and the trial court's presumption of correctness has developed into an absolute correctness, affirmed universally by the appellate courts. History has shown us that when too much power, or unrestrained power, resides with one person or body, then abuses are likely to occur. The lack of judicial oversight has led to "a culture of cover-ups" for unsupported lower court decisions permitting and even encouraging judicial abuse of discretion. In an effort to find a reason to affirm the trial court's decision, the appellate court in this case became the trier of fact and supplanted its opinion in place of the trial court's failure to issue specific factual findings and conclusions. Although evidence was taken by the trial court through testimony and exhibits concerning a change in circumstances by the residential parent, the trial court issued no direct finding or conclusion pertaining to this matter. However, the appellate court, in spite of not being in the best position to judge witness behavior and demeanor, and by only reviewing the Appellee's testimony, supplanted its opinion in this matter that the actions of the Appellee did not amount to a change in circumstances. To this end the appellate court ignored the Appellant's testimony and collaborating documentation and recorded history. This is not only improper it is

an abuse of discretion. The appellate court noted in its May 20, 2013 Judgment Entry at ¶45 “Clough also raises several other issues that she believes warrants a finding of a change of circumstances, although such issues were not the main substance of the argument presented by her counsel at trial as a basis for a change of circumstances. Since testimony was presented as to these issues, we will consider whether there is a basis for finding of a change in circumstances based on these issues.” The appellate court having observed that testimony and exhibits were presented relating to the residential parent’s actions, without specific findings and conclusions addressed by the lower court should have remanded the instant matter back to the lower court to formulate factual findings and conclusion. Instead the appellant court supplanted its opinion in place of the lower court. This was highly improper and circumvented the Appellant’s constitutional right to receive legal redress. When Appellant noted in her Application for Reconsideration that the appellate court supplanted its opinion in place of remanding the matter back to the lower court to make factual findings and conclusions it incredible responded, “This is a new argument, not raised in Clough’s appellate brief, which is not proper in an application for reconsideration”. Appellant’s Second Assignment of Error in her appeal was that “The trial court erred and abused its discretion unreasonably, arbitrarily, and unconscionably by failing to consider the extensive facts presented to find a change in circumstances in the residential parent and the lives of the children against the manifest weight of evidence”. This was clearly not a new argument, how was the Appellant to know the appellate court would supplant its judgment instead of remanding the matter back to the lower court until receiving its opinion. Furthermore, by the appellate court’s own reference, when considering a motion for reconsideration, “[t]he test generally applied \*\*\* is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been.” (Citation omitted) State v. Jones, 11th Dist. No. 2001-A-0027, 2003-Ohio-621, ¶ 5. The issue of whether a change

in circumstances occurred with the residential parent was not addressed by the lower court and should have resulted in the matter being remanded back to the lower court. The appellate court clearly didn't consider this when it should have and this error deprived the Appellant of her right of second review granted under the Ohio Constitution.

Finally, the Appellant recognizes that custody decisions are subjective and the attitudes and beliefs of a judge towards the participants largely influence the outcome. The Appellant having observed and documented a long sordid history of the trial court demeaning and diminishing her witness testimony, misrepresenting and changing her witness testimony, largely ignoring her own testimony and collaborating evidence, violating laws, and a total failure to record fault in the Appellee in spite of indisputable evidence, filed a Motion to Disqualify Judge Karen Lawson, Lake County Common Pleas Court Juvenile Division, with this Honorable Court. The record in this case clearly showed that the Appellant has not been afforded a fair and impartial judge as required under Ohio law. However, despite one-sided overwhelming evidence of bias that could not be discarded as harmless error, and without plausible explanation, this Honorable Court denied the Appellant's motion stating that the extraordinary action of disqualification was not the appropriate remedy in her case. This Honorable Court further stated that the proper remedy for the Appellant was to use the appellate process. In filing an Application for Reconsideration, the Appellant apprised this Honorable Court that she would ultimately be back to this Court as the court of appeals would as a general practice "rubber-stamp" the trial court's decision. This Honorable Court cannot deny jurisdiction in this matter as it would send a message to all Ohioans that there is no remedy for a biased and prejudiced judiciary despite protections guaranteed by the Ohio Constitution.

In conclusion, the principal of due process by a fair and impartial judiciary is a cornerstone of our American justice system. The right of all Ohioans to have their disputes fairly and impartially judged according to prevailing law is guaranteed by the Ohio Constitution. Just

because this case involves a custody matter is not reason to deny the Appellant justice. The actions of the trial court to circumvent the legislature's right to modify its laws, followed in succession by the court of appeals, threaten the rights of all Ohioans. We are a state of laws and no one is above the law. The Ohio legislature makes the laws and the judicial branch must uphold and follow the law whether or not they agree with it. Dr. Martin Luther King, once eloquently stated, "The threat to justice anywhere is a threat to justice everywhere". The rights of all Ohioans to have faith that their judicial system will uphold the law demands this Court grant jurisdiction to hear this case and review the erroneous and dangerous ruling of the court of appeals.

### **STATEMENT OF THE CASE**

#### **STATEMENT OF FACTS**

Appellant and Appellee were involved in a highly contested custody case, with widely divergent versions of the events leading up to the trial. On August 13, 2009, the Magistrate issued a Magistrate's Decision, awarding legal custody and residential parenting to the Appellee and requiring that appellant pay child support. The Magistrate also found the Appellant in Contempt of Court for refusing to allow the Appellee any parenting time with his children following an incident that occurred on June 21, 2009. The Appellant filed objections to the Magistrate's Decision on August 27, 2009.

On December 22, 2009, the Trial Court overruled the Appellant's Objections and adopted the Magistrate's Decision in full.

The Appellant appealed to the Court of Appeals on January 14, 2010. The Court of Appeals heard oral arguments on October 19, 2010, and filed its opinion on November 8, 2010.

The judgment affirmed the Trial Court's decision regarding custody and Contempt of Court, but reversed the commencement date for the Appellant to begin paying child support.

The Appellant's subsequent appeal to the Ohio Supreme Court for jurisdiction was denied as not establishing a significant constitutional question.

Since the initial custody decree, the Appellee has continually frustrated the Appellant in her right to schedule and receive visitation; has failed to allow Appellee nightly phone calls; has refused to allow participation in, or even notify Appellee of, the children's activities; has failed to seek and obtain proper medical treatment for the children; and has refused to exchange information about school and a myriad of other activities that involve the children. The actions by the Appellee have been a deliberate attempt to cut the Appellant out of the lives of the children.

The Appellant having no other option filed a Motion to Establish a Schedule for Telephone Contact on June 10, 2010; an Emergency Motion for Possession of Children on June 11, 2010; a Show Cause Motion on August 16, 2010, and a Motion to Compel the Exchange of Medical, School and Extracurricular Activity on September 21, 2010.

A hearing on the above matters was conducted on January 7, 2011 and the findings were journalized on May 10, 2011. The Trial Court found the Appellant's motions to establish daily telephone contact and motion to compel the exchange of information to be "well-taken". Appellant's show cause motion was deemed not well-taken on a technicality that the court was at liberty to determine enforcement. However, Appellant was awarded two extra days of visitation due to the Appellee interrupting her visitation. Although the Trial Court generally found in favor of the Appellant it stopped short of journalizing substantial credible evidence showing that the Appellee was refusing to allow Appellant daily phone calls, and deliberately misleading and failing to notify Appellant of important events and by his own email refused to allow Appellant

to attend events without his approval or to allow Appellant to bring any friends or family to any of the children's events.

Appellant attempted to negotiate an equal parenting plan with the Appellee out of court, but upon his refusal filed a Motion for the Allocation of Parental Rights and Responsibilities and Motion for Shared Parenting on August 18, 2011. Appellant also filed a shared parenting plan with the trial court on December 9, 2011.

A hearing on the Appellant's motions was conducted on April 24, 2012 and concluding on April 25, 2012. The Hearing Officer denied Appellant's motions stating that the Appellant failed to establish by a substantial amount of credible and competent evidence that a change of circumstances has occurred since December 2009 which was also *materially adverse to the children* (emphasis added). The Magistrate's Decision filed June 1, 2012 was later adopted and found to be proper in all aspects of the law following the Trial Court's Judgment Entry of August 22, 2012.

Appellant filed an appeal with the Eleventh District Court of Appeals on September 11, 2012, and filed her brief on October 26, 2012. Appellee filed his brief on December 2, 2012 and Appellant filed a brief in response to Appellee's brief on December 12, 2012.

On May 20, 2013 the Eleventh District Court of Appeals affirmed the Trials Courts decision denying Appellant's Motion for the Allocation of Parental Rights and Responsibilities and Motion for Shared Parenting.

On June 3, 2013 Appellant filed an Application for Reconsideration and Motion for Clarification with the Eleventh District Court of Appeals and Supplemented the Application for Reconsideration on June 12, 2013.

On August 1, 2013 the Eleventh District Court of Appeals denied Appellant's application for reconsideration and refused to provide any clarification.

follows.

**LAW AND ARGUMENT**

APPELLANT'S FIRST ASSIGNMENT OF ERROR

The court erred in interpreting that §O.R.C. 3109.04(E)(1)(a), specifying the requirements for a change in circumstances in order to change a previous custody decree, includes a condition that the changes must be material adverse to the children.

The trial courts and subsequent appellate court's opinion requiring that a change in circumstances must also be materially adverse to the children is clearly and convincingly against the law. The current statute in governing whether a change in circumstances has occurred is §R.C.3109.04(E)(1)(a). §R.C. 3109.04(E)(1)(a) in its entirety reads as follows:

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.

The 118th General Assembly substantially changed the statute. On April 12, 1990, Governor Richard Celeste signed Amended Substitute House Bill 591 into law. HB 591 eliminated the requirement that a court find, in certain contexts, that a child's present environment endangers significantly his physical health or his mental, moral, or emotional development before it may modify certain prior child custody decrees. The state legislature

removed the material adverse condition from the law concerning a change in circumstance. The general assembly provided further clarification in its Summary of Enactment under title, Grounds for Custody Modification – Elimination of need for danger to child’s health or development. “The act eliminates the requirement that a court find, in certain contexts, that a child’s present environment endangers significantly his physical health or his mental, moral, or emotional development before it may modify certain prior child custody decrees. Under the act, if a court finds that a change has occurred in the circumstances of the child who is the subject of the decree, his custodian, or either joint custodian, and that the modification is necessary to serve the best interest of the child, the court may modify the prior custody decree if the harm likely to be caused by a change in environment is outweighed by the advantages of the change in environment to the child.” The general assembly made it absolutely clear that when it revised the current statute §R.C. 3109.04(E)(1)(a) it consciously intended to completely eliminate the adverse clause from the requirements for a change in circumstances. The appellate court is mincing words and semantics in an attempt to justify that the phrase removed from R.C. 3109.04(B)(1)(c), “the child’s present environment endangers significantly his physical health or his mental, moral, or emotional development” is not the same as a “material and adverse effect upon a child”.

The appellate court in an attempt to justify applying the condition “material and adverse effect upon a child” cited several cases: *Haskett v. Haskett*, 11th Dist. No. 2011-L-155, 2013-Ohio-145; *Makuch v. Bunce*, 11th Dist. No. 2007-L-016, 2007-Ohio-6242; *Rohrbaugh v. Rohrbaugh*, 136 Ohio App. 3d 599, 604-605, 737 N.E. 2d 551; *D.W. v. T.R.*, 6th Dist. No. L-11-1099, 2012-Ohio-614; and *In re S.M.T.*, 8th Dist. No 97181, 2012-Ohio-1745. However, in researching the cited cases, *Haskett v. Haskett* in turn cites *Schiavoni v. Antonelli*, 11th Dist. No. 92-T-4794, 1993 Ohio App. LEXUS 5891, which cites *Wyss v. Wyss* (1982) 3 Ohio App. 3d 412 [3 OBR 479, 445 N.E. 2d 1153]. *Makuch v. Bunce* cites *Schiavoni v. Antonelli* and *Willoughby*

*v. Masseria*, 11th Dist. No. 2002-G-2437, 2003-Ohio-2368 which also cites *Schiavoni v. Antonelli*. *Rohrbaugh v. Rohrbaugh* cites *Wyss v. Wyss*. *D.W. v. T.R.* cites *Rohrbaugh v. Rohrbaugh*. *In re S.M.T* cites *Preece v. Stern*, Madison App. Nos. CA2008-09-024 and CA2008-12-029, 2009-Ohio-2519 which cites *Lindman v. Geissler*, Delaware App. No. 06CAF060036, 2007-Ohio-2003 which in turn cites *Rohrbaugh v. Rohrbaugh*. After reviewing all the cited case precedents they all lead back and originate with one case, *Wyss v. Wyss* (1982). *Wyss v. Wyss* was referencing R.C. 3109.04(B)(3) later changed to R.C. 3109.04[B][1][c] - “The child’s present environment endangers significantly his physical health or his mental, moral, or emotional development and the harm likely caused by a change of environment is outweighed by the advantages of such change to the child”. There is no possibility that *Wyss v. Wyss* in 1982 could have contemplated that the legislature in 1990 would substantially change and lower the requirement to the “best interests” test, therefore all noted citations are irrelevant to current law.

The appellate court also heavily relied on *Schiavone v. Antonelli*, 11th Dist. No. 92-T-4794, 1993 Ohio App. LEXIS 5891 to support the trial court’s decision. The appellate court misrepresented the *Schiavone* opinion as having considered the change in R.C. 3109.04 with respect to the material and adverse clause in its decision and still applied the requirement. This assertion is not correct. It is true that the above opinion noted that the wording of R.C. 3109.04 was slightly different than the current version; however it did so with respect to *Brown v. Rehder* (June 28, 1991) Geauga App. No. 90-G-1576. The reference to *Brown* was in relation to R.C. 3109.04 (E)(1)(a) “\*\*\*In applying these standards, the court shall retain the residential parent designated by the prior decree\*\*\*, unless the modification is in the best interest of the child and one of the following applies:”\*\*\*“(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.” The court only concluded in *Schiavone* that *Brown* held that R.C. 3109.04 provides for a “strong” presumption in favor of retaining the residential parent, and although the statute interpreted in *Brown* is

slightly different than the current version, the wording of the current statute, still supports such a presumption. The court was only referring to the presumption in favor of retaining the current designated residential parent. This merely refers to the burden of proof for a change in circumstances residing with the non-residential parent, not the specific requirements. The only reference to the material and adverse requirement in *Schiavone* was in a later citing of *Wyss v. Wyss* (1982), 3 Ohio App.3d 412. The court in *Schiavone* did not address the substance of the deleted wording “The child’s present environment endangers significantly his physical health or his mental, moral, or emotional development” from the current statute or make any pronouncement in regards to the material and adverse presumptive requirement implied in *Wyss v. Wyss* (1982). Therefore, this Court’s reference to the change in statute addressed in *Schiavone* as supporting the material and adverse clause is incorrect and cannot be used. There was no indication whatsoever that the court in *Schiavone* considered whether *Wyss* (1982) still supported the revised R.C. 3109.04 statute. It, in fact, does not.

The reference to the wording change in *Schiavone* was made in a footnote to *Brown* (not *Wyss*) that under a prior version of R.C. 3109.04, the non-residential parent was also required to establish under the third prong that the child’s present environment significantly endangered his or her emotional, mental, or moral development. The footnote went on to state, “this requirement has been deleted under R.C. 3109.04(E)(1)(a)(iii)”. However, the *Schiavone* opinion failed to recognize that the precedent established in *Wyss* (1982), a “change in circumstances” is intended to denote an event, occurrence, or situation which has a material and adverse effect upon a child was in relationship to the prior statute and the deleted requirement noted above. *Wyss* (1982) was specifically referencing the prior statute R.C. 3109.04(B)(1)(c), “the child’s present environment endangers significantly his physical health or his mental, moral, or emotional development and the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child”. The wording of 3109.04(B)(1)(c) positioned the court to

conclude in *Wyss* (1982) that the changes must be material and adverse to the child. The specific wording supporting this presumption has been deleted, therefore the precedent is no longer relevant or applicable to the current statute.

In citing *Wyss* (1982), the court in *Schiavone* failed to recognize that the requirement under the third prong of the statute interpreted by *Wyss* (1982) was significantly lessened and incorrectly applied a higher requirement for the “best interests” test than was necessary under the current statute. It simply failed to recognize that the *Wyss* (1982) precedent, “a change in circumstances is intended to denote an event, occurrence, or situation which has a material and adverse effect on a child” was no longer relevant to current law. The court’s “error” in *Schiavone* subsequently unleashed a number of linked case decedents further disseminating the error.

Finally, In *Schiavone* the appellate court didn’t rule based on whether the change in circumstances was material adverse, it found that no change of circumstances existed and none of the three prongs required for a change of circumstances under §ORC 3109.04(E)(1)(a) were met.

This Honorable Court must grant jurisdiction to hear this case in order to ensure that the lower courts cannot just ignore the authority of the Ohio legislature to amend its laws as it deems necessary. There cannot be any disagreement that the legislature lowered the requirement for a change in circumstances so that the best interests of the children may be served.

#### APPELLANT'S SECOND ASSIGNMENT OF ERROR

**The appellate court erred and abused its discretion unreasonably, arbitrarily, and unconscionably by supplanting its own judgment in place of remanding back the trial courts failure to consider the extensive facts presented to find a change in circumstances in the residential parent and in the lives of the children.**

The Magistrate's Decision of June 1, 2012 failed to consider changes in circumstance of the residential parent. In its opinion of May 20, 2013, the appellate court recognized that testimony was presented concerning changes in circumstances of the residential parent but in place of remanding the matter back to the trial court to issue factual findings and conclusions it chose to minimize the issues and subjectively interject its own opinion in place of the absence of consideration by the trial court. The appellate court failed to consider all the evidence since the original court decree. The appellate court ignored the case history that the Appellant's Motions for Daily Phone Contact, Motion for the Exchange of Medical, School and Extra-curricular Activities were deemed well-taken and journalized. Additionally, the Appellant was awarded two extra vacation days due to the Appellee interrupting the Appellant's vacation. The appellate court downplayed the issue of the Appellee using an incorrect surname. The appellate court excused this behavior by stating that the surname change occurred during the course of the proceedings and was finalized after the custody decision. This statement is blatantly false. The children never had any other surname other than Clough since their birth. When filing his initial motion to determine custody, the Appellee also motioned for the trial court to change the surname of the children to his own. At the original trial the Appellee failed to introduce any evidence that it would be in the children's best interest to change their surname, and the motion was denied. The only reason the surname issue was still pending was due to the multiple objections and appeals filed by the Appellee. There was never any justification for the Appellee to use another surname at any time during the proceedings and it was clearly done in an effort to alienate the Appellant. It was an intentional act by the Appellee to prevent the Appellant from having access or information pertaining to the children's activities or medical health issues. This evidence was reintroduced at the hearings on the instant matter. Significant evidence was presented in the form of the Appellee's own emails attempting to restrict the Appellant's attendance at activities stating that the Appellant had to obtain his permission to attend any of the

children's functions and she was not permitted to bring any male friends with her, despite the fact the Appellant was engaged and later became married. Most appalling was the appellate court's failure to accept that it was shown through the submission of actual records pertaining to the children's school, medical and other activities that the Appellee was deliberately registering the children under the wrong surname, which action initially prevented the Appellant from obtaining medical information for her children. This action could have potentially caused severe consequences if the children would have required immediate medical care and their medical histories could not be located because they were listed under the wrong surname.

Appellant testified that she was not provided medical or school information in a timely fashion and also that the Appellee was providing medical care for the children in violation of Medical Guidelines. Appellee admitted under oath that he has given the children medical treatment himself, even though this is contrary to the medical profession's code of conduct, nor is he a pediatric specialist. Appellee further admitted that his self-prescribed medical treatment has not been included in the children's medical records. As a licensed doctor of medicine, the Appellee knows full well the necessity and legal requirement of keeping an accurate and complete medical record for the safety of the patient. It is only a matter of good fortune that the children have not been gravely and irreparably harmed by this unapproved and dangerous practice. It is unconscionable that the appellate court downplayed and ignored this potentially dangerous and life-threatening practice.

The trial court and in succession the appellate court have demonstrated a history of downplaying and an absolute refusal to find any fault in the Appellee's actions. It was clearly shown that all of the Appellee's actions were to restrict the Appellant from daily interaction with and attending the children's activities and medical appointments. Such actions not only demonstrate a change of circumstances but also indicate that the best interests of the children would be better served if custody was modified. The appellate court deliberately downplayed and

separated addressed each of the Appellee's actions and then considered them inconsequential in order to support the trial court against the best interest of the children.

Most salient to the herein mater is the appellate court subjected its own opinion in the absence of any factual findings or conclusions issued by the trial court which is in the best position to be the tier of fact and observe the demeanor and testimony of the witnesses. The Appellant was also deprived of a fair and impartial second review of the evidence required under the Ohio Constitution. For this reason alone this Honorable Court must grant jurisdiction on this case.

### CONCLUSION

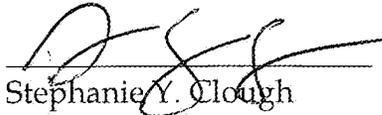
The Appellant has indisputably substantiated that the appellate court improperly placed a higher subjective burden for the purpose of meeting a change in circumstances than is required under the true letter and intent of the law by requiring that the change in circumstances must also be materially adverse to the children. The appellate court's unwarranted use of an outdated and extensively revised statute is prejudicial to the Appellant in that it forms a permanent barrier against a change in custody. Additionally, the appellate court supplanted its own opinion in place of the trial court and became its own trier of fact, denying the Appellant her right to a second review. Most importantly the appellate court failed to consider the children's best interests which have been established under case precedent to be supremely determinant over all other decisions. In order to ensure that due process is served, Appellant prays that this Honorable Court grant jurisdiction to hear this case and address the erroneous and dangerous ruling of the appellate court.

Respectfully submitted,

  
Stephanie Y. Clough  
Appellant, Pro se

PROOF OF SERVICE

A copy of the foregoing *Appeal Brief of Defendant-Appellant* was sent by regular U.S. Mail this 02 day of September 2013 to: Hans C. Kuenzi, attorney for Plaintiff, 1660 West Second Street, Suite 410, Cleveland, Ohio 44113, and Rebecca Castell, Guardian ad Litem, at 12690 Opalocka Drive, Chesterland, Ohio 44026.

  
Stephanie Y. Clough  
Appellant, Pro se

**IN THE COURT OF COMMON PLEAS  
JUVENILE DIVISION  
LAKE COUNTY, OHIO**

IN THE MATTER OF:  
JAMES V. CIREDU  
vs  
STEPHANIE Y. CLOUGH

MAGISTRATE DECISION  
CASE NUMBER: 2008CV02029  
TRIAL

On 05/30/12, this matter came on for consideration of the Trial which commenced April 24, 2012 and concluded April 25, 2012 on Defendant's Motion for Allocation of Parental Rights and Responsibilities and Motion for Shared Parenting filed August 18, 2011 before Magistrate Janette M. Bell.

Parties present for the hearing:  
HANS KUENZI (ATTORNEY FOR PLAINTIFF); JAMES P. KOERNER (ATTORNEY FOR DEFENDANT); JAMES V. CIREDU (PLAINTIFF); REBECCA J. CASTELL (GAL FOR JUVENILE); STEPHANIE Y CLOUGH (DEFENDANT)

Counsel made opening statements.

Ms. Clough, through Mr. Koerner, called the following witnesses to testify: James Cireddu, as if on cross-examination; Stephanie Clough; and Philip Shipman.

Defendant's Exhibits A, B, C, G, FF, GG, HH, II, JJ, KK, LL, LL(2), MM, NN, OO and FFF were admitted into evidence without objection.

Mr. Cireddu, through Mr. Kuenzi, called the following witnesses to testify: Young Clough and Victoria Cross-Cireddu, and James Cireddu.

Plaintiff's Exhibits 1, 2, 8, 10, 16, 29, 30, 59, 71, 72, 81, 84, 96, 97 and 121 were admitted into evidence without objection.

The Guardian ad Litem, Rebecca Castell, was called to testify.

Counsel made closing arguments.

Findings are as follows:

- Stephanie Clough, hereinafter Mother, and James Cireddu, hereinafter Father, are the parents of Jasmine Clough (DOB 1-18-06) and Grant Clough (DOB 12-11-08). They have never been married to one another.
- On December 19, 2009, after hearing evidence, the Court awarded sole legal custody to Father and awarded graduated parenting time to Mother. At the time of that decision, Mother was living in Columbus and was not supportive of Father having any contact with

the children. Father was living in the Cleveland area.

- The matter before the Court on this occasion was a trial on Mother's Motion for Allocation [reallocation] of Parental Rights and Responsibilities and Motion for Shared Parenting filed August 18, 2011.
- The current evidence revealed the following:
- Father and the children reside in paternal grandmother's home in Brecksville. The home is described as a five bedroom home on a quiet cul-de-sac. There are several children in the neighborhood that Jasmine and Grant enjoy playing with.
- After receiving sole custody of the children, paternal grandmother quit her job as a math teacher for the Department of Corrections and has been providing full-time childcare for the children while Father is working. Father is finishing up his Internal Medicine residency at University Hospitals in Cleveland, Ohio and on July 1, 2012 he will begin employment as a cardiology fellow at MetroHealth Medical Center in Cleveland, Ohio.
- Jasmine, age 6, is presently enrolled in kindergarten at Highland Drive Elementary School. She is doing well and on target academically. She struggled slightly with reading, however, after a meeting involving both Mother and Father and with Mother, Father and paternal grandmother working with Jasmine, she made significant improvement.
- Jasmine is involved in several extra-curricular activities including dance and Tee Ball.
- Father describes Jasmine as athletic, bright, energetic, thoughtful, considerate, sensitive and, at times, anxious.
- Grant, age 3, is not yet school-aged. He spends quite a bit of time with paternal grandmother who keeps him busy with educational activities.
- Grant is involved in an instructional baseball program.
- Father describes Grant as athletic, social, enthusiastic about learning and particularly interested in electronics.
- Both children are described as healthy aside from allergies.
- Mother met her current husband, Philip Shipman, a nurse, in April, 2010. They married in October, 2010. Mother had a baby, Aurora, with Mr. Shipman, on August 1, 2011.
- Mother and Mr. Shipman recently purchased a home in Broadview Heights, Ohio approximately eleven minutes from Father's house and in the same school district. The home is described as a brick ranch, with three bedrooms, a finished walk-out basement and extra living/sun room, presently being utilized as a playroom but that can be turned into a bedroom.
- Mother is finishing her Internal Medicine residency at the Ohio State Medical Center in Columbus, Ohio and on July 1, 2012 she will begin employment as a Pulmonary Critical

Care Fellow at the MetroHealth Medical Center in Cleveland, Ohio. (The same hospital where Father will be working).

- Mother lives in Hilliard, Ohio outside of Columbus, however she recently sold that residence and is currently transitioning to the home she and Mr. Shipman recently purchased in Broadview Heights, Ohio.
- Mother's parenting time with the children is now occurring at the new house.
- Jasmine and Grant get along well with their new half-sister Aurora and with Mr. Shipman.
- Mr. Shipman is presently working at the Cleveland Clinic. He too has been offered a job at MetroHealth Medical Center. Mr. Shipman plans to begin work at MetroHealth and continue to work at Cleveland Clinic as needed. Mr. Shipman testified that if Mother were named the custodian or had increased possession time with the children as requested in her Proposed Shared Parenting Plan, he would be able to coordinate his shifts at MetroHealth so that he could provide childcare for all of the children while Mother was at work.
- Mother and Father continue to have a difficult time accommodating the other when it comes to contact and involvement with the children.
- Mother claims that she is not afforded any meaningful extra parenting time when she has requested it.
- Mother testified that she is not provided medical or school information in a timely fashion and also objects to Father providing medical care for the children, i.e. applying a steroid cream to a rash that Mother felt was caused by an allergy as opposed to contact dermatitis as determined by Father.
- The parents cannot agree about the dental health of the children and whether or not treatment is needed.
- Mother testified that she does not always speak to the children on the telephone per a previous court order. Both Father and paternal grandmother testified that Mother speaks to the children on the telephone nightly.
- Mother testified that, at times, Father or paternal Grandmother utilize the name "Cireddu" when signing the children up for things as opposed to Clough. Father and paternal grandmother acknowledge the same and claim it is done for ease of identification as the family is well known in the Brecksville area.
- Mother and Father typically communicate via email as Father claims Mother has recorded their telephone conversations in the past without his knowledge.
- The Guardian ad Litem filed a written report and also testified. The Guardian ad Litem feels that Shared Parenting is appropriate in this case however she acknowledges that "communication will never be easy" for these parents.

## Conclusions of Law:

- A modification of the designation of residential parent and legal custodian of a child requires a determination that a 'change in circumstances' has occurred, as well as a finding that the modification is in the best interest of the child. R.C. 3109.04(E)(1)(a); *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 876 N.E.2d 546, 2007-Ohio-5589, syllabus.
- R.C. 3109.04(E)(1)(a) governs modification of a prior decree allocating parental rights and responsibilities. In order for a trial court to modify a prior decree regarding allocation of parental rights and responsibilities, the party requesting the modification must demonstrate each of the following three factors: (1) a change has occurred in the circumstances of the child, his residential parent, or either of the parents subject to a shared parenting decree; (2) the requested modification is necessary to serve the best interest of the child; and (3) the harm likely to be caused by a change of the child's environment is outweighed by the advantages of the change of environment. *In re Seitz*, 11th Dist. No.2002-T-0097, 2003-Ohio-5218.
- R.C. 3109.04(E)(1)(a) clearly states that the change of circumstances must be "based on facts that have arisen since the prior decree or were unknown to the court at the time of the prior decree."
- "The trial court may not modify a prior decree allocating parental rights and responsibilities unless it first finds a change has occurred in the circumstances of the child or his residential parent; and then, upon further inquiry, the court finds that the modification is in the child's best interests." *Lehman v. Lehman* (Feb. 28, 1997), 11th Dist. No. 95-T-5327, 1997 Ohio App. LEXIS 716, \*8; R.C. 3109.04(E)(1)(a). Thus, the court may proceed to a best-interest analysis only after the court has determined that a change in circumstances has occurred. *Id.* at \*8 -\*10. This change-in-circumstances determination is meant to serve as a "barrier that must be hurdled before inquiry can be made on those issues affecting the best interest of the child." *Perz v. Perz* (1993), 85 Ohio App.3d 374, 376, 619 N.E.2d 1094. The change in circumstances of the child or the parent must be based on facts arising since the prior decree or from facts unknown at the time of the prior decree. *Makuch v. Bunce*, 11th Dist. No.2007-L-016, 2007-Ohio-6242, at 12. This barrier is meant to operate as the "domestic relations version of the doctrine of res judicata," and is meant to prevent the "constant relitigation of the same issues" adjudicated in prior custody orders. *Perz*, supra, at 376, 619 N.E.2d 1094.
- "The requirement that a parent seeking modification of a prior decree allocating parental rights and responsibilities show a change of circumstances is purposeful: The clear intent of [R.C. 3109.04(E)(1)(a)] is to spare children from a constant tug of war between their parents who would file a motion for change of custody each time the parent out of custody thought he or she could provide the child a 'better' environment. The statute is an attempt to provide some stability to the custodial status of the children, even though the parent out of custody may be able to prove that he or she can provide a better environment." *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159, 1997-Ohio-260, quoting *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416, 445 N.E.2d 1153." *Fisher*, supra, at 59-60, 876 N.E.2d 546.

- " \* \* \* In general, the phrase 'change in circumstances' is intended 'to denote an event[,] occurrence, or situation which has a material and adverse effect upon a child. *Willoughby v. Masseria*, 11th Dist. No.2002-G-2437, 2003-Ohio-2368, at 22; see also, *Schiavone v. Antonelli* (Dec. 10, 1993), 11th Dist. No. 92-T-4794, 1993 Ohio App. LEXIS 5891, \*3. In determining whether a change of circumstances has occurred, the trial court has great latitude in considering all evidence before it. In re M.B., 2d Dist. No.2006-CA-6, 2006-Ohio-3756, at 9, citing *Wyss* [, supra]." *Makuch*, supra.
- Additionally, R.C. 3109.04(E)(1)(a) specifically requires, in the absence of a Shared Parenting Plan, that the change of circumstances pertain to the child or residential parent - not the nonresidential parent. See *Welch v. Schudel*, Van Wert App. No. 15-09-13, 2010-Ohio-715; *Khulenberg v. Davis* (Aug. 25, 1997), 12th Dist. No. CA96-07-143.
- The evidence established that there have been changes in Mother's life. She has married and had a baby. She and her husband recently purchased a house very near to where Father and the children reside. These events are clearly positive events for Mother and will no doubt be beneficial for the children. The statute, however, requires that the change(s) occur with the residential parent or children. Mother argues that the changes she has undergone extend to the children. That may be true to some degree, however the law also requires that the changes be unknown or unforeseen. Mother also argues that the children are now eighteen months older than they were when the decision was made, therefore, their age constitutes change. Aging and anticipatory milestones in one's life, i.e. marriage, childbirth and establishing a new residence are within one's normal contemplation and anticipation. Hence there is nothing unforeseen about these events. *Welch* at \*4.
- Additionally, the law in the Eleventh Appellate District is that any change must have a "material and adverse effect" upon a child. Assuming arguendo that this Hearing Officer were to conclude that a change of circumstances had occurred, the evidence presented did not establish that there has been any adverse material change with the children. The children, by all accounts, are doing well in their present environment.
- The Hearing Officer concludes that Mother has failed to establish by a substantial amount of credible and competent evidence that a change of circumstances has occurred since December 2009 which was also materially adverse to the children. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21; *Chubb v. Chubb* (Dec. 3, 1993), Ashtabula App. No. 92-A-1748, unreported at 3.

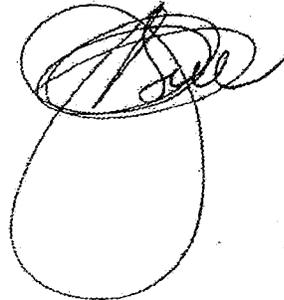
It is therefore recommended:

- Mother's Motion for Allocation of Parental Rights and Motion for Shared Parenting filed August 18, 2011 is not well-taken and is denied.
- All prior Court Orders, not modified herein, remain in full force and effect.

Any party may file objections to this decision within fourteen days. Such party shall not assign as error on appeal the Court's adoption of any findings of fact or conclusion of law in this decision unless the party timely and specifically objects to that finding or conclusion as required by Juv R. 40(D)(3)(b)(iv).

Electronically Filed

Juvenile Court  
Lake County, Ohio  
06/01/2012 11:48 AM  
KAREN LAWSON, Judge  
& Ex-Officio Clerk



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JANETTE M. BELL, MAGISTRATE

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ON 6/4/12 BY T. Carthen  
TO: J. Cireddu H. Kuenzi  
S. Clough J. Koerner  
R. Castell

IN THE COURT OF COMMON PLEAS  
JUVENILE DIVISION  
LAKE COUNTY, OHIO

IN THE MATTER OF:  
JAMES V. CIREDU VS  
STEPHANIE Y. CLOUGH

JUDGMENT ENTRY  
CASE NUMBER: 2008CV02029  
TRIAL

On 08/22/12, this matter came on for review of the Magistrate's Decision of 05/30/12.

Count 01 CUSTODY COMPLAINT -

The Court, having independently reviewed the matter and considered the Decision and the law, finds the Decision to be proper in all respects and adopts it in full.

It is therefore ordered:

- Mother's Motion for Allocation of Parental Rights and Motion for Shared Parenting filed August 18, 2011 is not well-taken and is denied.
- All prior Court Orders, not modified herein, remain in full force and effect.

Any party may file an appeal to this decision within thirty days. Such party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law in this decision unless the party timely and specifically objects to that finding or conclusion as required by Juv R. 40(D)(3)(b)(iv).

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Juvenile Court Lake County, Ohio 08/22/2012 10:53 AM KAREN LAWSON, Judge & Ex-Officio Clerk
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KAREN LAWSON, JUDGE

Book 511 / Page 614

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 TO: Clough  
Castell  
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IN THE COURT OF COMMON PLEAS  
JUVENILE DIVISION  
LAKE COUNTY, OHIO

FILED

2012 AUG 21 P 2: 24

JAMES V. CIREDDU

Plaintiff

-vs-

STEPHANIE Y. CLOUGH

Defendant

CASE NO. 2008 CV 02029

JUDGE KAREN LAWSON

JUDGMENT ENTRY

This matter came on for consideration upon Defendant's Objections to Magistrate's Decision of June 1, 2012, filed June 14, 2012; Defendant's Supplemental Objections to Magistrate's Decision for the Allocation of Parental Rights and Responsibilities and Motion for Shared Parenting and Motion to Disqualify Magistrate Bell, filed August 2, 2012; Plaintiff's Brief in Opposition to Supplemental Objections to Magistrate's Decision and Motion to Disqualify Magistrate Bell, filed August 15, 2012, Defendant's Brief in Response to Plaintiff's Objections (sic) to Defendant's Supplemental Objections to Magistrate's Decision and Motion to Disqualify Magistrate Bell, filed August 17, 2012 and Defendant's Amended Brief in Response to Plaintiff's Objections (sic) to Defendant's Supplemental (sic) Objections to Magistrate's Decision and Motion to Disqualify Magistrate Bell, filed August 21, 2012. The parties have waived oral argument.

The Court has conducted an independent review of the file, objections, brief in opposition, case law, statutory authority and the transcript of the proceedings.

The Court hereby finds said Objections are well taken in part.

The Magistrate erred in finding that sole legal custody was awarded to the father on December 19, 2009. The Court finds that the award of custody was December 22, 2009. Additionally, the Magistrate's Decision should be clarified at bullet point six to read "After father received sole custody of the children,".

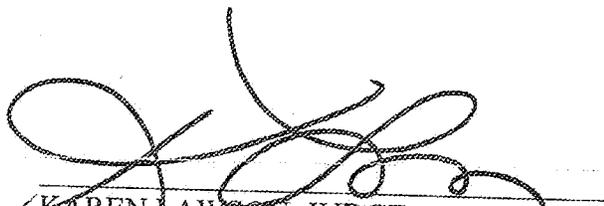
The balance of the Objections are not well taken and are hereby overruled.

Further, the Motion to Disqualify Magistrate Bell is not well taken and is hereby denied.

The Hearing scheduled for September 5, 2012 at 10:30 a.m., is hereby cancelled.

**IT IS SO ORDERED.**

Any party may file an appeal to this decision within thirty days. Such party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law in this decision unless the party timely and specifically objects to that finding or conclusion as required by Juvenile Rule 40(D)(3)(b)(iv).



KAREN LAWSON, JUDGE

CERTIFICATION OF RAMMIL  
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ON 8123112 BY JRAGO  
TO: Clough  
Castell  
Kuenzi

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO

JAMES V. CIREDU, et al.,

:

OPINION

Plaintiff-Appellee,

- vs -

STEPHANIE Y. CLOUGH,

Defendant-Appellant

FILED  
COURT OF APPEALS  
MAY 20 2013

CASE NO. 2012-L-103

MAUREEN G. KELLY  
CLERK OF COURT  
LAKE COUNTY, OHIO

Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2008 CV 02029.

Judgment: Affirmed.

*Hans C. Kuenzi*, Hans C. Kuenzi Co., L.P.A., 1660 W. Second Street, Suite 410, Cleveland, OH 44113 (For Plaintiff-Appellee).

*Stephanie Y. Clough*, pro se, 8060 Wright Road, Broadwater Heights, OH 44147 (Defendant-Appellant).

*Rebecca Castell*, 12690 Opalocka Drive, Chesterland, OH 44026 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Appellant, Stephanie Y. Clough, appeals the judgment of the Lake County Court of Common Pleas, Juvenile Division, denying her Motion for Allocation of Parental Rights and Responsibilities/Motion for Shared Parenting. The issues to be determined by this court are whether a court, when ruling on a motion to modify parental rights, may consider whether a change in circumstances is material and adverse to the children; whether a change in circumstances occurs when the non-custodial parent becomes

married, gets a new job, and moves closer to her children; and whether a best interest determination is necessary when the court decides there is no change of circumstances. For the following reasons, we affirm the decision of the trial court.

{¶2} On October 14, 2008, appellee, James V. Cireddu filed a Complaint with the Lake County Court of Common Pleas, Juvenile Division, to determine custody of his and Clough's two minor children, J.C., born on January 18, 2006, and G.C., born on December 11, 2008.

{¶3} Following a trial, on August 13, 2009, the magistrate issued a Magistrate's Decision and recommended granting legal custody of the children to Cireddu. In that Decision, the magistrate found that shared parenting was not feasible in this case, since Clough "is not likely to honor court-ordered parenting time with [Cireddu]." Additionally, the magistrate concluded that the geographical distance between the parents was not conducive to shared parenting. The trial court subsequently adopted this recommendation and Cireddu was granted legal custody.

{¶4} The custody determination was affirmed by this court in *Cireddu v. Clough*, 11th Dist. No. 2010-L-008, 2010-Ohio-5401.<sup>1</sup>

{¶5} Various other issues have been litigated by the parties following the custody determination, including a Motion to Determine Party Responsible for Transportation of the Minor Children, filed on February 25, 2010, a Motion to Establish Schedule of Telephone Contact filed on June 10, 2010, and a Motion to Compel Exchange of Information, filed on September 21, 2010.

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1. The lower court's judgment was reversed in part, due to this court's conclusion that an error was made in stating the appropriate date for the commencement of child support payments.

{¶6} On May 10, 2011, the trial court issued a Judgment Entry ordering Cireddu to make the children available for telephone conversations, notify Clough if they are unavailable, and arrange for compensatory telephone contact when necessary. Clough's Motion to Compel Exchange of Information was also well-taken, requiring Cireddu to provide Clough with information about the children, including their school and medical information.

{¶7} The issue of the children's surname was also raised in the initial Complaint and, after several different hearings and judgments, the lower court held that the children would retain Clough's surname. The lower court's ruling was appealed to this court on September 9, 2011, and was affirmed. *Cireddu v. Clough*, 11th Dist. No. 2011-L-121, 2012-Ohio-2242, ¶ 27 (holding that the lower court did not abuse its discretion in determining that no further hearing was required on the matter of the children's surname).

{¶8} The present matter was initiated by Clough's Motion for Allocation of Parental Rights and Responsibilities/Motion for Shared Parenting, filed on August 18, 2011. In this Motion, she contends that there was a change in circumstances to warrant a modification of parental rights, including that Clough would be relocating to Cuyahoga County in July 2012.

{¶9} A hearing was held on Clough's Motion on April 24-25, 2012. The following pertinent testimony was presented.

{¶10} Cireddu testified that he did not believe that Clough should have custody or that a shared parenting plan should be adopted, since changing the custody arrangement would be disruptive to the children, who had a stable routine in his home. He explained that he and the two children live in Brecksville with his mother, Victoria

Cross-Cireddu, who watches the children while he is performing his duties as a medical resident. She would continue to watch the children when he began working as a cardiology fellow in the summer of 2012.

{¶11} Cireddu explained that he generally complied with the phone call schedule set by the court unless the children were asleep or otherwise unavailable to speak with Clough. He believed Clough made efforts to alienate the children from him and it was difficult to compromise with Clough on issues related to the care of the children.

{¶12} Clough testified that she had previously been living in Hilliard, Ohio, but was selling that residence and had just purchased a home in Broadview Heights, in J.C.'s current school district. She explained that she was married to Philip Shipman, a nurse, in 2010, and had a child with him, A.C. She would be starting a pulmonary critical care fellowship at MetroHealth Medical Center in Cleveland in July of 2012.

{¶13} Clough testified that she had difficulty receiving information about the children's medical treatment and activities from Cireddu. She also explained that the children were not always made available for phone calls by Cireddu at the time ordered in the court's prior Judgment Entry. She also noted that Cireddu had been using the improper surname for the children on several occasions. Clough believed shared parenting would have a positive impact on the children.

{¶14} Philip Shipman, Clough's husband, testified that he interacts well with the children. He also explained that he and Clough had difficulty obtaining information about the children from Cireddu and that Clough and Cireddu had difficulty communicating.

{¶15} Victoria Cross-Cireddu, Cireddu's mother, testified that she cares for the children while Cireddu is working. She explained that they have a good relationship with him.

{¶16} The guardian ad litem (GAL), Rebecca Castell, testified that she recommended the court adopt a shared parenting plan. She filed a GAL Report with the court, reaching the same conclusion on April 16, 2012. She believed that Clough had changed and is more willing to cooperate with Cireddu than she had been in the past. She also felt that Clough's move near Cireddu was a step toward working together with him. She believed that the changes Clough made constituted a change in circumstances for the purpose of modifying custody.

{¶17} A Magistrate Decision was issued on June 1, 2012, recommending that Clough's Motion for Allocation of Parental Rights/Motion for Shared Parenting be denied. In this decision, the magistrate made several pertinent factual findings. The magistrate found that Cireddu's mother had quit her job and provided full-time childcare for the children while Cireddu was working, and that J.C. was "doing well" in kindergarten. The magistrate also found that Clough had married her current husband Philip Shipman, who testified that he would coordinate his work schedule to care for the children as necessary if custody was altered. Clough and Shipman had a child, A.C., on August 1, 2011, whom J.C. and G.C. get along with well. Further, Clough and Shipman recently purchased a home in Broadview Heights, in the same school district where Cireddu and the children lived, and would begin employment on July 1, 2012, at MetroHealth, the same hospital where Cireddu would be working. The court further found that, based on the testimony before it, Clough and Cireddu continued to have difficulty accommodating each other.

{¶18} Regarding its Conclusions of Law, the magistrate concluded that, although there were changes in Clough's life, including having a child, becoming married, and moving close to J.C. and G.C., no unforeseen changes occurred with the residential parent or the children, such that a legal change in circumstances could be found for the purposes of modifying custody. The magistrate also found that, under this court's precedent, any change must have a material and adverse effect on the children, which did not occur. The court concluded that it need not review the best interest issue since there was no change in circumstances.

{¶19} On August 2, 2012, Clough filed Supplemental Objections to the Magistrate Decision and a Motion to Disqualify Magistrate Bell. She argued that the magistrate misstated various facts and did not properly apply the change-of-circumstances law. Cireddu filed a Brief in Opposition on August 15, 2012, arguing that the law was properly applied in this matter.

{¶20} On August 21, 2012, the trial court issued a Judgment Entry finding the Objections to the Magistrate Decision to be well-taken in part, to clarify a few misstated facts. The remaining objections were overruled and the court denied the Motion to Disqualify Magistrate Bell. The trial court adopted the Magistrate Decision and denied the Motion for Allocation of Parental Rights and Responsibilities/Motion for Shared Parenting on August 22, 2012.

{¶21} Clough timely appeals and raises the following assignments of error:

{¶22} "[1.] The trial court erred in interpreting that §O.R.C. 3109.04(E)(1)(a), specifying the requirements for a change in circumstances in order to change a previous custody decree, includes a condition that the changes must be material [and] adverse to the children.

{¶23} “[2.] The trial court erred and abused its discretion unreasonably, arbitrarily, and unconscionably by failing to consider the extensive facts presented to find a change in circumstances in the residential parent and the lives of the children against the manifest weight of the evidence.

{¶24} “[3.] The trial court erred and abused its discretion unreasonably, arbitrarily, and unconscionably by failing to consider that the best interests of the children are paramount and the supreme determinant in all decisions.”

{¶25} In her first assignment of error, Clough argues that the lower court improperly applied the change-of-circumstances law under R.C. 3109.04. Specifically, she asserts that the magistrate considered whether the change in circumstances was materially adverse to the children and that the statute does not allow a court to consider this factor.

{¶26} Generally, in determining issues of custody, an abuse of discretion standard applies. *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). However, in this assignment of error, since the issue raised by Clough relates to whether the lower court applied the appropriate law or legal standard, it is a question of law, which is reviewed de novo. *In re J.S.*, 11th Dist. No. 2011-L-162, 2012-Ohio-4461, ¶ 19, citing *Ivancic v. Enos*, 11th Dist. No. 2011-L-050, 2012-Ohio-3639, ¶ 48.

{¶27} In the present matter, the Magistrate Decision stated the following regarding the material and adverse change element, the application of which is disputed by Clough: “[T]he law in the Eleventh Appellate District is that any change must have a “material and adverse effect” upon a child. Assuming arguendo that this Hearing Officer were to conclude that a change of circumstances had occurred, the evidence presented did not establish that there had been any adverse material change with the children.”

{¶28} In order to determine whether the proper law was applied in this matter, we must consider the statutory law and cases involving the modification of parental rights. R.C. 3109.04(E) sets forth the procedure for modifying a prior decree allocating parental rights and responsibilities for the care of children. R.C. 3109.04(E)(1)(a) states that “[t]he 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 \* \* \*, 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.”

{¶29} In applying the change of circumstances prong of R.C. 3109.04(E)(1)(a), this court has held on many occasions that “[a] change of circumstances ‘is intended to denote an event, occurrence, or situation which has a material and adverse effect upon a child.’” (Emphasis deleted.) *Haskett v. Haskett*, 11th Dist. No. 2011-L-155, 2013-Ohio-145, ¶ 35, citing *Schiavone v. Antonelli*, 11th Dist. No. 92-T-4794, 1993 Ohio App. LEXIS 5891, \*9 (Dec. 10, 1993); *Makuch v. Bunce*, 11th Dist. No. 2007-L-016, 2007-Ohio-6242, ¶ 12. While Clough takes exception with the lower court’s application of this standard, it was clearly following the precedent of this court’s foregoing decisions.

{¶30} Multiple other districts have also applied the material and adverse analysis in addressing change of circumstances cases under R.C. 3109.04. *Rohrbaugh v. Rohrbaugh*, 136 Ohio App.3d 599, 604-605, 737 N.E.2d 551 (7th Dist.2000); *D.W. v. T.R.*, 6th Dist. No. L-11-1099, 2012-Ohio-614, ¶ 16; *In re S.M.T.*, 8th Dist. No. 97181, 2012-Ohio-1745, ¶ 6.

{¶31} We note that Clough takes issue with the lower court applying the law of this district and asserts that there “is only one law in the statute” and that is the law of

the Legislature. However, the “lower court must apply controlling precedent.” *State v. Hardesty*, 4th Dist. No. 07CA2, 2007-Ohio-3889, ¶ 14. Also, as this court has noted, “R.C. 3109.04 does not define ‘changes in circumstances’” and, therefore, courts have established through the case law that the phrase denotes an event “which has a material and adverse effect upon a child.” (Citation omitted.) *Dragon v. Dragon*, 11th Dist. Nos. 2011-A-0037 and 2011-A-0039, 2012-Ohio-978, ¶ 12.

{¶32} Clough argues that in 1990, the statute relating to the modification of custody changed, and certain portions were removed. She asserts that the foregoing cases cite a case decided under the prior statute, *Wyss v. Wyss*, 3 Ohio App.3d 412, 445 N.E.2d 1153 (10th Dist.1982), for the proposition that the change of circumstances should be material and adverse, and do not take into consideration the change in the statute.

{¶33} Initially, we note that there was never specific language in R.C. 3109.04 stating the material and adverse element, either in the statute prior to the amendment in 1990 or in the present statute, but again emphasize that it was developed through the case law, as discussed above. The language referenced by Clough as being removed was contained in R.C. 3109.04(B)(1)(c), which is equivalent to the present R.C. 3109.04(E)(1)(a)(iii), and stated that “the child’s present environment endangers significantly his physical health or his mental, moral, or emotional development.”<sup>2</sup> Clough fails to explain how the removal of such language has an impact on the adverse and material analysis. Nothing in the removal of the foregoing language is related to the case law of various courts that a change of circumstances should be adverse to the

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2. The requirement 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” remained and is still present in R.C. 3109.04(E)(1)(a)(iii).

children or has any relation to this element. Further, such analysis by the courts is consistent with R.C. 3109.04(E)(1)(a)'s present requirement that a change must be in the circumstances of the child or the child's residential parent. Such a change would generally be a negative or adverse one, otherwise no change in custody would be warranted.

{¶34} We would also emphasize that this court explicitly noted in *Schiavone*, decided in 1993, that R.C. 3109.04 had changed and recognized that the requirement under the previous version, that the child's present environment significantly endangered his or her health or development, was deleted. *Schiavone*, 1993 Ohio App. LEXIS 5891, at \*8, fn. 1. In light of this analysis, the court still applied the material and adverse requirement under the change of circumstances analysis and made no finding that the change in the statute impacted the case law as to this issue. Based on the foregoing, we cannot find that the lower court erred in applying such analysis in its decision.

{¶35} The first assignment of error is without merit.

{¶36} In her second assignment of error, Clough asserts that the lower court erred in finding no change of circumstances. Specifically, she maintains that the changes in her life, including moving closer to the children, her marriage, the birth of a new child, and her new employment in the area, created a change of circumstances. She also argues that Cireddu's failure to allow her to have phone contact with the children, failure to provide her with medical and school information, and his attempts to "frustrate" her visitation, constituted a change in the children's circumstances.

{¶37} Cireddu argues that the testimony shows that the children are doing well in their current home and there was no evidence to support a change of circumstances.

{¶38} “In determining whether a [change in circumstances] has occurred, we are mindful that custody issues are some of the most difficult and agonizing decisions a trial judge must make. Therefore, 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.” (Citation omitted.) (Emphasis deleted.) *Smith v. Smith*, 11th Dist. No. 2009-T-0064, 2010-Ohio-3051, ¶ 11.

{¶39} As noted above, pursuant to R.C. 3109.04(E)(1)(a), the party seeking a modification of a prior decree allocating parental rights and responsibilities must show “that a change has occurred in the circumstances of the child” or “the child’s residential parent.” “A change in circumstances is a threshold requirement intended to provide some stability to the custodial status of the child.” *Smith* at ¶ 11, citing *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, ¶ 15. Appellate courts, however, “must not make the threshold for change so high as to prevent a trial judge from modifying custody if the court finds it is necessary for the best interest of the child.” *Davis*, 77 Ohio St.3d at 420-421, 674 N.E.2d 1159. “The change in circumstances necessary to justify a modification of custody ‘must be a change of substance, not a slight or inconsequential change.’” *In re S.B.*, 11th Dist. No. 2010-A-0019, 2011-Ohio-1162, ¶ 85, citing *Davis* at 418.

{¶40} At trial, the major arguments raised by Clough’s counsel related to changes in Clough’s life. Clough argues that these changes included moving near her children, becoming married, getting a new job, and having a new baby. Each of these is a change to *her* circumstances, however. As stated in R.C. 3109.04, the change must occur “in the circumstances of the child” or “the child’s residential parent.” This court

held in *Walsh v. Walsh*, 11th Dist. No. 2004-G-2587, 2005-Ohio-3264, that a change in the non-custodial parent's "residence is not a factor to be considered under R.C. 3109.04(E)(1)(a). The only factors applicable in the instant case are changes in facts relating to the children or the residential parent; changes relating to the non-custodial parent are irrelevant." *Id.* at ¶ 19.

{¶41} Clough provides several cases to dispute that these personal changes in her life cannot constitute a change in circumstances. However, each of these cases are distinguishable. In *Jones v. Jones*, 4th Dist. No. 06CA25, 2007-Ohio-4255, a change in circumstances was found because there was evidence that the children were unhappy with their current living arrangement, circumstances which are not present in this case. In *Rodkey v. Rodkey*, 8th Dist. No. 86884, 2006-Ohio-4373, the appellate court specifically held that the change of circumstances analysis did not apply, due to provisions in the existing shared parenting plan. Thus, it cannot apply to the present case, where the change of circumstances is the only issue before this court. Finally, in *Alessio v. Alessio*, 10th Dist. No. 05AP-988, 2006-Ohio-2447, a change of circumstances was found when the residential parent moved away from the other parent, and her new husband's job created a risk of future moves. These were changes relating to the residential parent, unlike in the present matter.

{¶42} Further, while the changes in Clough's life may have some effect on the children's lives, it cannot be said that the trial court abused its discretion in determining that the changes did not rise to the level required for a change in circumstances under R.C. 3109.04. Even if the changes do affect the children to some degree, they are not material and adverse, since they relate to their mother living closer, and having a new sibling. As was held by the trial court, no material and adverse effect had occurred at

the point of the trial, and “[t]he children, by all accounts, are doing well in their present environment.” Clough also agreed in her testimony that the children were “well-cared for.”

{¶43} Clough also cites the passage of time and aging of the children as a relevant change. However, it cannot be held that “the mere passage of time since the original decree would constitute a sufficient change of circumstances, lest courts become timekeepers of child custody arrangements and be called on to ‘restart the clock’ in favor [of] the parent whose whim it is to change custody.” *Andrews v. Andrews*, 11th Dist. No. 2005-T-0121, 2006-Ohio-4942, ¶ 40.

{¶44} Clough cites *Tolbert v. McDonald*, 3rd Dist. No. 1-05-47, 2006-Ohio-2377, as justification for considering a passage of time and a change in the age of the children. In that case, the court concluded that the change in the children’s age was a factor to consider, when there was a five year gap between the custody determination and filing of a motion for change of custody, since the child “changed” from an infant to a school-aged child. *Id.* at ¶ 33. That case is distinguishable, given that, in the present matter, custody was granted to Cireddu in the final judgment by the lower court on December 22, 2009, and Clough’s Motion for Allocation of Parental Right and Responsibilities was filed a little over a year and a half after this custody determination was made. We cannot conclude that the passage of that short period of time can be a change in circumstances, especially given our finding that a passage of time is generally not sufficient to warrant a change in circumstances.

{¶45} Clough also raises several other issues that she believes warrants a finding of a change of circumstances, although such issues were not the main substance of the argument presented by her counsel at trial as a basis for a change in

circumstances. Since testimony was presented as to these issues, we will consider whether there is a basis for a finding of a change in circumstances based on these issues.

{¶46} Initially, we note that Clough cites case law and provides argumentation that interference with visitation constitutes a change of circumstances. However, even by Clough's own assertions, Cireddu did not deny her court ordered visitation time but merely did not grant her requests for switching of visitation dates or times or did not afford her extra visitation. This does not constitute an interference with visitation, since Cireddu is not required to accommodate Clough's requests for changes in visitation which is set forth in the court orders. In addition, there was testimony presented that Cireddu did offer extra visitation on several occasions, including after the birth of Clough's third child, A.C.

{¶47} Clough argues that the failure of Cireddu to provide information such as school or medical records and dates of certain children's events constituted a change of circumstances. However, there was no finding by the lower court that such a failure occurred. Cireddu testified that he tried to provide all information related to any activities, medical, or dental appointments "as quickly as is possible." He also explained that Clough has access to all medical or academic information as the children's mother. This was sufficient for the court to determine that Clough was receiving information and that no change in circumstances occurred, especially given that the credibility of the parties is for the trier of fact to determine. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Moreover, Clough was able to obtain many of the requested records directly through the school or from Cireddu at some point, and we cannot find that the matter constituted a change in circumstances. See *Foos v. Foos*,

6th Dist. No. WD-11-005, 2012-Ohio-1234, ¶ 40 (while “appellant is entitled to be informed of her children’s education and medical treatment, \* \* \* there is no statutory requirement that the residential parent provide information available to the nonresidential parent from other sources”).

{¶48} Clough also takes issue with Cireddu providing certain medical treatment to the children, although he is a doctor, and not initially having the children receive dental care. Cireddu’s mother testified that the children were in good health and that when a medical issue arose that needed further treatment, Cireddu took the children to a pediatrician or an allergist. Again, however, there was no finding by the court or evidence presented that any medical care provided by Cireddu or his choice of when to take the children to the doctor impacted the children in any negative or adverse way or in a manner that would rise to a change in circumstances. See *In re S.B.*, 2011-Ohio-1162, at ¶ 92, citing *Hinton v. Hinton*, 4th Dist. No. 02CA54, 2003-Ohio-2785, ¶ 14-29 (the trial court did not err in finding no change of circumstances occurred when there were ongoing disputes between the parties regarding the children’s health).

{¶49} Regarding Cireddu’s failure to use the children’s correct surname, there is no evidence as to how this constitutes a change in circumstances. The surname change occurred during the course of the proceedings and was finalized after the custody decision. Cireddu testified that after the court issued its decision, he stopped using Cireddu as the children’s last name on documents. Including the wrong name on a few applications or personal items such as J.C.’s dance clothing and programs, does not rise to the level of a change in circumstances. These small arguments are of the type that are to be avoided, since they are slight or inconsequential. See *Davis*, 77 Ohio St.3d at 418, 674 N.E.2d 1159 (“the change must be a change of substance,”

especially given that “[t]he clear intent of [R.C. 3109.04] is to spare children from a constant tug of war between their parents who would file a motion for change of custody each time the parent out of custody thought he or she could provide the children a ‘better’ environment”). To the extent that Cireddu does not follow the court’s direction to use the appropriate surname, there are other methods of addressing this issue. Not every dispute between the parties warrants a finding that a change in circumstances occurred for the purposes of modifying custody.

{¶50} Finally, Clough argues that she had difficulty exercising court ordered telephone contact with the children. For similar reasons as explained above, we cannot find that the few occasions where Cireddu admitted that the children were at an activity or asleep and could not talk on the phone rise to the level of a change of circumstances or a substantial change.

{¶51} The second assignment of error is without merit.

{¶52} In her third assignment of error, Clough argues that the trial court erred by failing to consider the best interests of the children. We disagree.

{¶53} This court has held that when a party seeking a modification of custody fails “to prove a change of circumstances had occurred since the prior decree, \* \* \* the trial court was not obliged to continue on with a best interests analysis.” *Haskett*, 2013-Ohio-145, at ¶ 39; *Stevenson v. Kotnik*, 11th Dist. No. 2010-L-063, 2011-Ohio-2585, ¶ 46 (a best interests determination under R.C. 3109.04(E)(1)(a) is “not made unless and until a change of circumstances has been shown”); *Lehman v. Lehman*, 11th Dist. No. 95-T-5327, 1997 Ohio App. LEXIS 716, \*8 (Feb. 28, 1997). As discussed in the prior assignment of error, there was no change in circumstances and, therefore, the lower court did not need to proceed further in its analysis.

{¶54} While Clough emphasizes the importance of evaluating the children's best interest in a custody determination, the law clearly sets forth that the change of circumstances factor must be proven for the court to make a ruling that alters its prior custody determination. To the extent that Clough argues that the threshold for a change of circumstances was too high and therefore prevented the judge from modifying custody that was necessary for the best interest of the children, this issue has been considered in the previous assignment of error.

{¶55} The third assignment of error is without merit.

{¶56} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, Juvenile Division, denying Clough's Motion for Allocation of Parental Rights and Responsibilities/Motion for Shared Parenting, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

STATE OF OHIO  
COUNTY OF LAKE

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)SS.  
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IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

JAMES V. CIREDU, et al.,

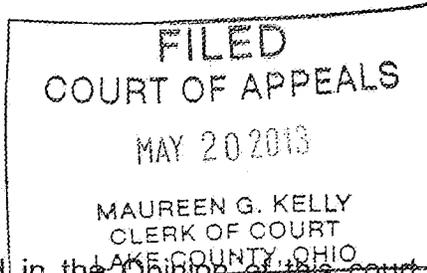
Plaintiff-Appellee,

- vs -

STEPHANIE Y. CLOUGH,  
Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2012-L-103



For the reasons stated ~~in the Opinion of this court,~~ the assignments of error are without merit. The order of this court is that the judgment of the Lake County Court of Common Pleas, Juvenile Division, is affirmed. Costs to be taxed against appellant.

  
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JUDGE DIANE V. GRENDALL  
FOR THE COURT

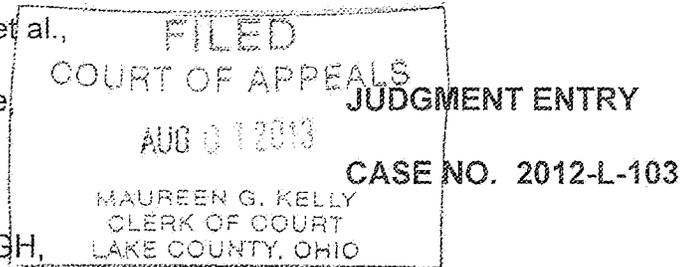
STATE OF OHIO )  
 )SS.  
COUNTY OF LAKE )  
IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

JAMES V. CIREDU, et al.,

Plaintiff-Appellee

- vs -

STEPHANIE Y. CLOUGH,



Defendant-Appellant.

This matter is before this court on appellant, Stephanie Y. Clough's, June 3, 2013 Application for Reconsideration of this court's decision in *Cireddu v. Clough*, 11th Dist. No. 2012-L-103, 2013-Ohio-2042. Clough also filed a Supplemental Application for Reconsideration on June 12, 2013. Appellee, James V. Cireddu, did not file a response. For the following reasons, we deny Clough's Application for Reconsideration and the Supplemental Application for Reconsideration.

In *Cireddu*, this court affirmed the trial court's judgment, denying Clough's Motion for Allocation of Parental Rights and Responsibilities. This court held that there was no change of circumstances to justify a modification of custody and that the trial court properly applied the law in considering whether any potential change was material and adverse to the children. *Id.* at ¶ 33-34 and ¶ 40-50.

Appellate Rule 26(A) does not provide specific guidelines to be used by an appellate court when determining whether a prior decision should be reconsidered or modified. *State v. Black*, 78 Ohio App.3d 130, 132, 604 N.E.2d 171 (1st Dist.1991). When considering a motion for reconsideration, "[t]he test generally applied \* \* \* is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." (Citation omitted.) *State v. Jones*, 11th Dist. No. 2001-A-0027, 2003-Ohio-621, ¶ 5.

Importantly, an application for reconsideration is not designed to be used in situations where a party simply disagrees with the logic employed or conclusions reached by an appellate court. *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). Instead, App.R. 26 is meant to provide "a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error" or renders a decision that is not supported by law. *Id.*

Clough first asserts that this court erred in not finding that the trial court's consideration of whether the alleged change in circumstances was material and adverse to the children was improper under R.C. 3109.04, as amended in 1990. In its opinion, this court specifically and thoroughly considered the change in the statute referred to by Clough, and held that the law still requires the trial court to consider whether a change in circumstances is material and adverse to the

children. *Cireddu*, 2013-Ohio-2042, at ¶ 33 (the amendment to the statutory language was unrelated to the case law of various courts that a change of circumstances should be adverse to the children).

In her supplemental application, Clough also asserts that this court misapplied *Schiavone v. Antonelli*, 11th Dist. No. 92-T-4794, 1993 Ohio App. LEXIS 5891, \*9 (Dec. 10, 1993), by holding that the court in that case specifically considered whether the material and adverse standard applied in light of the change in the statute. However, in *Cireddu*, this court explained that the *Schiavone* court took note of the fact that R.C. 3109.04 had been amended, but “still applied the material and adverse requirement under the change of circumstances analysis.” *Cireddu*, 2013-Ohio-2042, at ¶ 34. This analysis was included to address Clough’s apparent argument that this court had never recognized the 1990 statutory amendment, and did not include a statement that the *Schiavone* case explicitly considered the specific issue raised by Clough. It was clear in *Schiavone* that this court was aware of the statutory amendment and continued to apply the material and adverse standard, even with the knowledge of the change in the law, as was explained in the *Cireddu* opinion.

Based on the foregoing, this issue was fully considered by this court and Clough points to no error in this court’s analysis, but instead appears to simply disagree with this court’s conclusion, which is not a proper basis for reconsideration. “The purpose of reconsideration is not to reargue one’s appeal based on dissatisfaction with the logic used and conclusions reached by an

appellate court.” *In re I.T.A.*, 7th Dist. Nos. 11 BE 27 and 11 BE 29, 2012-Ohio-2438, ¶ 5.

To the extent that Clough requests that this court “explain and offer clarification” as to its reasons for certain holdings, the opinion speaks to this court’s reasoning for its decision. App.R. 26 does not provide for a party to seek clarification, but requires this court to reconsider its decision to address obvious errors or its failure to consider an issue. *Jones*, 2003-Ohio-621, at ¶ 5. It does not mandate that this court provide further explanation of an issue that has already been fully and adequately addressed.

Clough next argues that this court considered only evidence that was favorable to Cireddu. A review of the opinion, however, reveals that this court evaluated and discussed both parties’ testimony in reaching its conclusion, including testimony that benefitted Clough. *See Cireddu*, 2013-Ohio-2042, at ¶¶ 12-14, 16, 46. The fact that the conclusion was ultimately adverse to Clough does not constitute a failure to consider her evidence and whether the trial court abused its discretion.

Clough also addresses each of the reasons she believes justified a finding that a change of circumstances occurred. Once more, she simply reasserts the same arguments raised in her initial appellate brief as grounds for reconsideration. These issues were fully considered by this court.

Specifically, as to Clough’s claim that Cireddu’s interference with visitation constituted a change of circumstances, this court held that there was no evidence

presented at the hearing on the Motion for Allocation of Parental Rights and Responsibilities of an interference sufficient to constitute a change of circumstances. We specifically noted that, during the hearing, Clough took issue with Cireddu's failure to make changes to accommodate her schedule or allow additional visitation, which does not constitute interference with visitation. *Id.* at ¶ 46.

Regarding Cireddu's failure to provide Clough with information related to the children, which she argues was "downplay[ed]" by this court, this issue was also fully considered. This court noted that there was testimony from both parties as to the issue of the children's information, but there was sufficient evidence to support the trial court's conclusion that no change had occurred. It was further emphasized that Cireddu was not required to provide information Clough could have received directly from the school or doctors as the children's mother. *Id.* at ¶ 47. Similarly, Clough asserts that this court "minimizes" the issue of the difficulty she had maintaining phone contact with the children. This court considered this issue and concluded that "we cannot find that the few occasions where Cireddu admitted that the children were at an activity or asleep and could not talk on the phone rise to the level of a change of circumstances or a substantial change." *Id.* at ¶ 50.

As to the children's medical treatment, Clough asserts that this court failed to consider her statement, as a doctor, that Cireddu's treatment of the children was harmful. Not only was this fully considered by the court, but Clough also fails to

recognize that her testimony alone was not the only evidence to be considered as to this issue. See *Id.* at ¶ 48.

As to the children's surname, Clough merely reasserts the argument from her appellate brief that their incorrect surname was used. This was recognized by this court, which concluded that the issue regarding the surname "does not rise to the level of a change in circumstances." *Id.* at ¶ 49.

Although this court reached a conclusion that was dissatisfactory to Clough, it is clear that this court addressed each of these alleged errors. Based on the foregoing, we find that these issues have already been fully and adequately considered by this court in our opinion, and that no obvious error occurred.

Finally, Clough argues that this court should have remanded the matter for the trial court to make specific factual findings as to the foregoing issues, since it only made a limited conclusion that there was no change of circumstances. This is a new argument, not raised in Clough's appellate brief, which is not proper in an application for reconsideration. Further, Clough states that this court held that evidence was taken by the trial court, "but no finding of facts or conclusions were issued." This court made no such statement in its opinion. As is evident from the trial court's Judgment Entry, there were various factual findings made by the court regarding the testimony presented.

Accordingly, Clough has not demonstrated any obvious error or omission in this appeal which would necessitate reconsidering our opinion. Clough's

Application for Reconsideration and Supplemental Application for Reconsideration are denied.



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JUDGE DIANE V. GREDELL

TIMOTHY P. CANNON, P.J.

CYNTHIA WESTCOTT RICE, J.,

concur.