

ORIGINAL

IN THE SUPREME COURT OF OHIO

STEPHANIE Y. CLOUGH

Appellant

vs.

JAMES V. CIREDU

Appellee

) CASE NO. 2013-1445  
)  
) On Appeal from the Lake County Court of  
) Appeals, Eleventh District Court of Appeals  
) Case No. 2012-L-103  
)  
)  
)

MEMORANDUM IN RESPONSE

HANS C. KUENZI (0018897)  
HANS C. KUENZI CO., L.P.A.  
Attorney for Appellee  
Skylight Office Tower, Suite 410  
1660 W. Second Street  
Cleveland, Ohio 44113  
(216) 241-9711 Phone  
(216) 241-4804 Fax  
*hans@kuenzilaw.com*

FILED  
OCT 09 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

STEPHANIE Y. CLOUGH  
Appellant, Pro Se  
8060 Wright Road  
Broadview Heights, Ohio 44147  
(440) 417-3382 Phone  
*stephanieclough@hotmail.com*

REBECCA J. CASTELL (0076238)  
Guardian ad Litem  
12690 Opalocka Drive  
Chesterland, Ohio 44026  
(440) 729-1252 Phone  
*rcastelllaw@gmail.com*

RECEIVED  
OCT 09 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

**TABLE OF CONTENTS**

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION..... 1

ARGUMENTS IN RESPONSE TO PROPOSITIONS OF LAW..... 2

Proposition of Law No. I:

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 adverse to the children. .... 2

Proposition of Law No. II:

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 ..... 5

CONCLUSION..... 8

CERTIFICATE OF SERVICE ..... 8

**Authorities**

Rev. Code §3109.04(E)(1)(a) ..... 2, 3, 4, 6

*Fisher v. Hasenjager*, 116 Ohio St. 3d 53, 2007-Ohio-5589 ..... 2, 3

*In re Seitz*, 11<sup>th</sup> Dist. No. 2002-T-0097, 2003-Ohio-5218..... 2

*Lehman v. Lehman* (Feb. 28, 1997), 11<sup>th</sup> Dist. No. 95-T-5237 ..... 2

*Perz v. Perz* (1993), 85 Ohio App. 3d 374 ..... 2

*Davis v. Flickinger* (1997), 77 Ohio St. 3d 415, 1997-Ohio-260..... 3

*Willoughby v. Messeria*, 11<sup>th</sup> Dist. No. 2002-G-2437, 2003-Ohio-1257..... 3

*Schiavone v. Antonelli* (Dec. 10, 1993), 11<sup>th</sup> Dist. No. 92-T-4794..... 3

*Welch v. Schudel*, 2010-Ohio-715 ..... 3, 6

*Khulenberg v. Davis* (Aug. 25, 1997), 12<sup>th</sup> Dist. No. CA 96-07-143..... 3

*Haas v. Bauer*, 9<sup>th</sup> Dist. No. 02CA008198, 2004-Ohio-437 ..... 5

*Booth v. Booth* (1984), 44 Ohio St.3d. 142 ..... 5

*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217..... 5

*In re Jane Doe I* (1991), 57 Ohio St.3d 135 ..... 5

*DiLacqua v. DiLacqua* (1993), 88 Ohio App.3d 48 ..... 5

*State v. Reeves*, 11<sup>th</sup> Dist. No. 2006-T-0099, 2007-Ohio-4765 ..... 6

*Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77..... 6

**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

Appellant argues in essence that she is entitled to review in this Court because her claims were denied by the trial court and in the court of appeals. Unfortunately, one does not earn the right to appeal to this Court simply by failing to succeed in the courts below. In order to earn the right to appeal, Appellant must demonstrate that this matter is a case of public or great general interest or involves a substantial constitutional question. Appellant fails in all respects to make such a showing. It is the function of the courts of this state to determine disputes based upon the record of evidence presented. The fact that a court does not find evidence persuasive does not mean that there exists a conspiracy to deny one relief. It simply means that the evidence presented is not sufficient to earn the relief sought. Being too self righteous to concede that the evidence below did not support her claims, Appellant chooses instead to impugn the integrity of the courts below in an effort to win redress before this Court.

This case is not one of great general interest and does not involve any substantial constitutional question. The issues at bar involve a routine allocation of parental rights and responsibilities. As with most cases of this sort, the determination of the credibility of the parties and their witnesses became a critical function of the trial court. The trial court does not infringe upon constitutional rights by assessing credibility and choosing to believe one party over the other. The assessment of credibility is a tool available to the court to weigh the quality of the evidence before it. A finder of fact is free to believe all, some or none of the testimony of each witness. Any challenge to the discretion exercised by the trial court in this function, or the Court of Appeals upon review, does not involve a substantial constitutional question.

## ARGUMENTS IN RESPONSE TO PROPOSITIONS OF LAW

Proposition of Law No. I: 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 adverse to the children.

The modification of a designation as the residential parent and legal custodian of a child requires a determination that a change of circumstances has occurred, as well as a finding that the modification is in the best interest of the child. Rev. Code §3109.04(E)(1)(a); *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, syllabus. Rev. Code §3109.04(E)(1)(a) governs the modification of a prior decree allocating parental rights and responsibilities. In order for the trial court to modify a prior decree regarding the allocation of parental rights, the party requesting the modification must demonstrate each of the following three factors: (1) a change has occurred in the circumstance 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*, 11<sup>th</sup> Dist. No. 2002-T-0097, 2003-Ohio-5218.

The trial court may not modify a prior decree allocating parental rights unless it first finds a change 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 interest. *Lehman v. Lehman* (Feb. 28, 1997), 11<sup>th</sup> Dist. No. 95-T-5237 at \*8. Thus, the court may proceed to a best-interest analysis only after the court has determined that a change of 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. 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. *Id.* at 376.

“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 [Rev. Code §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, 1997-Ohio-260; *Fisher, supra.* at 59-60.

In general, the phrase “change of circumstances” is intended to “denote an event[,] occurrence or situation which has a material and adverse effect upon a child”. *Willoughby v. Masseria*, 11<sup>th</sup> Dist. No. 2002-G-2437, 2003-Ohio-1257 at ¶22, citing *Schiavone v. Antonelli* (Dec. 10, 1993), 11<sup>th</sup> Dist. No. 92-T-4794 at 3. Indeed, Rev. Code §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 his residential parent, not the nonresidential parent. *See Welch v. Schudel*, 2010-Ohio-715; *Khulenberg v. Davis* (Aug. 25, 1997), 12<sup>th</sup> Dist. No. CA 96-07-143.

Appellant takes issue with this legal standard based upon the revision of a factor contained in Rev. Code §3109.04(E)(1)(a), which was enacted in 1990. By this revision, a required finding that a “child’s present environment endangers significantly his physical health or his mental, moral or emotional development” was removed from the standard. Therefore, Appellant argues, the trial court and court of appeals erred in their interpretation of Rev. Code §3109.04(E)(1)(a) by requiring that she demonstrate that the change of circumstances which has occurred is both material and adverse to the children.

This argument fails however as Appellant refuses to acknowledge that courts of this state have repeatedly held that, in a determination of whether a change of circumstances has occurred, the focus is not on the noncustodial parent. The issue is whether the circumstances of the child or his custodial parent have changed. If they have changed for the better, then logically there should be no basis for modification. It follows therefore that only if circumstances of either have changed for the worse should the trial court then consider whether the best interest of a child would be served by a modification. The foregoing revision of Rev. Code §3109.04(E)(1)(a) did not change this logic. All the revision did was to remove any limitation on the type of event, occurrence or situation which could have a material and adverse effect upon a child. Previous to the revision, the only types of situations which were recognized as being material and adverse to a child were those which “[endanger] significantly [the child’s] physical health or his mental, moral or emotional development”.

Clearly, the trial court adjudicated this case using the proper legal standard as to whether a change of circumstances has occurred which has had a material and adverse impact upon the children. Insofar as the trial court and court of appeals properly interpreted Rev. Code §3109.04(E)(1)(a) in their application of the law to the facts of this case, Appellant’s First Propositional of Law fails.

Proposition of Law No. II: 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 judgment of the trial court in child custody matters enjoys a presumption of correctness. *Haas v. Bauer*, 9<sup>th</sup> Dist. No. 02CA008198, 2004-Ohio-437 at ¶20. The review of a judgment in such matters must focus on whether the trial court abused its discretion. *Booth v. Booth* (1984), 44 Ohio St.3d 142, 144. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138. Therefore, absent a finding that the trial court in this case abused its discretion, the decision of the trial court denying Appellant's motion to modify its standing custody order must be upheld.

In determining whether the trial court abused its discretion, the inquiry becomes whether the record contains sufficient evident to support the judgment of the trial court. As long as there is evidence in the record to support a judgment, it cannot be said that the judgment of the trial court is arbitrary. *DiLacqua v. DiLacqua* (1993), 88 Ohio App.3d 48, 60.

In this case, the inquiry therefore becomes whether the trial court erred in failing to find that Appellant had produced sufficient evidence to conclude that the circumstances of Appellee or the children had changed in a manner which was materially adverse to the children. The weight of evidence clearly establishes that Appellant did not produce sufficient evidence to meet this standard.

To begin, despite Appellant's claim to the contrary, the record does not establish that Appellee has denied Appellant access to the children. Rather, the evidence below demonstrates that Appellee complies with the standing orders affording Appellant with parenting time and telephone

access to the children. Appellee also occasionally offers Appellant additional parenting time with the children. To the extent that the court chose to believe the testimony of Appellee and his witnesses over the testimony of Appellant in this regard was within the purview of the magistrate. Credibility is best determined by the trier of fact who has opportunity to view the witnesses and observe their demeanor in weighing their capacity for telling the truth. *See State v. Reeves*, 11<sup>th</sup> Dist. No. 2006-T-0099, 2007-Ohio-4765¶14, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-81. The trial court therefore did not err in failing to find a change of circumstances materially adverse to the children based on Appellee's conduct toward Appellant.

The passage of time cited by Appellant as supporting a finding of a change of circumstance is also insufficient to modify the standing order of custody. The change in circumstances of the residential parent of the child 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". Rev. Code §3109.04(E)(1)(a). The fact of human aging is within one's normal contemplation and anticipation. Hence, the fact that children have aged cannot serve as a change of circumstance sufficient to modify the standing custody order.

The balance of the argument advanced by Appellant under this Proposition of Law is supported by the cases having little or no relevance to the issue at bar. As stated in response to Appellant's First Proposition of Law, the standard set forth in Rev. Code §3109.04(E)(1)(a) specifically requires, in the absence of a shared parenting plan, that the change of circumstance, materially adverse to the child, pertain to the child or his residential parent, not the nonresidential parent. *Welch, supra*. In this case, the children are doing very well in their present environment. Appellee is assisted in this care of the children by their loving grandmother, a former teacher, to whom the children respond well. The children are very comfortable in their home. Even Appellant conceded that the children appear happy, healthy, well-adjusted and well cared for. Given the foregoing, there was no credible evidence before the magistrate upon which the trial court could

conclude that a change of circumstances materially adverse to the children has occurred in affairs of Appellee or the minor children. The trial court therefore did not err in finding that Appellant had failed to meet her burden of proof. Likewise, the court of appeals did not err in affirming this ruling based upon the record below.

Appellant's Second Proposition of Law is without merit and therefore fails.

## CONCLUSION

Appellant received a fair and impartial hearing before the trial court. She was afforded the right of appellate review as to all issues before the Eleventh District Court of Appeals. The fact that she failed to prevail upon her claims does not earn her the right to present her case before this court. She offers no basis which would warrant review in this matter. Accordingly, Appellee requests that this Court decline jurisdiction in this matter.

Respectfully submitted,



---

HANS C. KUENZI (0018897)  
HANS C. KUENZI CO., L.P.A.  
Attorney for Appellee  
Skylight Office Tower, Suite 410  
1660 W. Second Street  
Cleveland, Ohio 44113  
(216) 241-0040 Phone  
(216) 241-4804 Fax  
*hans@kuenzilaw.com*

## CERTIFICATE OF SERVICE

A copy of the foregoing was sent by Ordinary U.S. Mail to Appellant Stephanie Y. Clough at 8060 Wright Road, Broadview Heights, Ohio 44147, and Rebecca Castell, Guardian ad Litem, at 12690 Opalocka Drive, Chesterland, Ohio 44026, this 8 day of October, 2013.



---

HANS C. KUENZI (0018897)  
HANS C. KUENZI CO., L.P.A.  
Attorney for Appellee