

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STACEY R. SCHNEIDER,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2010-T-0012
JAMES B. SCHNEIDER,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2002 DR 651.

Judgment: Affirmed.

Brendan J. Keating, 144 North Park Avenue, #200, Warren, OH 44481 (For Plaintiff-Appellant).

Deborah L. Smith, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482-4270 (For Defendant-Appellee).

Terry A. Swauger, The Law Offices of Dennis W. Tackett, 308 Bank One Building, 106 East Market Street, Warren, OH 44481 (Guardian ad litem).

MARY JANE TRAPP, J.

{¶1} Appellant, Stacey R. Schneider, appeals from the January 4, 2010 judgment entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, overruling her objection and adopting the magistrate's decision which, inter alia, changed custody of the parties' child from mother to father. Ms. Schneider asserts that the trial court abused its discretion by failing to make an express finding in its entry that the harm caused by a change in custody is outweighed by the benefits resulting

from the change. We find that although not expressly written in its January 4, 2010 judgment entry, the record demonstrates that the trial court did in fact engage in the required advantages-versus-harm balancing test in arriving at its decision, and thus, we affirm.

{¶2} Substantive and Procedural Facts

{¶3} Ms. Schneider and appellee, James B. Schneider, were married on November 7, 2000, and one child was born as issue of the marriage: R.N.S., d.o.b. December 13, 2002 (“minor child”). The parties separated prior to the minor child’s birth. The procedural history of this case is extensive, as it goes back to December 27, 2002, when Ms. Schneider filed a complaint for divorce.

{¶4} In February 2003, Ms. Schneider was granted temporary custody of the minor child. Mr. Schneider was granted companionship with the minor child twice per week for six hours for each visit, and was ordered to pay temporary child support in the amount of \$625.42 per month.

{¶5} Mr. Schneider was granted leave and filed an answer and counterclaim to the complaint for divorce in August 2003.

{¶6} Attorney Marc Lambert was appointed as the first guardian ad litem for the minor child in October 2003.

{¶7} In January 2004, Mr. Schneider filed a motion for contempt for Ms. Schneider’s failure to comply with his companionship with the minor child. In March 2004, Mr. Schneider filed a proposed shared parenting plan and a motion to modify child support in July 2004. In August of that same year, he filed another motion for contempt for Ms. Schneider’s failure to comply with his companionship.

{¶8} Following a hearing, the trial court reduced Mr. Schneider's child support obligation to \$319.08 per month and altered his companionship with the minor child based upon an agreement between the parties.

{¶9} In October 2004, Mr. Schneider filed an amended shared parenting plan.

{¶10} Following a hearing, the parties were granted a divorce on December 15, 2004. Pursuant to the divorce decree, the trial court indicated, inter alia, that Mr. Schneider's amended shared parenting plan shall be implemented; that he pay child support based on the guidelines; and that neither party shall pay spousal support to the other.

{¶11} In January 2005, Ms. Schneider filed a notice of appeal with this court, Case No. 2005-T-0008, which was later dismissed upon her request.

{¶12} Following a hearing, in April 2005, the trial court ordered Mr. Schneider to pay child support in the amount of \$717.34 per month.

{¶13} In July 2005, Ms. Schneider filed a motion to modify companionship, and in August Mr. Schneider filed a motion to find Ms. Schneider in contempt for her failure to comply with the trial court's order of shared parenting. Following a hearing, the magistrate denied both motions due to somewhat confusing language regarding summer companionship. The trial court approved and adopted the magistrate's decision that same date.

{¶14} In May 2006, Attorney Lambert withdrew as guardian ad litem and the trial court appointed Attorney Terry Swauger ("GAL") as his successor.

{¶15} In July 2006, Mr. Schneider filed a motion for reallocation of parental rights followed in January 2007 by a motion for contempt, alleging that Ms. Schneider failed to

comply with the companionship order. A hearing was held before the magistrate and in his May 8, 2007 decision, the magistrate determined that the shared parenting plan be terminated; that Ms. Schneider be appointed residential parent and legal custodian of the minor child; and Mr. Schneider would have companionship. The trial court approved and adopted the magistrate's decision on that same date.

{¶16} Mr. Schneider requested findings of fact and conclusions of law, and Mr. Schneider submitted his proposed findings of fact and conclusions of law in August 2007.

{¶17} In October 2007, Mr. Schneider filed a motion for contempt due to Ms. Schneider's failure to comply with the trial court's May 8, 2007 order. Following hearings in November 2007 and April 2008, the magistrate clarified in two decisions the previous order regarding Mr. Schneider's companionship, which were approved and adopted by the trial court.

{¶18} Another motion for reallocation of parental rights was filed by Mr. Schneider in April 2009, as well as a motion to show cause alleging that Ms. Schneider should be found in contempt due to her failure to comply with the trial court's previous orders regarding companionship. It is the determination on the motion for reallocation of parental rights that is now before us.

{¶19} A hearing before the magistrate commenced on August 5, 2009.

{¶20} **The Guardian ad Litem's Testimony**

{¶21} At that hearing, the GAL testified that he had been the guardian ad litem for the minor child for over three years. He found that the minor child had 22 unexplained absences when she attended kindergarten in Brookfield and that Ms.

Schneider had moved at least three times since the parties were last in court. He indicated that the minor child is happy and outgoing and has a good and positive relationship with her parents, stepparents, stepbrothers, and significant others, including Ms. Schneider's boyfriend. The GAL opined that the minor child's strongest bond was to her mother. However, he said that he has "concerns" and, therefore, was neutral and did not have a recommendation as to where the minor child should be placed for purposes of custody.

{¶22} Ms. Schneider's Testimony

{¶23} Ms. Schneider testified regarding her housing situation, including the fact that after her boyfriend's house was in foreclosure, she lived in an apartment and was also living with relatives. She had previously expressed some plans to relocate, but no longer had plans to do so at that time. She stated that she planned on moving back in with her boyfriend in Austintown, which is out of the minor child's school district. Ms. Schneider also testified at length with respect to her history of on again off again employment and schooling. She "didn't really realize" that the minor child had missed so many school days in kindergarten. Ms. Schneider also stated that she "forgot" to give Mr. Schneider the minor child's school schedule which he had requested.

{¶24} Mr. Schneider's Testimony

{¶25} Mr. Schneider is an engineer for Canadian Pacific Railway. He has lived at the same residence for the last 10 years, which is a three bedroom home that he shares with his wife and two stepsons. The parties' minor child has her own bedroom at his home. Mr. Schneider indicated that his daughter has a strong bond and positive relationship with himself, his wife, his stepsons, and other friends and relatives.

{¶26} He testified at length with respect to Ms. Schneider's failure to comply with the trial court's order of companionship, which resulted in missed time with his daughter. He believed that Ms. Schneider did not honor or facilitate his relationship with his daughter and he expressed his great concern regarding his daughter's school attendance while she was in her mother's care because Ms. Schneider failed to send his daughter to preschool and the child later missed an excessive amount of school days while attending kindergarten.

{¶27} In addition he testified that Ms. Schneider refused to give him the minor child's school schedule or report card. He expressed concern with how Ms. Schneider's conduct including frequent moves; instability in relationships, employment and school schedule; and his daughter's excessive school absences would impact the child's future.

{¶28} A few simple questions by the magistrate were most telling as to the assertion that Ms. Schneider was impeding rather than facilitating visitation by being continually late for scheduled drop-offs or cancelling visitation because of "car trouble." Mr. Schneider was asked whether Ms. Schneider was always on-time to pick up her daughter after visitation. He replied that for the pick-up Ms. Schneider was "never late" and never had any car trouble.

{¶29} **The Magistrate's Decision**

{¶30} Following that hearing, the magistrate determined that Mr. Schneider had lost 25 percent of his companionship, thus he considered this to be a change of circumstances permitting the trial court to consider a reallocation of parental rights and responsibilities. The magistrate found that the minor child's best interest would be

served by having Mr. Schneider as the residential parent and legal custodian, with Ms. Schneider having companionship. The trial court approved and adopted the magistrate's decision on September 2, 2009.

{¶31} Ms. Schneider filed a motion to stay the proceedings, a motion to set aside the magistrate's decision pursuant to Civ.R. 53, and a request for findings of fact and conclusions of law. She also filed her proposed findings of fact and conclusions of law that same day.

{¶32} Mr. Schneider filed a memorandum in opposition to Ms. Schneider's motion for stay, and a memorandum in opposition to Ms. Schneider's motion to set aside the magistrate's decision.

{¶33} The trial court denied the motion to set aside the magistrate's decision and the magistrate filed his decision with findings of fact and conclusions of law. On that same date, the trial court approved and adopted the magistrate's decision, finding that there was a change of circumstances due to evidence establishing a denial of approximately 25 percent of Mr. Schneider's companionship time; that the best interest of the minor child would be served by having Mr. Schneider be the residential parent; and that Ms. Schneider would have companionship three weekends per month and week on/week off during the summer months. Mr. Schneider's child support obligation was terminated, and Ms. Schneider was ordered to pay child support in the amount of \$156.50 per month.

{¶34} Ms. Schneider filed an objection to the magistrate's decision on December 21, 2009, and on January 4, 2010, the trial court overruled the objection to the

magistrate's decision. It is from that judgment that Ms. Schneider filed a timely appeal, asserting the following assignment of error for our review:

{¶35} “The court abused its discretion by failing to make a finding that the harm caused by a change in custody is outweighed by the benefits resulting from said change, as required by R.C. 3109.04(E)(1)(a).”

{¶36} In her sole assignment of error, Ms. Schneider argues that the trial court abused its discretion by failing to make the required R.C. 3109.04(E)(1)(a) finding that the harm caused by a change in custody is outweighed by the benefits resulting from such change.

{¶37} **Standard of Review**

{¶38} “In reviewing matters involving the allocation of parental rights and responsibilities of minor children, a trial court is vested with broad discretion; thus, a trial court's decision will be reversed only upon a showing of an abuse of discretion.” *Dexter v. Dexter*, 11th Dist. No. 2006-P-0051, 2007-Ohio-2568, at ¶11, citing *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74; *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418. An abuse of discretion is the trial court's “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11. Furthermore, “[d]eference to the trial court on matters of credibility ‘is even more crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does *not* translate to the record well.’” (Emphasis sic.) *Dexter*, supra, at ¶11, quoting *Davis* at 418.

{¶39} **Balancing Advantage versus Harm in a Change of Custody Determination**

{¶40} R.C. 3109.04(E)(1)(a), which governs the modification of a prior order allocating parental rights and responsibilities, provides:

{¶41} “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:

{¶42} “(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.

{¶43} “(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.

{¶44} “(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.”

{¶45} This statute sets forth the procedure for modifying a prior decree allocating parental rights and responsibilities for the care of children. “In order to modify a prior decree, R.C. 3109.04(E)(1)(a) mandates a finding (1) of a change in circumstances; (2) that the modification is necessary to serve the best interest of the child; and (3) that the

harm resulting from the change will outweigh the benefits of not changing.” *Makuch v. Bunce*, 11th Dist. No. 2007-L-016, 2007-Ohio-6242, at ¶11.

{¶46} At issue in the present case is whether the trial court complied with R.C. 3109.04(E)(1)(a)(iii), by finding that “[t]he harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.” Ms. Schneider alleges that the trial court abused its discretion because it failed to make an express finding with respect to R.C. 3109.04(E)(1)(a)(iii) in its January 4, 2010 judgment entry. We disagree.

{¶47} In its judgment entry, the trial court found that a change of circumstances had occurred and that the best interest of the minor child would be better served by having Mr. Schneider as the residential parent. Ms. Schneider correctly points out that the trial court did not make an express finding in its January 4, 2010 judgment entry regarding R.C. 3109.04(E)(1)(a)(iii). However, we note that although a trial court is required to consider the statutory factors, it is not necessary for the trial court to set forth its analysis as to each factor in its judgment entry so long as it is supported by some competent, credible evidence. See *Coe v. Schneider*, 4th Dist. No. 05CA26, 2006-Ohio-440, at ¶32; *Matis v. Matis*, 9th Dist. No. 04CA0025-M, 2005-Ohio-72, at ¶6-7; *In re Jacobberger*, 11th Dist. No. 2003-G-2538, 2004-Ohio-6937, at ¶26 and ¶31. See, also, *Sayre v. Hoelzle-Sayre* (1994), 100 Ohio App.3d 203, 212 (compliance with statute found even absent language expressly applying balancing test of harm versus advantages). “However, this court must review the record to determine whether a substantial amount of credible and competent evidence supports the trial court’s

finding.” *Alessio v. Alessio*, 10th Dist. No. 05AP-988, 2006-Ohio-2447, at ¶27, citing *Davis*, supra.

{¶48} The trial court's failure to make an express finding in its judgment entry that “[t]he harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child” does not lead us to conclude that it failed to consider the issue. R.C. 3109.04(E)(1)(a)(iii). The record before us establishes that the trial court was fully aware of the statutory procedure and considered the appropriate factors, including R.C. 3109.04(E)(1)(a)(iii) and (F)(1)(a)-(j). Credible and competent evidence exists to support the trial court’s determination.

{¶49} Specifically, with respect to R.C. 3109.04(E)(1)(a)(iii), the record reveals that the trial court addressed and considered the advantages and disadvantages of leaving the minor child with Ms. Schneider or placing her with Mr. Schneider. The trial court found that the minor child was developing well and had no health, learning or behavioral issues. However, the trial court placed great emphasis on Ms. Schneider’s ongoing failure to facilitate companionship and a relationship with and between her daughter and Mr. Schneider. The trial court determined that a change of environment would allow for the better facilitation of companionship and relationship with both of the minor child’s parents. Thus, the record shows that although not expressly written in its January 4, 2010 judgment entry, the R.C. 3109.04(E)(1)(a)(iii) issue was considered by the trial court in rendering its decision.

{¶50} For the foregoing reasons, Ms. Schneider's sole assignment of error is not well-taken. The judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.