

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

ROBERT L. STEVENSON, JR.,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2010-L-063
KATHERINE RUTH KOTNIK,	:	5/27/11
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2006 SE 00842.

Judgment: Affirmed.

Kenneth J. Cahill, Dworken & Bernstein, 60 South Park Place, Painesville, OH 44077 (For Plaintiff-Appellee).

Neil R. Wilson, Neil R. Wilson Co., L.P.A., FirstMerit Bank Building, 56 Liberty Street, #205, Painesville, OH 44077 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Katherine Ruth Kotnik, appeals from the May 12, 2010 judgment entries of the Lake County Court of Common Pleas, Juvenile Division, overruling her objections and adopting the magistrate's decision; granting appellee, Robert L. Stevenson, Jr.'s motion to dismiss Ms. Kotnik's Motion to Change Custody and Child support; and dismissing Ms. Kotnik's motions. The juvenile court properly determined that Ms. Kotnik failed in her burden of establishing that a change of

circumstances had occurred. Contrary to Ms. Kotnik's assertion, there is no evidence that the juvenile court did not properly consider the minor child's wishes and concerns after it conducted an in camera interview with the child. Thus, the juvenile court did not abuse its discretion by dismissing Ms. Kotnik's motion for change of custody. In addition, the record establishes that the juvenile court properly considered all the evidence and did not err by granting Mr. Stevenson's Civ.R. 41(B)(2) motion to dismiss. Therefore, we affirm.

{¶2} Procedural History and Factual Background

{¶3} Ms. Kotnik and Mr. Stevenson never married but had one child together, B.K., who was born on September 25, 1998. After birth, the minor child lived with Ms. Kotnik in Ohio. However, in July 2002, Ms. Kotnik moved with her daughter to North Carolina to help Ms. Kotnik's sister who had been diagnosed with cancer. While in North Carolina Ms. Kotnik began a relationship with Matthew Walker. The couple purchased a home together in 2004. Problems developed in the household apparently stemming from Mr. Walker's alleged cocaine use and inappropriate behavior with B.K. As a result of action taking by children's services in that state, a North Carolina court issued an order granting custody of the minor child to Mr. Stevenson in August 2005, and B.K. returned to Ohio. Ms. Kotnik followed in November of that same year.

{¶4} In May 2006, the Lake County Prosecutor's Office initiated a support action against Ms. Kotnik.

{¶5} A hearing was held before the magistrate and based upon the agreement of the parties, the magistrate recommended that Ms. Kotnik pay child support and determined an arrearage. The magistrate also recommended that residential placement

remain with Mr. Stevenson. The parties agreed to a visitation schedule, and the juvenile court adopted the magistrate's decision the following day.

{¶6} Three years later in August 2009, Ms. Kotnik filed a Motion for Change of Custody and Child Support alleging a change of circumstances. In her motion, Ms. Kotnik stressed that Mr. Stevenson is verbally abusive to the minor child, has fits of anger, is obesely overweight, and smokes heavily in the presence of the minor child. Ms. Kotnik also filed a motion for an in camera interview with the minor child, which was granted a month later.

{¶7} **Evidence Presented at the Magistrate's Hearing**

{¶8} The magistrate heard testimony from Ms. Kotnik and three other witnesses at a hearing in February 2010.

{¶9} **Mr. Stevenson's Former Girlfriend**

{¶10} The deposition testimony of Cheryl Saunders, the former girlfriend of Mr. Stevenson, was presented to the magistrate and detailed her observations of Mr. Stevenson's smoking and eating habits together with his use of profanity.

{¶11} Ms. Saunders, who first met Mr. Stevenson in 2001, described an August 2005 trip with Mr. Stevenson to pick up B.K. from North Carolina so that the minor child could live with him in Ohio.

{¶12} Sometime later in 2005 or 2006, Ms. Saunders, Mr. Stevenson, B.K., and Mr. Stevenson's teenage son, Benjamin Stevenson, began living together. Ms. Saunders stated that Mr. Stevenson would smoke two packs of cigarettes a day outside until he became fed up with that in the spring of 2006, stating, "I'm sick of going in the

fu***** cold. I'm going to start smoking in the house.” She said B.K. had asthma and observed her using an inhaler.

{¶13} She also described Mr. Stevenson’s frequent use of profanity when he would get angry. He would use the following swear words: “fu*****,” “a**hole,” and “bitch” in the child’s presence. She also related that he would threaten his daughter, giving an example of when the minor child would be unable to sleep at night, Mr. Stevenson would say to her, “Get your fu***** little ass back into the bedroom. You need to get to sleep. I don’t want to be fu***** woken up again.” He would also tell the minor child to “[s]hut the fu** up.” Ms. Saunders said that he never hit the minor child even though he would tell her, “I’m going to beat your ass or tan your hide[.]” She further testified that B.K. would frequently call her mother and grandmother in the middle of the night. On one night, the minor child called children services. After someone from the agency was sent to speak with them, Ms. Saunders suggested that Mr. Stevenson seek anger management counseling and that B.K. also go to counseling, but nothing ever happened.

{¶14} As for the family’s eating habits, Ms. Saunders said they frequented fast food restaurants including McDonald’s and Dairy Queen.

{¶15} In August 2007, Ms. Saunders ended the relationship with Mr. Stevenson, apparently after Mr. Stevenson found out she had feelings for another man she met on the internet and moved out of the house.

{¶16} **Mr. Stevenson’s Step-Father**

{¶17} Interestingly, Mr. Stevenson’s step-father, George Schimke, testified for Ms. Kotnik, but he did not remember whether Mr. Stevenson smoked in front of the

minor child; he never knew Mr. Stevenson to have a bad temper; nor did he ever hear Mr. Stevenson swear in front of the minor child.

{¶18} Mr. Stevenson's Son

{¶19} Benjamin, who visited his father once every two weeks and then began living with his father and B.K. in February 2007, testified that his father was a “heavy” cigarette smoker and his grandfather, Mr. Schimke, was a “light” smoker. Benjamin stated the two men smoked in front of the minor child. He said that Mr. Stevenson occasionally got mad but never went into a “rage” or swore at him. Benjamin indicated his father would use swear words infrequently, such as “fu**” and “sh**.” If B.K. was near, she would hear Mr. Stevenson’s language. According to Benjamin, home cooked meals consisted of mashed potatoes, corn, hot dogs, etc., and the family frequently ate at McDonald’s, Dairy Queen, Burger King, and Taco Bell.

{¶20} Benjamin was also questioned about his half-sister. He believed B.K. is a good student. She has never told Benjamin that she was afraid of her father. She has asthma and only “very scarcely” needed to use her breathing machine. He observed B.K. use the machine once after running outside and did not see her experience shortness of breath inside the home. Benjamin said that Mr. Stevenson continues to smoke in the house but uses a filter to clean the cigarette smoke out of the air.

{¶21} On cross-examination, Benjamin testified B.K. has a close, loving, and bonded relationship with her father, and that she appears to be properly clothed, fed, healthy, and happy.

{¶22} Ms. Kotnik

{¶23} Although Mr. Stevenson is difficult to communicate with, Ms. Kotnik has been able to exercise her visitation with her daughter from 2006 to present. When she picks her up from Mr. Stevenson's home, her daughter reeks of smoke. That is of special concern to her because the child was diagnosed with asthma in 1999. She believes it is in the minor child's best interest to live with her in part because when her daughter is at her house, she eats salads, fruits, vegetables, meats, and potatoes.

{¶24} B.K. would call her in the middle of the night to talk to her. On one occasion she called her because she was having an asthma attack. The frequency of those calls has diminished, and Ms. Kotnik explained that B.K.'s call to children's services followed B.K. being grounded and not permitted to go to ballet class.

{¶25} On cross-examination, Ms. Kotnik admitted that she had been involved in a bad relationship while living in North Carolina, and confirmed that after social services got involved, custody of her daughter was taken from her and given to Mr. Stevenson.

{¶26} **In Camera Interview**

{¶27} Following the hearing, the magistrate ordered Mr. Stevenson to bring the minor child for an in camera interview, which was conducted on February 11, 2010, and the motion hearing was continued. The tape recording of the in camera interview was filed and made a part of the record. We have reviewed the interview and, in keeping with the line of opinions from a majority of appellate districts, we will not disclose the details of the child's statements because as explained in *Chapman v. Chapman*, 2d Dist. No. 21652, 2007-Ohio-2968, "[i]n a custody dispute, the best interest of the child is cardinal. R.C. 3109.04(B)(2)(c) makes clear the legislative intent to provide an in camera atmosphere free of influence, pressure and anxiety so that, if appropriate, a

child can participate in the determination of his or her custody. *** If a child believes that every word he or she speaks to the judge may later be read by his or her parents, the child may withhold information and the court's decision-making process may thereby be compromised. To allow parents access to the transcript of their child's in camera interview defeats the statute's purpose to foster candor and also exposes the child to a parent's potentially hostile reaction to the child's words." Id. at ¶28

{¶28} Mr. Stevenson's Motion to Dismiss

{¶29} After Ms. Kotnik rested and offered her exhibits, counsel and the magistrate discussed the procedure to be followed to complete the hearing. It was agreed that the magistrate would read and consider the deposition testimony of Ms. Saunders and conduct the in camera interview with B.K. It was also agreed that Mr. Stevenson's counsel would file a written motion to dismiss, and Ms. Kotnik's counsel would have a period of time to submit a written response. No objection was raised by Ms. Kotnik's counsel to the interposition of a motion to dismiss.

{¶30} The day after the child's interview and before the hearing was scheduled to resume, Mr. Stevenson filed a motion to dismiss Ms. Kotnik's Motion to Change Custody and Child Support. Ms. Kotnik's response to the motion was due to be filed on or before February 26, 2010, pursuant to the Magistrate's Order issued on the day of the hearing; however, a responsive brief was not filed until March 25, 2010, after the Magistrate's Decision had already been issued.

{¶31} The magistrate recommended that Mr. Stevenson's motion to dismiss be granted; that Ms. Kotnik's motion be dismissed; and that the further hearing date be cancelled. Ms. Kotnik timely filed objections to the magistrate's decision, which, inter

alia, first raised an objection to the procedural use of a motion to dismiss in juvenile court proceedings.

{¶32} The trial court overruled Ms. Kotnik's objections and adopted the magistrate's decision; granted Mr. Stevenson's motion to dismiss Ms. Kotnik's Motion to Change Custody and Child Support; and dismissed same. It is from those judgments that Ms. Kotnik filed a timely appeal, asserting the following assignments of error for our review:

{¶33} "[1.] The trial court erred in adopting the magistrate's decision of March 11, 2010 and dismissing the appellant's motion for change of custody.

{¶34} "[2.] The trial court erred in granting appellee's motion to dismiss which was filed pursuant to Civil Rule 41(B)(2) at the end of appellant's case."

{¶35} **Was a Change of Circumstances Established?**

{¶36} In her first assignment of error, Ms. Kotnik argues that the juvenile court erred by adopting the magistrate's decision and dismissing her motion for change of custody. She stresses that second hand smoke, Mr. Stevenson's use of profanity, and the minor child's diet establish a change of circumstances warranting a change in custody. In addition, Ms. Kotnik contends the juvenile court did not consider the minor child's wishes after conducting the in camera interview.

{¶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} R.C. 3109.04

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

{¶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 *** 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 *** 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 ***.

{¶43} "(ii) The child, with the consent of the residential parent *** 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} In this case, the juvenile court properly determined that Ms. Kotnik failed in her burden of establishing that a change of circumstances had occurred. There is no doubt from the evidence that Mr. Stevenson is a heavy smoker who smokes in the presence of his daughter. Although second hand smoke is unhealthy, especially with respect to an asthmatic child and it is true that a body of law has developed recently that permits consideration of a parent’s smoking habits when considering what is in the child’s best interests, the magistrate correctly explained that a best interests determination is “not made unless and until a change of circumstances has been shown.”

{¶47} We agree with the magistrate that the record fails to establish that Mr. Stevenson’s smoking is a change of circumstances as there was no evidence that Mr. Stevenson’s smoking habits changed since August 2005 when he assumed custody of the child.

{¶48} B.K. was first diagnosed with asthma as early as 1999. While the record is silent as to whether he was a heavy smoker and whether he smoked in the child’s presence at the time custody was changed in 2005, the record is also devoid of any evidence of a change in his habit when around his daughter since that order other than

evidence that he confined his smoking to outside the home for a period of time and used an air filter when he did smoke inside.

{¶49} Regarding the other issues raised by Ms. Kotnik in support of her motion, while the use of profanity may be certainly offensive to many and any use of belittling profanity directed toward a young woman is especially inappropriate because of its effect on the development of self-esteem, Mr. Schimke testified that his step-son did not swear in front of the minor child nor did he have a bad temper. According to Benjamin, his father occasionally got mad but never went into a “rage” and would use swear words infrequently. Once again, we can find no evidence in this record of a baseline from which we can then determine a change of circumstances regarding his use of profanity.

{¶50} Finally, although we live in a fast food society and certain fast food offerings are not nutritionally optimal, the record reveals that B.K. appears to be properly fed, healthy, happy, and doing well in school. Moreover, just as the record is silent as whether he was a heavy smoker and whether he smoked in the child’s presence at the time custody was changed in 2005, with an equally silent record as to any evidence of a change in this habit, the record is also silent as to both a baseline and a change in Mr. Stevenson’s use of profanity and sources of nutrition for the child. Ms. Kotnik presented no medical testimony or records regarding any change in the child’s health.

{¶51} Therefore, Ms. Kotnik failed to establish a change of circumstances by a preponderance of the evidence. We agree with the magistrate that “[c]hildren are not ping pong balls – they cannot be shuttled back and forth when one parent feels they can offer a better environment than the custodial parent.”

{¶52} In addition, this court notes that we reviewed the tape recording from the in camera interview from beginning to end. Contrary to Ms. Kotnik's assertion, our review of the interview vis-à-vis the decision below confirms there is no evidence that the juvenile court did not properly consider the minor child's wishes and concerns after it conducted the in camera interview. Although a trial court is required to consider the statutory factors of R.C. 3109.04(E)(1)(a), 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; *Sayre v. Hoelzle-Sayre* (1994), 100 Ohio App.3d 203, 212. Further, the wishes of the child are only one factor that the trial court shall consider in determining the best interest of the child. R.C. 3109.04(F)(1)(b).

{¶53} The record before us establishes that the juvenile court was fully aware of the statutory procedure and considered the appropriate factors, including R.C. 3109.04(E)(1)(a)(i)-(iii) and (F)(1)(a)-(j). Credible and competent evidence exists to support the juvenile court's determination. Thus, the juvenile court did not abuse its discretion by dismissing Ms. Kotnik's motion for change of custody.

{¶54} Ms. Kotnik's first assignment of error is without merit.

{¶55} **Civ.R. 41(B)(2) Motions in a Juvenile Court Proceeding**

{¶56} In her second assignment of error, Ms. Kotnik asserts the juvenile court erred in granting Mr. Stevenson's motion to dismiss pursuant to Civ.R. 41(B)(2) because the civil rules do not apply in juvenile court and because, without hearing

appellee's case and any cross-examination of appellee, the trial court did not have a "complete evidentiary picture of the child's change of circumstances and best interest."

{¶57} Standard of Review

{¶58} The dismissal by the juvenile court was an involuntary dismissal which is governed by Civ.R. 41(B)(2). "The Rules of Civil Procedure apply to custody proceedings in juvenile court except when they are clearly inapplicable.' *In re H.W.*, 114 Ohio St.3d 65, 2007-Ohio-2879, at ¶11, *** citing Civ.R. 1(C)(7) and *State ex. rel. Fowler v. Smith*, 68 Ohio St.3d 357, 360, ***. See also Juv.R. 45(B)." *In re D.M.*, 2d Dist. No. 08-CA-0105, 2009-Ohio-3026, at ¶9. (Parallel citations omitted.) See, also, *Leonard v. Yenser*, 3d Dist. No. 10-2003-01, 2003-Ohio-4251 (applying Civ.R. 41(B)(2) to a juvenile court proceeding).

{¶59} "[P]ursuant to Civ.R. 41(B)(2), if a case is tried to the court, *** the defendant may, after the plaintiff has presented his evidence and rested, move for a dismissal of the plaintiff's action on the ground that, upon the facts and law, the plaintiff has failed to show a right to relief. *** The trial court, in determining whether the plaintiff has shown a right to relief, 'is not required to review the evidence in the light most favorable to the plaintiff but is required only to determine whether the plaintiff has made out his case by a preponderance of the evidence.' *** Furthermore, the conclusions of the trial judge 'may not be set aside unless they are erroneous as a matter of law or against the manifest weight of the evidence.' ****" *L.W. Shoemaker, M.D., Inc. v. Connor* (1992), 81 Ohio App.3d 748, 752. (Internal citations omitted.)

{¶60} Civ.R. 41(B)(2)

{¶61} Civ.R. 41(B)(2) provides:

{¶62} “(B) Involuntary dismissal: effect thereof.

{¶63} “***

{¶64} “(2) Dismissal; non-jury action.

{¶65} “After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff’s evidence, the defendant *** may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. ***”

{¶66} Again, Ms. Kotnik failed to establish a change of circumstances, and we do not find that the conclusions of the trial judge are erroneous as a matter of law or against the manifest weight of the evidence. The record reveals the juvenile court properly considered all the evidence and did not err by granting Mr. Stevenson’s Civ.R. 41(B)(2) motion to dismiss.

{¶67} Ms. Kotnik’s second assignment of error is without merit.

{¶68} For the foregoing reasons, Ms. Kotnik’s assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas, Juvenile Division, is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.