

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JENNIFER M. SIMS, ET AL	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008-CA-27
ANTHONY JAMES DURANT	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Fairfield County Court of Common Pleas, Domestic Relations Division, Case No. 04PA-273

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: December 5, 2008

APPEARANCES:

For Plaintiff-Appellee For Defendant-Appellant

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Gwin, P.J.

{¶1} Defendant-appellant Anthony James Durant, appeals the judgment of the Court of Common Pleas, Domestic Relations Division, Juvenile Branch, of Fairfield County, Ohio, which overruled his motion to terminate the shared parenting agreement between him and Plaintiff-appellee Jennifer Sims concerning their minor child. Appellant assigns a single error to the trial court:

{¶2} “I. THE TRIAL COURT ERRED IN DETERMINING THAT A CHANGE OF CIRCUMSTANCE HAD NOT OCCURRED AND THEREFORE DISMISSING THE DEFENDANT-APPELLANT’S MOTION TO TERMINATE THE SHARED PARENTING PLAN.”

{¶3} The record indicates the parties entered into an agreed shared parenting decree on September 15, 2005. The Plan designated appellee the residential parent for school purposes, but otherwise, whichever parent had physical custody of the child at the time was to be the residential parent for that time. The shared parenting agreement set out a schedule for the parents’ respective parenting times and set child support to be paid by appellant.

{¶4} On July 21, 2006, appellant filed a motion to terminate the shared parenting order and for an order of custody. The court granted an emergency ex parte order of custody, which designated appellant the legal custodian and residential parent of the child, and granted appellee supervised visitation. On September 18, 2006, the parties entered into an agreed entry which maintained the provisions of the ex parte order but granted appellee more parenting time. Subsequently, the parties agreed to terminate appellant’s child support obligation at least while the motion to terminate was pending.

{¶15} On November 6, 2007, a magistrate conducted a hearing on appellant's July 21, 2006 motion to terminate the shared parenting agreement and re-allocate parental rights and responsibilities. The magistrate cited the Supreme Court's case of *Fisher v. Hasenjager*, 116 Ohio St. 3d 53, 2007-Ohio-5589, 876 N.E. 2d 546, which held before a court may modify a shared parenting plan, it must find both a change in circumstances and that modification is in the best interest of the child, syllabus by the court.

{¶16} Pursuant to R.C. 3109.04, a change in circumstances is based upon facts that arose after the prior order or facts which were unknown to the court when it issued the prior order. In general, courts review motions to modify orders based upon the circumstances as it existed at the time of the filing of the motion. However, if necessary, in determining change of circumstances, a domestic relations court may consider developments that occurred after the motion was filed. *Makuch v. Bunce*, Lake App. No. 2007-L-016, 2007-Ohio-6242 at paragraph 17 and footnote 1 following, citing *Carruthers v. Carruthers* (July 24, 1979), Fairfield App. No. 9-CA-79.

{¶17} Our standard of reviewing decisions of a domestic relations court is generally the abuse of discretion standard, see *Booth v. Booth* (1989), 44 Ohio St. 3d 142. The Supreme Court made the abuse of discretion standard specifically applicable to custody proceedings in *Miller v. Miller* (1988), 37 Ohio St. 3d 71. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable, see, e.g. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217. Thus, when we apply the abuse of discretion standard, we may not substitute our judgment for that of the trial court, *Pons v. State Medical Board* (1993), 66 Ohio St. 3d 619, 621.

{¶8} Because the court here did not find a change in circumstances, it did not proceed to determine the best interest of the child.

{¶9} We find the trial court erred in determining no change in circumstances had occurred. The child's residential parent and custodian had changed from the time the parties had entered into the original shared parenting decree, as did the parties' visitation arrangement and support. The circumstances had been such for the court to grant an emergency ex parte order which contravened the shared parenting agreement, and appellant agreed to continue the order. The order had been in effect for over a year. This can only be described as a change in circumstances.

{¶10} We find the court erred, and on remand, must make a best interest determination. On remand the trial court may reach the same conclusion it did here if it finds although there was a change in circumstances, it would nevertheless not be in the best interest of the child to terminate the shared parenting agreement. The court must find both a change in circumstances and the best interest of the child before terminating the agreement. *Fisher, supra*.

{¶11} The assignment of error is sustained.

{¶12} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, of Fairfield County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

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IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JENNIFER M. SIMS, ET AL	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ANTHONY JAMES DURANT	:	
	:	
	:	
Defendant-Appellant	:	CASE NO. 2008-CA-27

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, of Fairfield County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion. Costs to appellee.

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY