[Cite as *Locke v. Locke*, 2001-Ohio-3398.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

SHERYL S. LOCKE	)	CASE NO. 00 CO 10
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	O P I N I O N
	)	
CHARLES A. LOCKE	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Columbiana County, Ohio Case No. 96 DR 372

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. James T. Hartford
Hartford and Dickey
91 West Taggart Street
P.O. Box 85
East Palestine, Ohio 44413

For Defendant-Appellant:

Atty. William W. Taylor
Calhoun, Kademenos & Heichel
Six West Third Street
Suite 200, Box 268
Mansfield, Ohio 44901-0268

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 26, 2001

WAITE, J.

{¶1} This appeal arises from a decision of the Columbiana County Court of Common Pleas overruling separate motions for shared parenting filed by both parties. Appellant argues that the trial court was required to find a significant change in circumstances, rather than merely a change in circumstances, thereby disregarding the holding in *Davis v. Flickinger* (1997), 77 Ohio St.3d 415. For the following reasons, we affirm the judgment of the trial court.

{¶2} The parties were married on August 25, 1984. Two children were born during the marriage: Krista, born on October 20, 1987, and Bryce, born on April 11, 1990. By Opinion and Judgment Entry dated April 8, 1997, the parties were granted a divorce and the court awarded custody of the two minor children to Appellee. The case has been before this Court twice previously, but none of the issues reversed or modified on appeal concern any determination as to custody.

{¶3} On August 18, 1999, Appellant filed a motion for shared parenting. On August 20, 1999, Appellee filed a separate motion for shared parenting. The motions came on for oral hearing on December 8, 1999. The hearing was continued to January 4, 2000, so that Appellee could complete the presentation of her case.

{¶4} The court filed its decision on January 11, 2000. The

court held that there was no significant change in circumstances which would warrant a change in the prior parenting decree. (1/11/00 Opinion, p. 5). The court also found that it would not be in the best interests of the children to modify the custody order and that the harm caused by a change in custody would be greater than any benefit that would be obtained. (1/11/00 Opinion, p. 5). The court did modify Appellant's visitation rights. (1/11/00 Opinion, p. 6).

{¶5} Appellant filed his appeal on February 11, 2000. App.R. 4(A) requires that a notice of appeal be filed within thirty days of the judgment being appealed. "Where a notice of appeal is not filed within the time prescribed by law, the reviewing court is without jurisdiction to consider issues that should have been raised in the appeal." *State ex rel. Pendell v. Adams County Bd. Of Elections* (1988), 40 Ohio St.3d 58, 60. Lack of subject matter jurisdiction can be raised *sua sponte* by the court at any stage of the proceedings. *Fox v. Eaton Corp.* (1976), 48 Ohio St.2d 236, 238, overruled on other grounds *Manning v. Ohio State Library Board* (1991), 62 Ohio St.3d 24, paragraph one of syllabus.

{¶6} As earlier stated, the trial court filed its Opinion and Judgment Entry on Tuesday, January 11, 2000. App.R. 4(A) mandated that Appellant file his notice of appeal no later than February 10, 2000. Excluding the day that the judgment was filed, we find that this appeal was filed on the thirty-first day. February 10,

2000, was not a Saturday, Sunday or legal holiday, and therefore the final date for filing an appeal was not extended under App.R. 14(A).

{¶7} It appears that Appellant may have assumed that the last date for filing an appeal was exactly one month from the date of the judgment. This is only true when the judgment being appealed is filed in a month that has only thirty days. If the judgment entry being appealed is filed in a month with thirty-one days, e.g. July 15, the appeal will be untimely filed if delayed until the same day in the following month, e.g. August 15. Attorneys who wait until the very last minute to file their appeals should take special note of the requirements of App.R. 4(A) and the consequences of miscalculating the appeal period. The period for filing an appeal is thirty days, regardless of the number of days in the month.

{¶8} Generally, under such circumstances, this appeal would be dismissed. The record is not entirely clear, though, that all the parties were served with notice of the January 11, 2000, judgment. Because there is no notation in the trial court's docket that the parties were served with notice of the judgment pursuant to Civ.R. 58(B), the time for filing the appeal is tolled, and the appeal is deemed to be timely filed. *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 85.

{¶9} Appellant presents a single assignment of error which

states:

{¶10} "WHETHER THE TRIAL COURT ERRED BY DENYING THE PARTIES' MOTIONS FOR SHARED PARENTING."

{¶11} As part of this assignment of error, Appellant asserts four sub-issues for our review.

{¶12} Appellant's first sub-issue asserts:

{¶13} "A. WHETHER THE TRIAL COURT APPLIED AN IMPROPER STANDARD WHEN MAKING ITS DETERMINATION BY HOLDING THE PARTIES TO THE BURDEN OF PROOF OF DEMONSTRATING A **SIGNIFICANT** CHANGE OF CIRCUMSTANCES, IN CONTRADICTION OF *DAVIS V. FLICKINGER*, 77 Ohio St.3d 415 (1997)."

{¶14} Appellant argues that this case is governed by R.C. §3109.04(E). Appellant argues that a modification of child custody under R.C. §3109.04(E)(1)(a) is permitted: (1) if the court finds a change in circumstances of the child, his residential parent, or either parent subject to a shared parenting decree; and (2) if the modification is necessary to serve the best interests of the child. Appellant contends that the trial court erred by requiring a significant change in circumstances rather than merely a sufficient change in circumstances. Appellant relies on *Davis v. Flickinger* (1977), 77 Ohio St.3d 415, which states, "R.C. 3109.04 requires only a finding of a 'change in circumstances' before a trial court can determine the best interest of the child in considering a change of custody. Nowhere in this statute does the word 'substantial' appear." *Id.* at 417. Appellant argues that the trial court specifically stated that it

was requiring some evidence of a substantial change in circumstances as a prerequisite to modifying custody. (Tr. p. 23-24). Appellant concludes that the trial court's error in law prevented the court from implementing the shared custody plan.

{¶15} Appellee argues that the only change of circumstances presented by Appellant at the motion hearing was that he had developed heart problems since the original custody decree. Appellee concludes that Appellant did not meet his burden of proof in establishing a change in circumstances.

{¶16} A reviewing court should not reverse a trial court's determination as to whether a change in circumstances has occurred absent an abuse of discretion. *Davis, supra*, at 416. "In determining whether a change in circumstances has occurred so as to warrant a change in custody, a trial judge, as the trier of fact, must be given wide latitude to consider all issues which support such a change * * *." *Id*.

{¶17} R.C. §3109.04(E)(1)(a) states:

{¶18} "*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*, his 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:

{¶19} "(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree to a change in the designation of residential parent.

{¶20} "(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.

{¶21} "(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." (Emphasis added).

{¶22} This Court recently held that three elements must exist in order for a trial court to properly modify a prior custody decree: "(1) there must be an initial threshold showing of a change in circumstances, (2) if circumstances have changed, the modification must be in the children's best interests, and (3) any harm to the children from a modification of the [prior decree] must be outweighed by the advantages of such a modification." *Rohrbaugh v. Rohrbaugh* (2000), 136 Ohio App.3d 599, 604. This Court also held that, "R.C. 3109.04(E)(1)(a) creates a rebuttable presumption that retaining the residential parent designated by the prior decree is in the child's best interest." *Id.*

{¶23} *Rohrbaugh*, based on the holding in *Davis, supra,* disagreed with the trial court's finding that no change of circumstances had occurred when the mother, who was the residential parent, relocated the child to a city 170 miles away. *Id.* at 606. Nevertheless, *Rohrbaugh* upheld the trial court decision because the trial court had also found that a

modification of custody would not be in the child's best interest and would cause more harm than any potential benefit which might result from a change. *Id.*

{¶24} We agree with Appellant that, in the case under review, the trial court established an artificially high standard for finding a change in circumstances. Nevertheless, the trial court also found that the best interests of the children would not be served by changing the primary residential parent and that the harm caused by the change would be greater than any benefit. (1/11/00 Opinion, p. 5). This is akin to the situation in *Rohrbaugh*, and the trial court's error is harmless because of the alternative basis for its ruling.

{¶25} A severe flaw in Appellant's argument is that he does not specify what change of circumstances actually took place which would warrant a modification of custody. Appellant only argues that the trial court used an erroneous legal standard. Without specifying how the judge's legal standard was applied to the evidence presented at the hearing, Appellant cannot show that he was prejudiced by the error in law. *Rickel v. Cloverleaf Local School Dist. Bd. Of Edn.* (1992), 79 Ohio App.3d 810, 815.

{¶26} Appellant's use of *Davis, supra,* is also misleading. *Davis* dealt with a situation in which the trial court found that there was a sufficient change of circumstances and that it was in the child's best interest to modify custody. 77 Ohio St.3d at

416. The court of appeals reversed on the theory that the trial court did not have discretion to modify custody unless a substantial change in circumstances was first established. *Id*. The Supreme Court reversed the court of appeals because, "the court of appeals appeared to require a higher burden of proof than required by statute. In reality, however, the court of appeals merely seems to substitute its judgment for that of the trial bench, rather than deciding the case on an abuse of discretion standard." *Id*. at 418.

{¶27} *Davis* was concerned that the court of appeals was making the standard for establishing a change of circumstances so high that it prevented the trial court from modifying custody if the trial court also found that such a change was in the best interests of the child. *Id*. at 420-421. Although the Ohio Supreme Court seemingly rejected the "substantial change in circumstances" standard, its redefined standard is not significantly different:

> **{¶28}** "Clearly, there must be a change of circumstances to warrant a change of custody, and the change must be a change of substance, not a slight or inconsequential change."

{¶29} *Id*. at 418.

{¶30} In the case at bar, the trial court found both that: (1) change of circumstances had occurred, and (2) that any change would no in the best interests of the children. The holding in *Davis* should ca us from substituting our own judgment for that of the trial court wher

trial court has specifically considered the best interests of the children. On the basis of this Court's ruling in *Rohrbaugh*, we find no merit in Appellant's first sub-issue.

{¶31} Appellant's second sub-issue asserts:

{¶32} "B. THE TRIAL COURT ERRED BY NOT ALLOWING DEFENDANT-APPELLANT TO PRESENT EVIDENCE CONCERNING THE BEST INTEREST OF THE MINOR CHILDREN."

{¶33} Appellant's argument is that the trial court did not allow him to present the full range of evidence relating to the best interests of the children, but rather, only permitted the introduction of evidence which had arisen since the original divorce decree was issued. Appellant cites to two places in the transcript where the trial court attempted to limit testimony to events which occurred after the divorce. (Tr. pp. 40, 108). Appellant argues that *Davis, supra,* held that the best interests of the children is the primary issue in a change of custody proceeding. *Id.* at 420. Appellant concludes that the trial court erred in limiting his evidence regarding the best interests of the children to facts which occurred after the divorce.

{¶34} Appellee argues that the trial court did not limit Appellant's witnesses from testifying about the best interests of the children, but rather, only limited the witnesses from testifying about any change of circumstances which related to pre-divorce events.

{¶35} R.C. §3109.04(E)(1)(a) states, in pertinent part:

{¶36} "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, his 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." (Emphasis added).

{¶37} The statute itself limits the relevant evidence in custody modification cases to that evidence which has arisen since the prior custody decree, most likely in an effort to avoid relitigating the entire original award of custody at each subsequent proceeding. *In re Reynolds* (1982), 2 Ohio App.3d 309, 311. The trial court did not err in attempting to limit Appellant's witnesses from testifying as to irrelevant pre-divorce events. Appellant's second sub-issue is without merit.

{¶38} Appellant's third sub-issue asserts:

{¶39} "C. THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF THE GUARDIAN *AD LITEM'S* REPORT WHEN IT WAS PREPARED LATE AND DID NOT EVEN ADDRESS THE ISSUE OF BEST INTEREST OF THE MINOR CHILDREN, BUT RATHER, ONLY LOOKED TO SEE IF THE [sic] WAS A CHANGE OF CIRCUMSTANCES."

{¶40} Appellant argues that the court order appointing Kathleen Bartlett as guardian ad litem also ordered her to file her written report five days prior to the hearing on the merits. Appellant argues that the trial court erred in allowing the report to be admitted into evidence over Appellant's timely objection, citing *Newman v. Newman* (Dec. 9, 1996), Perry App. No. CA-96-28,

unreported, in support. Appellant contends that the report on its face is prejudicial to Appellant because it recommends against a change in custody. (Tr., Court Exh. A., p. 3).

{¶41} Appellee argues that matters involving the introduction or exclusion of evidence are within the sound discretion of the trial court, citing *Newman, supra*. Appellee argues that *Newman* and other cases cited by Appellant do not propose that a guardian ad litem's report which has been filed late must be excluded from evidence, but rather, that the trial court may exclude the report if, in its discretion, it so decides. Appellee also contends that Appellant failed to demonstrate to the trial court how he was prejudiced by the late filing of the report.

{¶42} A trial court ruling on the inclusion or exclusion of evidence will not be overturned on appeal except upon a showing of clear and prejudicial abuse of discretion. *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271.

{¶43} The guardian ad litem was required to file her report at least five days prior to any *final adjudication*, and not five days prior to the December 8, 1999, hearing as argued by Appellant. (5/4/99 Magistrate's Order, p. 2). The final adjudication took place on January 11, 2000, when the trial court filed its opinion. The guardian ad litem's report was filed on December 8, 1999, on the first day of the hearing on the merits of the motions to change custody. Therefore, the report was not filed late as

alleged by Appellant.

{¶44} Even if it had been filed late, the trial court admitted the report while at the same time allowing Appellant an opportunity to argue how he would be prejudiced by the supposedly late filing of the report. (Tr. p. 5). Apparently, the court was willing to grant a continuance upon a showing of prejudice. (Tr. p. 5). Appellant declined to present any evidence of prejudice and closed his case in chief without requesting a continuance. The hearing was continued anyway in order for Appellee to complete the presentation of her case. At the continued hearing the court once again gave Appellant an opportunity to cross-examine the guardian ad litem, which he declined to do. (Tr. p. 230). Appellant did attempt to call an unscheduled rebuttal witness, which the court did not permit. (Tr. p. 231).

{¶45} Given that Appellant did not offer the trial court any evidence or explanation as to how he was prejudiced by the alleged late filing of the report, and given the fact that Appellant had a subsequent opportunity to cross-examine the guardian ad litem about the report, he has failed to establish that he was prejudiced by the alleged late filing.

{¶46} Appellant's reliance on *Newman, supra,* is also misplaced. *Newman* merely stands for the proposition that the exclusion of evidence is within the discretion of the trial court. *Id.* at *4. Nothing in *Newman* suggests that the trial court was required to

exclude the guardian ad litem's report after it was filed late. Appellant is attempting to transform a discretionary decision into a mandatory procedural rule.

{¶47} Appellant's third sub-issue is without merit.

{¶48} Appellant's fourth sub-issue asserts:

{¶49} "D. THE CUMULATIVE ERRORS MADE BY THE TRIAL COURT PREVENTED THE DEFENDANT-APPELLANT FROM RECEIVING A FULL AND FAIR HEARING, AND THUS REQUIRE REVERSAL."

{¶50} Appellant argues that, although none of the errors made by the trial court were substantial enough to warrant reversal, the effect of all the combined errors was to deny him a full and fair hearing. Appellant argues that *Katz v. Enzer* held that the combined effect of four errors at trial resulted in prejudice by depriving the appellant a full and fair hearing of the disputed issues at trial. (1985), 29 Ohio App.3d 118, 123. Appellant cites five other cases purportedly standing for the same principle. Appellant contends that the three alleged errors argued *supra* combined to create reversible error.

{¶51} Appellee argues that the trial court did not make any errors, and furthermore, that the trial court did not abuse its discretion in making the rulings cited by Appellant.

{¶52} The only error actually committed by the trial court was the use of an overly stringent legal standard for establishing a change of circumstances so as to allow for a modification of the prior custody decree. A single error by the trial court cannot be

cumulative error. In addition, even though the trial court stated an erroneous legal basis for its judgment, a reviewing court will affirm the decision if it is legally correct for other reasons. *Perry v. Gen. Motors Corp.* (1996), 113 Ohio App.3d 318, 324. The trial court also found that a change of custody would not be in the best interests of the children, and thus under R.C. §3109.04(E)(1)(a) the prior custody decree should not have been modified regardless of the error in law concerning change in circumstances. Appellant's fourth sub-issue is also found to be without merit.

{¶53} Having found all of Appellant's arguments to be meritless, we overrule his sole assignment of error. The decision of the trial court is affirmed in full.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.