**[Cite as *Gomez v. Gomez*, 2009-Ohio-4809.]**

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| DAGMAR GOMEZ, | ) | |
| | ) | CASE NO. 08 NO 356 |
| PLAINTIFF-APPELLEE, | ) | |
| | ) | |
| - VS - | ) | O P I N I O N |
| | ) | |
| JOHN PAUL GOMEZ, | ) | |
| | ) | |
| DEFENDANT-APPELLANT. | ) | |

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| CHARACTER OF PROCEEDINGS: | Civil Appeal from Common Pleas Court, Case No. 205-0135. |
| JUDGMENT: | Reversed and Remanded. |
| APPEARANCES: | |
| For Plaintiff-Appellee: | Dagmar Gomez, *Pro Se*<br>513 Spruce Street<br>Caldwell, Ohio 43724 |
| For Defendant-Appellant: | John Paul Gomez, *Pro Se*<br>318 Moon Clinton Road, Unit A-10<br>Moon Township, Pennsylvania 15108 |

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

Dated: September 11, 2009

VUKOVICH, P.J.

**¶{1}** Appellant John Paul Gomez ("the father") appeals the decision of the Noble County Common Pleas Court, which denied his motion to reallocate parental rights and responsibilities and allowed appellee Dagmar Gomez ("the mother") to retain custody of the parties' children. The father urges that the court imposed a stricter standard than the statutory "changed circumstances" test and that the court abused its discretion in failing to find sufficient changed circumstances to proceed to the best interest portion of the test for custody modification. For the following reasons, we conclude that there were sufficient changed circumstances to require the trial court to address the children's best interests. As such, the judgment of the trial court is reversed, and the case is remanded with orders to continue applying the modification statute.

STATEMENT OF THE CASE

**¶{2}** The parties were divorced in February 2006, at which time the mother received custody of the parties' children. On April 6, 2006, the mother was found in contempt for failure to notify the court of an address change after she moved from her grandparents' residence to her boyfriend's residence. She was not found in contempt for failure to permit daily telephone contact, as the father alleged, because that matter was in a temporary order, which expired upon entry of the final divorce decree. (04/06/06 Tr. 28). She was sentenced to thirty days in jail and allowed to purge by following the court's new order to provide visitation as ordered and to provide telephone contact on Monday and Thursday evenings.

**¶{3}** Another contempt hearing proceeded on October 18, 2006. The father set forth three complaints. First, each time he called his daughter since the court's prior order, the telephone was disconnected right after he said hello to her. He endured this for three months and then stopped calling until his motion could be addressed. Second, he pointed out that the mother called the children's physician's office while they were sick and asked them not to provide him with any information. Third, he advised that he only received two weeks of summer visitation instead of the five weeks ordered by the court. The mother admitted that more than two weeks after

the father proposed a summer schedule, she wrote a note to him which claimed that he was entitled only to one week of summer visitation.

**¶{4}** The court did not find the mother in contempt, stating it could not find beyond a reasonable doubt that her behavior was willful. However, the court told the mother that her obligation to aid in the facilitation of telephone contact extended to making sure the child did not hang up after mere seconds. The court also suggested that she should have known that the court's order allowed the father to receive medical information. Finally, the court scolded: "I want to go back to the five weeks visitation. How, in God's name, we are where we are, we have been where we have been, can you say that you think Mr. Gomez was only entitled to one week of visitation." (10/17/06 Tr. 74).

**¶{5}** In April 2007, appellant filed a motion to reallocate parental rights and responsibilities and a memorandum in support based upon the mother's failure to facilitate visitation, the mother's move and the step-father's negative involvement. (He purportedly did not file his motion earlier because it had been suggested to him that the trial court had no jurisdiction over modifications while an appeal was pending from the original divorce).

**¶{6}** In the summer of 2007, Children Services investigated various claims: the father saw his children mimicking sexual acts; the three-year-old daughter stated that her stepfather stuck her with a fork and that either he or her father kicked her in her private area or her buttocks; and, she stated that a mark on her back was caused when her stepfather beat her with a belt. Notably, the child subsequently attributed this mark to her younger brother hitting her and even to the caseworker hitting her. Children Services found all allegations to be unsubstantiated. As a result of the marked back, the father sought a civil protection order against the stepfather. The trial court denied his motion on July 27, 2007. This court affirmed that decision. See *Gomez v. Dyer*, 7th Dist. No. 07NO342, 2008-Ohio-1523.

**¶{7}** On August 30, 2007, the hearing on the father's modification motion commenced and had to be continued for a later date because the courthouse closed at noon. On January 28, 2008, at a procedural hearing, appellant asked the court to recuse itself. The mother's attorney moved for supervised visitation on the basis that

appellant believed Children's Services was attempting to trick him into getting a psychological evaluation and signing a release of his medical records. The court imposed supervised visitation, and this court dismissed his appeal due to procedural failings. Thereafter, the trial court recused itself, disclosing that it could no longer be impartial.

**¶{8}** A visiting judge held the continued hearing on appellant's modification motion on April 23, 2008 and immediately lifted the supervised visitation and imposed visitation every other weekend from Friday to Sunday pending final judgment. The father submitted as exhibits various prior transcripts. Opposing counsel had no objection to the use of these transcripts, and the court agreed to review the prior testimony. The father focused on the mother's undisclosed move soon after the divorce, the non-facilitation of visitation and telephone contact, the step-father's actions of disrespecting him in front of his children, and the allegations of abuse by the step-father. The court took the matter under advisement.

**¶{9}** On April 25, 2008, appellant filed a motion for findings of fact and conclusions of law. See Civ.R. 52 (party may file such motion before entry of judgment or within seven days after notice of announcement of decision). On September 10, 2008, the trial court denied appellant's motion to reallocate parental rights and responsibilities in a decision which contained findings of fact and conclusions of law.

**¶{10}** In its findings, the court noted that the parties' communications were strained, that both parties attributed the visitation issues to the other party, and that the arguments of both parties had some merit. The court stated that the father had anger management problems and needs treatment. The court also stated that the mother's actions have exacerbated the problems and that she should be in a counseling program. The court opined that the father's new wife helped facilitate visitation and communication but the mother's new husband does not help facilitate visitation and communication.

**¶{11}** The court concluded that there was "no change of circumstance significant enough to warrant" modification. Due to this threshold finding, the court did not proceed to address the children's best interests or whether the harm likely to be

caused by a change of environment was outweighed by the advantages of the change of environment to the child. The court then provided the father visitation every other weekend from Friday to Sunday and one overnight during the week unless there is school in which case the weekday visitation would be for three hours. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR

**¶{12}** Appellant's sole assignment of error provides:

**¶{13}** "THE TRIAL COURT ERRED IN ITS INTERPRETATION OF OHIO'S R.C. § 3109.04(E), ABUSING ITS DISCRETION UNREASONABLY, ARBITRARILY, AND UNCONSCIONABLY BY FAILING TO CONSIDER EXTENSIVE FACTS TO FIND A 'CHANGE OF CIRCUMSTANCES' IN THE LIVES OF THE CHILDREN AND THE RESIDENTIAL PARENT AGAINST THE MANIFEST WEIGHT OF EVIDENCE ON RECORD; THUS, ERRONEOUSLY FAILED TO CONSIDER THE BEST INTERESTS OF THE CHILDREN AS MANDATED BY OHIO'S R.C. § 3109.04(F)."

**¶{14}** The statute applicable to custody modification motions provides in pertinent part:

**¶{15}** "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: * * *

**¶{16}** "(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." R.C. 3109.04(E)(1)(a).

**¶{17}** Initially, appellant argues that the trial court imposed a stricter test for custody modification than required by R.C. 3109.04(E)(1)(a). Specifically, the court

determined that there was no "change of circumstance significant enough" to warrant modification. Appellant suggests that *any* change in circumstances is sufficient.

**¶{18}** The Ohio Supreme Court has stated that courts requiring "a substantial change in circumstances" appear to be applying a higher burden of proof than required by statute. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 417-418. The Court stated, however, that nomenclature was not the key issue. Id. at 418. "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*." Id. (emphasis added).

**¶{19}** A statement that the changed circumstances are not "significant enough" to warrant modification does not equate with a requirement of "substantial changed circumstances." The trial court's holding that the changed circumstances presented were not "significant enough" to warrant modification is similar to saying that the change was not "of substance." This is the appropriate test under *Davis*.

**¶{20}** Next, appellant argues that there were sufficiently changed circumstances to require the court to proceed to address the children's best interests and argues that the trial court's decision on changed circumstances was contrary to the manifest weight of the evidence.

**¶{21}** In determining whether sufficient changed circumstances have occurred, a trial court has wide latitude in considering all the evidence before it and such a decision cannot be reversed absent an abuse of discretion. Id. at 418. The trial judge has the best opportunity to view the demeanor and attitude of the witnesses, including gestures, voice inflection and eye movements. Id. We do not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and the weight of the evidence submitted before the trial court. Id. at 419.

**¶{22}** The *Davis* Court held that: "[A] new marriage that creates hostility by the residential parent and spouse toward the nonresidential parent, frustrating attempts at visitation, may be an unforeseen change in circumstances warranting further inquiry into the best interest of the child." Id. at 419. The question of whether this situation exists is generally one for the trier of fact. See id.

**¶{23}** Here, the court found appellant to be in need of anger management counseling. The court could have rationally believed that any hostility was caused by

the father, as there was testimony that the step-father reported to police that the father once slapped his glasses off his face. *Yet, the trial court did specifically find that the step-father was not helpful in facilitating visitation and contact* (and the father's new wife was helpful).

**¶{24}** This appears to be related to the testimony that the step-father interrupted telephone conversations and degraded the father in front of the children. There was also a past incident during a drop-off where the step-father refused to take the children's belongings purchased by the father, including a Dora DVD which the father pointed out that the daughter wanted to watch with her mother. Additionally, the court specifically found that the mother's actions exacerbated the problems and that she needs counseling.

**¶{25}** Contrary to the father's suggestions, the mother need not wait indefinitely at the meeting point, which is ninety minutes from her house, when he is late; nor must she switch weekends every time he seeks a change. However, *the trial court specifically found that there was some merit to the father's allegations regarding visitation and communication.*

**¶{26}** *The mother had been found in contempt since the divorce* by the original court. The visiting court's denial of modification characterized the mother's April 2006 contempt as "technical" as she failed to inform the court of her address change until after she was served with the contempt papers. Still, the facts of the situation are relevant.

**¶{27}** The mother and the children had been residing at her grandparents' house. She moved into her boyfriend's house with the children sometime prior to March 8, 2006. On this day, the father tried to call his daughter and both he and a police officer were informed that the mother and children had moved to an undisclosed location. Thus, the father, who was already having trouble with telephone contact, had no telephone contact with his children until after the April 6, 2006 contempt hearing.

**¶{28}** Moreover, the mother admittedly called the children's physician's office and asked them in an upset manner why they would think about providing medical information to the father. (10/18/06 Tr. 18-22, 63-64, 74). However, her attempts to have the physician's office withhold this information were unsuccessful. As the court

stated, the father was entitled to this information under the court's order. (10/18/06 Tr. 74). During this same time period, she sent police to the father's house to check on the children merely because he told her he was taking them to the emergency room because they were sick. (10/18/06 Tr. 3-5).

**¶{29}** Even more important is the mother's *failure to provide the father with his five weeks of summer visitation* in 2006; he only received two weeks of visitation. The court had instructed the parties at the April hearing to start preparing the summer schedule. The father submitted his proposal to the mother on June 7, 2006. When she finally responded to his proposal over *two weeks later* (by having the step-father throw a note through the father's car window as he drove away), *she claimed that he was only entitled to one week of summer visitation*.

**¶{30}** She eventually admitted that he was entitled to five weeks. Although she had delayed the summer visitation due to her original claim, she would not let him begin his visitation on July 14, when he next requested. When she dropped the children off at the half-way point on July 21, she told the daughter she would see her on Sunday. However, appellant believed he would be receiving two weeks visitation at that time. An argument ensued, the police were called, and the mother left with the children because the father wanted two weeks or nothing.

**¶{31}** The mother claimed that she was just following his original visitation schedule. (10/18/06 Tr. 67). Yet, he had submitted a new proposal after she caused the delay and controversy. Without the revised schedule, he would not have been able to exercise his full visitation because June and part of July were already over. As it turned out, he was not provided with his summer visitation until July 28 and then only for two weeks. Notwithstanding his attempts thereafter, he never was provided the additional three weeks. More telephone contact issues were alleged thereafter.

**¶{32}** The mother's alleged compliance with weekend visitations and the summer 2007 visitation schedule (which the court had to specifically set) does not erase the prior events constituting changed circumstances of substance. In other words, improprieties are not vanquished from consideration merely because the non-movant begins to comply with visitation during the seventeen months it took the court to address the modification motion.

**¶{33}** Finally, notwithstanding the fact that the daughter's various allegations were not found to be credible by Children's Services or the prior court, the situation itself is relevant to the changed circumstance analysis, as is the genesis of her story-telling. Notably, there was no allegation that the father coached the child, and in fact, it was the mother who reported the child's first statements about someone poking her with a fork. Although alone, this involvement of Children's Services may not constitute changed circumstances of substance (since there were no results to the investigation), it is a factor to place on the scale in determining whether there were changed circumstances of substance.

**¶{34}** Considering all of the events occurring since the date of the February 2006 divorce, we conclude that a change of circumstances of substance occurred. As such, the trial court improperly failed to evaluate the children's best interests. Accordingly, the judgment of the trial court is hereby reversed, and this case is remanded for continued application of the modification statute.

Waite, J., concurs.
DeGenaro, J., concurs.