

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

SARAH MILLER f.k.a. FORNEY, :
 :
 Plaintiff-Appellant, : CASE NO. CA2011-08-057
 :
 - vs - : OPINION
 : 7/30/2012
 :
 RICHARD D. FORNEY, III, :
 :
 Defendant-Appellee. :

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 2004 DRC 0845

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defendant-appellee

HUTZEL, J.

{¶ 1} Plaintiff-appellant, Sarah L. Miller (Mother), appeals from a judgment of the
Clermont County Common Pleas Court, Domestic Relations Division, finding that a change in
circumstances had occurred and that it was in the best interest of the minor child for
defendant-appellee, Richard D. Forney, III (Father), to be the residential parent.

{¶ 2} Mother and Father were married on May 13, 2000, and one child, Richy, was

born of the marriage that same year. Four years later, the parents agreed to dissolve their marriage and enter into a shared parenting plan. Over time, Mother moved from Batavia, Ohio to Hillsboro, Ohio, and Father moved from Batavia, Ohio to Reading, Ohio. The distance between the homes was over an hour and caused difficulties with the shared parenting plan. In addition, the parents' relationship deteriorated and communication issues began. Thus, in 2008, both parents moved to modify or terminate the shared parenting plan. On March 25, 2008, the trial court terminated shared parenting and designated Mother as the residential parent (Shared Parenting Decision). Father was awarded visitation one time per week and three weekends per month.

{¶ 3} On May 6, 2009, Father moved to modify the previous allocation of parenting rights and requested to be named the residential parent. Father argued that Mother's independent choice to remove the child from public school and begin homeschooling through an online school was a change in circumstances not in the best interest of the child. At a hearing on the matter, Father argued that he was not given access to the online school and had no way of discussing Richy's education and behavior with an unbiased third party. The magistrate determined that a change in circumstances had occurred and the trial court adopted the magistrate's decision over Mother's objections. A parenting investigation was ordered to assist in the trial court's best interest determination.

{¶ 4} Two years later, a best interest hearing was held and the trial court issued its decision on July 5, 2011. In the decision, the trial court reaffirmed the finding that a change in circumstances had occurred due to the decision to homeschool. The trial court further found that it would be in the best interest of the child for Father to be the residential parent, so long as Father agreed to return to his residence in Batavia. Father complied with the trial court's request to return to Batavia and was consequently designated the residential parent. Mother received visitation including rotating weeks during the summer months.

{¶ 5} From the change in circumstance and best interest decisions, Mother appeals, raising the following three assignments of error:

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE [TRIAL] COURT ABUSED ITS DISCRETION WHEN IT FOUND A CHANGE IN CIRCUMSTANCES WHICH WAS NOT SUPPORTED BY FACT OR LAW.

{¶ 8} Assignment of Error No. 2:

{¶ 9} THE [TRIAL] COURT ABUSED ITS DISCRETION WHEN IT DID NOT APPLY THE BEST INTEREST FACTORS OF R.C. 3109.04(F)(1) TO DETERMINE WHETHER MODIFICATION OF CUSTODY WAS IN THE CHILD'S BEST INTEREST.

{¶ 10} Assignment of Error No. 3:

{¶ 11} THE [TRIAL] COURT'S DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 12} Before considering the specific assignments of error, we acknowledge that "the power of the trial court to exercise discretion is peculiarly important in proceedings involving the custody and welfare of children." *Kenney v. Kenney*, 12th Dist. No. CA2003-07-078, 2004-Ohio-3912, ¶ 6. "The discretion a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination has on the lives of the parties concerned." *Id.*; *Davis v. Flickinger*, 77 Ohio St.3d 415, 418 (1997). Therefore, the trial court's determinations shall be reviewed under an abuse of discretion standard. *Id.* The term abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 13} In determining whether a modification of custody is warranted, a court must follow R.C. 3109.04(E)(1)(a), which provides, in pertinent part:

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, * * * and that the modification is necessary to serve the best interest of the child.

In applying these standards, the trial court shall retain the residential parent designated in the prior decree unless a modification is in the child's best interest and, pertinent here, the harm likely to be caused by the change of environment is outweighed by the advantages of the change to the child. R.C. 3109.04(E)(1)(a)(iii); *Valentine v. Valentine*, 12th Dist. No. CA2004-12-314, 2005-Ohio-6163, ¶ 6.

{¶ 14} In her first assignment of error, Mother argues that the trial court erred in finding that her choice to homeschool the child constituted a change in circumstances.

{¶ 15} "Although R.C. 3109.04 does not provide a definition of the phrase 'change in circumstances,' Ohio courts have held that the phrase is intended to denote 'an event, occurrence, or situation which has a material and adverse effect upon a child.'" *Lewis v. Lewis*, 12th Dist. No. CA2001-09-209, 2002-Ohio-1601, ¶ 7, citing *Rohrbaugh v. Rohrbaugh*, 136 Ohio App.3d 599, 604-05 (7th Dist.2000). In order to warrant the abrupt disruption of the child's home life, the change in circumstances must be one "of substance, not a slight or inconsequential change." *Flickinger*, 77 Ohio St.3d at 418.

{¶ 16} In its change in circumstances decision, the trial court referenced its 2008 Shared Parenting Decision, where the trial court expressed concern over Mother's "manipulative tendencies," her "derogation of Father," and her indifference toward the importance of Father in the child's life. The trial court further stated that Mother had placed the child completely under her domain by removing him from public school and not having him participate in extracurricular activities offered by the online school. The trial court then found that, due to the issues of this particular case, a change in circumstances had occurred.

{¶ 17} Mother argues that the trial court relied on facts already in evidence in making its change in circumstances decision. Specifically, Mother contends that the trial court's decision was based primarily upon findings it made in its Shared Parenting Decision. As Mother's manipulative tendencies and issues with Father were apparent to the trial court in 2008, Mother asserts that these facts could not be relied upon by the trial court in its change in circumstances decision in 2009 and, therefore, the trial court's ruling was an abuse of discretion.

{¶ 18} We find Mother's argument unpersuasive due to the trial court's reliance on *Gardini v. Moyer*, 61 Ohio St.3d 479, 481 (1991). In *Gardini*, the trial court found that a change in circumstances had occurred when the mother chose to remove the children from parochial school and place them in homeschooling. *Id.* at 481. The trial court relied on testimony that homeschooling would bind the children tightly to the educating parent and create conflict with the non-educating parent. *Id.* In reversing the court of appeals decision in *Gardini v. Moyer*, 11th Dist. No. 89-G-1499, 1990 WL 36562 (Mar. 30, 1990), and reinstating the trial court's ruling, the Ohio Supreme Court found "there was a substantial amount of credible and competent evidence to show that the children are endangered both by their present environment [with their mother] and the inevitable effects of their present environment upon their future development." *Gardini*, 61 Ohio St.3d at 484-85.

{¶ 19} Here, as in *Gardini*, it is clear that the trial court was concerned that Mother's choice to homeschool Richy would cause Richy to bond with Mother over Father and cause conflict in Richy's relationship with Father. Thus, the trial court's finding of a change in circumstances was based upon not only Mother's decision to homeschool, but how that decision would impact Richy's relationship with both his parents.

{¶ 20} We find this situation analogous with cases where one parent chooses to move from living in-state to out-of-state. Although such a choice, on its own, does not warrant a

finding of a change in circumstances, a change in circumstances may occur when the move is coupled with the impact of the move upon the child's welfare. See *Zinecker v. Zinecker*, 133 Ohio App.3d 378, 384 (12th Dist.1999); *Clontz v. Clontz*, 12th Dist. No. CA91-02-027, 1992 WL 44979 (Mar. 9, 1992). Here, the trial court found that Mother's choice to homeschool Richy, along with the impact such a choice would have on Richy's relationship with Mother and Father, constituted a change in circumstances. Upon a careful review of the record, we cannot say that this was an abuse of discretion.

{¶ 21} Accordingly, Mother's first assignment of error is overruled.

{¶ 22} In her second assignment of error, Mother argues that the trial court erred in finding it in the best interest of Richy for Father to be the residential parent. Specifically, Mother argues that the trial court failed to consider the best interest factors of R.C. 3109.04(F)(1) and failed to make a finding pursuant to R.C. 3109.04(E)(1)(a)(iii).

{¶ 23} According to R.C. 3109.04(E)(1)(a), once a change in circumstances has been established, the trial court can modify custody only if "the modification is necessary to serve the best interest of the child." *In re R.A.S.*, 12th Dist. No. CA2011-09-102, 2012-Ohio-2260, ¶ 30. R.C. 3109.04(F)(1)(a)-(j) provides factors which must be considered when making a best interest determination:

- (a) The wishes of the child's parents regarding the child's care;
- (b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;
- (c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;
- (d) The child's adjustment to the child's home, school, and community;

(e) The mental and physical health of all persons involved in the situation;

(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child * * *;

(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶ 24} Mother first argues that the trial court failed to consider these factors, relying solely on the wishes and concerns of Richy. We disagree.

{¶ 25} The trial court heard testimony that both parents desired to be the residential parent and both parents possessed the physical and mental capabilities to care for Richy. R.C. 3109.04(F)(1)(a) and (e). Evidence also revealed that Richy loved both Mother and Father and desired only that both could learn to be nice to each other. R.C. 3109.04(F)(1)(b). Further, evidence at the hearing showed that both parents made the facilitation of parenting time difficult by moving great distances apart from one another without considering the effect this would have on Richy. R.C. 3109.04(F)(1)(f).

{¶ 26} The trial court also heard testimony that Father was unsupportive of Richy's participation in extracurricular activities. Testimony indicated that one of Father's issues with these activities centered on his belief that Mother set up these activities in order to control

what happened during Father's parenting time.

{¶ 27} In addition, evidence was presented to the trial court concerning Mother's disregard for Richy's best interest. Specifically, testimony, including that from psychological experts, indicated that Mother isolated Richy through the use of homeschooling, did not have Richy participate in extracurricular events offered by the online school, failed to seek therapy for Richy's speech impediment, and failed to acknowledge the value of Father's role in Richy's life.

{¶ 28} We are mindful that the "knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record, and the reviewing court should be guided by the presumption that the trial court's findings were correct." *Kenney*, 2004-Ohio-3912 at ¶ 7; *Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988).

{¶ 29} Based upon the foregoing, we find that, though the trial court did take Richy's wishes and concerns into account in making its decision, the trial court also analyzed the remaining factors of R.C. 3109.04(F)(1). Thus, the trial court's best interest decision was not arbitrary or unreasonable.

{¶ 30} Mother also argues that the trial court's best interest decision is devoid of any finding, pursuant to R.C. 3109.04(E)(1)(a)(iii), that the harm to the child in changing the residential parent is outweighed by the advantages of changing the child's environment. Such a finding must be made before a modification of custody is permissible. R.C. 3109.04(E)(1)(a); *Valentine*, 2005-Ohio-6163 at ¶ 6.

{¶ 31} A reviewing court may make assumptions regarding the trial court's consideration of evidence and application of relevant statutory requirements. *Sayre v. Hoelzle-Sayre*, 100 Ohio App.3d 203, 212 (3d Dist.1994). *See also, In re Dye*, 12th Dist. Nos. CA2011-04-004, CA2011-04-005, CA2011-04-006, 2012-Ohio-2570, ¶ 59. Here, the

trial court considered the testimony of the parents, a parenting investigation, an in camera interview with the child, psychological examinations of the parents, and a guardian ad litem report. We find this evidence contained sufficient information to find that the harm to the child was outweighed by the advantages of the Father being the residential parent. Thus, it can be concluded that the trial court followed the dictates of R.C. 3109.04(E)(1)(a)(iii) in making its decision.

{¶ 32} Accordingly, Mother's second assignment of error is overruled.

{¶ 33} In her third assignment of error, Mother argues that the trial court's change in circumstances and best interest decisions are against the manifest weight of the evidence, as the greater amount of credible evidence offered at the hearings supported a decision to keep Richy with Mother.

{¶ 34} "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a [hearing], to support one side of the issue rather than the other.'" (Emphasis sic.) *Eastley v. Volkman*, ___ Ohio St.3d ___, 2012-Ohio-2179, ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

In a manifest weight analysis, the reviewing court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered.

Schneble v. Stark, 12th Dist. Nos. CA2011-06-063, CA2011-06-064, 2012-Ohio-3130, ¶ 67; *Thompkins*, at 387. Moreover, "every reasonable presumption must be made in favor of the judgment and the finding of facts." *Volkman*, at ¶ 21. "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment * * *." *Id.*

{¶ 35} Mother first argues that the trial court's decision is contrary to the evidence

where the grant of custody to Father was premised on his moving to Batavia. Essentially, Mother contends that the trial court's decision that if Father stayed in Reading, Ohio, Mother would remain the residential parent meant that Mother's home was an appropriate setting for Richy and, therefore, a modification should not have occurred.

{¶ 36} We find Mother's argument unpersuasive. The trial court clearly found that both parents were capable of raising the child, and there is no evidence that Mother's home would be an inappropriate residence for Richy. The trial court also found that the distance between the parents' homes made it difficult for Richy to participate in extracurricular activities and was one reason why Father failed to allow Richy to participate in these activities. Thus, it appears that the trial court determined that the best home for Richy would be one located near his extracurricular activities and in closer proximity to both parents.

{¶ 37} However, the trial court went on to determine that, due to Mother's isolation of Richy, failure to seek therapy for his speech impediment, and lack of appreciation for Father's role in Richy's life, it would not be in Richy's best interest to remain in Mother's custody. Based upon all of these findings, the trial court determined that living with Father, in a location in closer proximity to Richy's extracurricular activities, would be in Richy's best interest.

{¶ 38} Upon a careful review of the record, the trial court's best interest decision was based upon credible evidence that Richy needed to socialize and not be isolated and that social activities in which Richy participated were nearer the Batavia, Ohio area rather than the Reading, Ohio area. We cannot say that such a determination was against the manifest weight of the evidence.

{¶ 39} Mother further argues that the trial court's decisions are against the manifest weight of the evidence because the trial court (1) failed to consider evidence that Father had not participated in the child's life; (2) found that the child suffered socially due to

homeschooling when there was no evidence to support such a conclusion; and (3) ignored the recommendation of the psychological experts that parenting time should be split evenly between the parents.

{¶ 40} We cannot say that the trial court failed to consider Father's shortcomings in its decision. In fact, the trial court specifically stated it was concerned that Father has refused to allow the child to attend his activities during Father's time. Additionally, we cannot say that the trial court's decision was a miscarriage of justice in finding that the child suffered socially from homeschooling when there was evidence from the home investigation that the child was "socially awkward with slumped shoulders and limited eye contact." Finally, we cannot say that the trial court ignored the recommendations of the experts regarding parenting time, as the trial court specifically referenced the expert testimony in its decision and Mother was awarded significant visitation time.

{¶ 41} The mere fact that the trial court chose to rely on other evidence in the record does not equate to the trial court clearly losing its way and creating a manifest miscarriage of justice. The trial court was in the best position to observe the witnesses and make credibility determinations. See *In re G.K.*, 9th Dist. Nos. 24276, 24278, 2008-Ohio-5442, ¶ 12. As such, the trial court's decision was not against the manifest weight of the evidence.

{¶ 42} Accordingly, Mother's third and final assignment of error is overruled.

{¶ 43} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.