

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KRISTIN A. KISER	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
JEFFREY W. KISER	:	Case No. 2009AP100052
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 1995TC070363

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 23, 2010

APPEARANCES:

For Plaintiff-Appellee

ERICK L. BAUER
TIMOTHY L. FOX
130 West Third Street
Dover, OH 45622

For Defendant-Appellant

DOUGLAS C. BOND
700 Courtyard Centre
116 Cleveland Avenue, NW
Canton, OH 44702

Farmer, J.

{¶1} On or about April 18, 1997, appellant, Jeffrey Kiser, and appellee, Kristin Kiser, were granted a divorce. A shared parenting plan was put in place for the parties' minor child, born October 20, 1991.

{¶2} On October 1, 2008, appellee filed a motion for modification of parental rights and responsibilities. A hearing before a magistrate was held on February 20, 2009. By decision filed May 1, 2009, the magistrate recommended the reallocation of parental rights and responsibilities to appellee. The magistrate also made recommendations on child support and healthcare issues.

{¶3} On May 15, 2009, appellant filed objections to the magistrate's decision. A hearing was held on September 8, 2009. By judgment entry filed September 16, 2009, the trial court approved and adopted the magistrate's decision.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "IT WAS ERROR AND AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO ACCEPT A MAGISTRATE'S DECISION WHICH MODIFIED AN ALLOCATION OF PARENTAL RIGHTS AND RESPONSIBILITIES WITHOUT REGARD TO A FINDING OF A CHANGE OF CIRCUMSTANCES AS WELL AS WITHOUT A FINDING OF THE BEST INTERESTS OF THE MINOR CHILD BEING SERVED."

II

{¶6} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ADOPTING THE CHILD SUPPORT COMPUTATION WORKSHEET CALCULATIONS

FOR SOLE RESIDENTIAL PARENT WHEN SHARED PARENTING WAS MODIFIED IN ERROR."

III

{¶7} "IT WAS ERROR FOR THE TRIAL COURT TO CONSIDER THE MOTION AS IT WAS FILED WITHOUT PROPER SUPPORTING FOR ALLOCATION OF PARENTAL RIGHTS DOCUMENTATION."

I, III

{¶8} Under these assignments, appellant claims the trial court erred in reallocating parental rights and responsibilities to appellee as there were no specific findings as to change of circumstances, no analysis on the best interest of the child, and appellee failed to file the required supporting documentation. We disagree.

{¶9} At the outset, it is conceded that the child has reached the age of majority and actual custody is a moot issue. At the heart of these assignments is appellant's challenge to the award of child support once custody was reallocated to appellee. If the trial court erred, then there was no change of custody and no child support is due. We note the parties were operating under a shared parenting plan, and the minor child, with assistance from both parties, lived with appellee since February of 2008.

{¶10} Appellant argues the magistrate erred in finding, "Jeffrey Kiser is not objecting to the change of custody." May 1, 2009 Magistrate's Decision at Finding of Fact No. 5. During the magistrate's hearing, the following statements were read into the record:

{¶11} "THE COURT: It's my understanding that at this point Mr. Kiser is consenting to change of custody, ah, permitting Marcie to reside with her mother, Kristin

Kiser. Ah, the issues remaining are, ah, what the amount of child support should be and what should be the starting date, the effective date for child support be." February 20, 2009 T. at 2.

{¶12} Appellant was unrepresented and did not challenge the statements. Appellant was immediately placed under oath and examination proceeded on financial facts relative to child support.

{¶13} Appellant argues the magistrate should have inquired of him as to whether the statement regarding his consent to the change of custody was true, and the magistrate should have followed the dictates of R.C. 3109.04(E)(1)(a) regarding change of circumstances and the best interest of the child balancing test:

{¶14} "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:

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

{¶16} "(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.

{¶17} "(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."

{¶18} The standard of review for a determination of whether there has been a change of circumstances is abuse of discretion. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217. When applying this standard, we are not free to substitute our judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135.

{¶19} In *Sims v. Durant*, Fairfield App. No. 2008-CA-27, 2008-Ohio-6442, ¶6, this court noted the following:

{¶20} "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."

{¶21} Further, in *Fichthorn v. Fichthorn*, Guernsey App. No. 09-CA-10, 2009-Ohio-5138, ¶22, this court acknowledged the following:

{¶22} "The best interest of the child is of paramount importance in allocating parental rights and responsibilities. Where the parties have entered into an agreement regarding what arrangements will serve the child's best interest, a trial court need not make a specific finding to that effect. Either party may bring any parenting issues to the trial court if a modification of the order is necessary in the future."

{¶23} Appellant also argues Loc.R. 27 of the Court of Common Pleas of Tuscarawas County was violated as appellee failed to file required documentation regarding the child support issue. We find any deficiency was satisfied when appellee filed the necessary documentation on October 8, 2008, one week after the filing of her motion.

{¶24} From our review of the record, we note prehearing discovery was limited solely to financial data, and there was never a specific objection to the change of custody issue via a motion or other pleading.

{¶25} Upon review, we find the magistrate did not err in finding appellant had agreed to the change of custody and that appellant's silence was his assent to the statements cited supra.

{¶26} Assignments of Error I and III are denied.

II

{¶27} Based upon our findings in Assignments of Error I and III, we find the issue of child support is limited to appellant's sole objection that the magistrate did not consider appellant's recent salary decrease. We disagree.

{¶28} The magistrate specifically acknowledged the following:

{¶29} "Jeffrey Kiser earned \$65,000.00 during 2008. During February 2009 his salary was cut in half. Pay stubs show he began earning \$32,500.00 in February 2009. Jeffrey Kiser pays for health insurance for the minor child at the rate of \$46.39 every two weeks." May 1, 2009 Magistrate's Decision at Finding of Fact No. 3.

{¶30} These amounts were utilized by the magistrate in the child support worksheet adopted by the trial court.

{¶31} Assignment of Error II is denied.

{¶32} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ William B. Hoffman

s/ Patricia A. Delaney

JUDGES

SGF/sg

