

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Nicole D. Blaker

Court of Appeals No. WD-04-003

Appellant

Trial Court No. 99DR050

v.

Kurt A. Wilhelm

DECISION AND JUDGMENT ENTRY

Appellee

Decided: January 28, 2005

* * * * *

Sharon L. Griffin, for appellant.

Jeffrey P. Nunnari, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This appeal is from a judgment issued by the Wood County Court of Common Pleas, Domestic Relations Division, involving the post-divorce modification of a shared parenting plan. Because we conclude that the trial court did not abuse its discretion, we affirm.

{¶ 2} Appellant, Nicole D. Blaker (“mother”), and appellee, Kurt A. Wilhelm (“father”), were divorced in June 1999. As part of that judgment, the court approved a shared parenting plan for the couple’s minor child, Lucas, born in June 1996. Mother

remained in the marital home located in Walbridge, Ohio. Father at first moved approximately 16 miles from Walbridge to Haskins, Ohio, near his parents. Lucas lived in each parent's home, alternating between them on a weekly basis. Beginning in 2000, Lucas attended the pre-school program at Haskins Elementary School for two years. Since both parties were employed, Lucas often stayed with a baby sitter or the paternal grandparents in the Haskins area.

{¶ 3} In April 2002, mother filed a motion to show cause, to terminate the shared parenting plan, and for designation as the sole residential parent of Lucas. These motions were predicated upon father's remarriage in October 2002 and move to his new wife's residence in Napoleon, Ohio, approximately 24 miles from Haskins. A guardian ad litem ("GAL"), Mimi Yoon, was appointed to represent Lucas' best interest. Pending the resolution of the issues, the court ordered that Lucas reside temporarily with mother and that he begin kindergarten in the Lake School system, near mother's home.

{¶ 4} In October 2002, a magistrate conducted a hearing on the motion to show cause and modification issues. Both parties presented testimony and evidence regarding which school district would be best for Lucas. Father advocated for the Otsego district, which included Haskins Elementary or, in the alternative, Napoleon School district where he resided. Mother presented evidence in support of Lucas remaining in the Lake School

district. The GAL, concerned with the lengthy transport time in taking Lucas to school in the Otsego district, reaffirmed her recommendation that Lucas remain full time with mother in Lake schools.

{¶ 5} On January 16, 2003, the magistrate issued his decision denying mother's motion to terminate shared parenting, but re-allocated the parenting times. The magistrate cited drive time issues with placing Lucas in the Otsego/Haskins school and concerns about mother's health. Lucas was to complete kindergarten, the 2002-2003 school year, at Lake and then switch to Napoleon Schools for the 2003-2004 school year. The original alternating week arrangement was replaced by Lucas residing primarily with father during the school year and with mother during summer break. If the parties could not agree on a parenting schedule, during the school year, mother would have the first three weekends per month with Lucas, from Friday 6:00 p.m. until Sunday at 6:00 p.m. and a midweek parenting time from 5:30 until 8:30 p.m. During summer break, father would have Lucas on alternate weekends and a midweek parenting time. Each party would be entitled to one week of uninterrupted summer vacation time. Orders concerning child support and other expenses remained the same.

{¶ 6} Mother and father each filed objections to this decision. The trial court affirmed the majority of the magistrate's decision but changed the time allocation for the summer vacation time beginning in June 2003 until the start of school in August 2003. The trial court split the 2003 summer, with Lucas residing primarily with mother until July 15, 2003 and then switching to reside with father which would then continue into the

start of the school year. The court also designated non-residential parenting times to assure contact with both parents during the entire summer vacation.

{¶ 7} Appellant now appeals from that judgment, arguing the following sole assignment of error:

{¶ 8} “The trial court erred as a matter of law, abused its discretion and ruled against the manifest weight of the evidence when it ordered the removal of the parties’ one (1) minor son, Lucas, from Appellant/Mother’s Lake School District, relocating Lucas to Appellee/Father’s Napoleon School District.”

{¶ 9} In determining the allocation of parental rights and responsibilities for the care of minor children, the trial court is vested with broad discretion. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Absent an abuse of that discretion a trial court's decision regarding these issues will be upheld. *Masters v. Masters* (1994), 69 Ohio St.3d 83, 85. An 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* (1983), 5 Ohio St.3d 217, 219.

{¶ 10} In an abuse-of-discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. See *Davis v. Flickinger* (1997), 77 Ohio St. 3d 415, 416. “This highly deferential standard of review rests on the premise that the trial judge is in the best position to determine the credibility of witnesses because he or she is able to observe their demeanor, gestures and attitude. * * *. This is especially true in a child custody case, since there may be much that is evident in the parties' demeanor

and attitude that does not translate well to the record.” *In re LS*, 152 Ohio App.3d 500, 2003-Ohio-2045, at ¶12.

{¶ 11} R.C. 3109.04(E)(1)(a) requires that to modify a shared parenting plan which was part of a prior decree, the trial court must find 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] 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:

{¶ 12} “(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.

{¶ 13} “(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.

{¶ 14} “(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.”

{¶ 15} In determining whether a change in circumstances has occurred which warrants a change in custody or parenting plan, a trial judge, as the trier of fact, must be given wide latitude to consider all issues which support such a change, including a change in circumstances because of a child's age and consequent needs. See *Davis*, supra, at 416-417. A trial court’s finding of a “change of circumstances” pursuant to

R.C. 3109.04 will also not be disturbed, absent an abuse of discretion. *Id. at 416; Miller supra*, at 74.

{¶ 16} In this case, when the initial shared parenting plan was approved at the time of the divorce, Lucas was a toddler. In our view, the fact that Lucas was beginning school in 2003, constituted a sufficient change of circumstances to justify the review of the shared parenting plan. Although placing him in Haskins Elementary, the “half-way” point between the parties’ homes, might be convenient for the parents, it does not address the best interest of a child living near the friends he makes at school and other activities in the community. In addition, when Lucas was with father, the alternating week living arrangement would have required Lucas to rise at 5:00 a.m. and be taken to his grandparents to await the school bus. Consequently, the trial court was provided with two viable options: Lake schools with mother or Napoleon schools where father now resides.

{¶ 17} As the trial court noted, Lucas does not favor either parent. The record indicates that he has established a good rapport with his stepmother and step-siblings. Stepmother is able to drive Lucas directly to school and father who now finishes his workday at 2:30 p.m. will be able to pick him up or spend time with him after school. The only negative aspect to the arrangement is that Lucas must change schools and primary residences.

{¶ 18} If Lucas were to remain with mother, he would sometimes need to ride for an hour on the bus to school when her job required early hours. He also would go to a daycare many afternoons until mother was able to pick him up. Mother’s health issues,

diabetes and smoking, and a 1999 DUI conviction, while not reasons by themselves for changing the parenting plan, are valid considerations. Simply put, faced with a difficult decision, the trial court weighed all the factors and determined that attending the Napoleon school district was in Lucas' best interest. Cognizant of the imbalance in parenting time during the school year this would cause, the trial court adjusted the summer vacation schedule to provide Lucas more time with mother. Upon reviewing the entire record and surrounding circumstances, we cannot say that the trial court abused its discretion in changing the school district and allocation of parenting time in the shared parenting plan.

{¶ 19} Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 20} The judgment of the Wood County Court of Common Pleas, Domestic Relations Division, is affirmed. Court costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Richard W. Knepper, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.
CONCUR.

JUDGE

