

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

Jo.W.

Court of Appeals No. L-14-1095

Appellee

Trial Court No. 10202121

v.

Je.W.

DECISION AND JUDGMENT

Appellant

Decided: March 20, 2015

* * * * *

Dennis P. Strong, for appellee.

Stephen D. Long, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, which reallocated the parental rights and responsibilities of plaintiff-appellee, Jo. W. (father), and defendant-appellant, Je. W. (mother), and thereby named father as the residential parent and legal custodian of the parties minor child. Mother now challenges that judgment through the following assignments of error:

1.

A. The magistrate failed to make the necessary finding as to whether the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

B. The magistrate's finding that a change of custody was in the best interest of the child was against the manifest weight of the evidence.

C. The trial court erred in overruling mother's objections to magistrate's decision by employing the wrong standard of review.

{¶ 2} Mother and father are the natural parents of H.W., who was born in 2005.

At the time of H.W.'s birth, mother and father lived together in a home owned by father in Berkey, Ohio. In 2010, the parties separated and father filed a complaint to establish the allocation of parental rights and responsibilities in the court below. Following their separation, there was an incident of domestic violence between them. As a result of that incident, mother obtained a domestic violence CPO against father. Although father was ultimately found to be not guilty of domestic violence, the CPO remained in place until September 2013.

{¶ 3} Through a mediated agreement, mother was deemed the residential parent and legal custodian of H.W. and father was awarded parenting time every other weekend from Friday at 7:00 p.m. through Sunday at 7:00 p.m., and every Wednesday from 5:00 p.m. through 7:00 p.m.. The parties also adopted the Lucas County Juvenile Court parenting plan for purposes of child support orders. That mediated agreement was made part of a judgment entered by the court on July 9, 2010. For a time, the visitation

schedule worked well, with the parties' parents helping with the transfer of H.W. for parenting time.

{¶ 4} Following their separation, mother continued to live in the Berkey home until March 2011, when she moved to a townhome on Holland-Sylvania Road in Toledo, Ohio. In April, 2012, mother decided to move in with her then boyfriend, whom she later married, in Leipsic, Ohio. In making this decision, mother did not consult father in any way or discuss with him the effect the move might have on his parenting time. Mother claimed at the hearing below that she notified father by letter of her impending move. Father denied ever receiving such notification. Following mother's move to Leipsic, father's visits with H.W. became inconsistent, in part due to mother's frustration with father's parenting time.

{¶ 5} On October 19, 2012, father filed a motion to show cause and for reallocation of parental rights. Father asserted that mother had failed to abide by the court's judgment entry of July 9, 2010, by changing the terms of the judgment, frustrating communication regarding drop-off and pick-up of H.W., and failing to appear with H.W. at the exchange location for father's parenting time. Father further asserted that mother moved from Lucas County with H.W. without notice to father or the court's permission, and did so in an attempt to interfere with father's visitation. Father requested an order requiring mother to appear and show cause why she should not be held in contempt for her continuing failure to abide by the court's order of July 9, 2010. Father further requested an order reallocating parental rights and naming him the legal custodian of H.W. Following mother's response, generally denying father's allegations, the court

3.

appointed Diana Bittner as a guardian ad litem for H.W. Throughout the proceedings below, the parties reached several interim agreements through mediation, which modified the parenting time and transportation issues for holidays and summer vacation time.

{¶ 6} The case proceeded to a hearing before a magistrate on October 7, 11, and 18, 2013, at which father, mother, paternal grandmother, maternal grandmother, stepfather, and the guardian ad litem testified. In addition, the court interviewed H.W. in camera. That testimony revealed the following.

{¶ 7} Father is a recovering alcoholic who, at the time of the hearing below, had been sober for approximately three years. He attends AA meetings three times a week and has brought H.W. to some of the meetings when family members of participants are welcome. He works as a pipefitter, and although he was laid off at the time of the hearing, he reported making \$60,000 to \$80,000 per year. He also reported that when he does work, he usually works from 7:00 a.m. to 3:30 p.m..

{¶ 8} Father testified that mother did not tell him of her move to Leipsic until after she had moved, and that for approximately one month after mother and H.W. moved, he did not know where they were. Father stated that because of the CPO in place, it was difficult for him to exercise his parenting time. He relayed an incident in which he was supposed to drop off H.W. at the prearranged meeting place in Leipsic, but mother didn't show. After trying unsuccessfully for some time to contact mother, H.W. said she knew where mother lived. Father then decided to drive H.W. back to mother's home. When he arrived, the sheriff was there, who arrested him for violating the CPO. Those charges were eventually dismissed because the court order did allow contact for visitation

purposes. That incident precipitated his filing of the motion for a change of custody.

Father testified that since he filed the motion, mother has not been providing H.W. for the Wednesday visits and has not shown up at the midway drop off location as required. He stated that mother has texted him that she cannot provide H.W. for weekday visits because of her work schedule. He further testified that he has no phone contact with H.W., that he receives no updates on H.W.'s medical information, and in fact does not know the name of H.W.'s doctor.

{¶ 9} In describing his own living situation, father testified that he lives with his fiancé at his home in Berkey, Ohio. He stated that his fiancé has a good relationship with H.W. and that his parents have been very involved in H.W.'s life since her birth. He further stated that while the CPO was in effect, mother and his parents often communicated regarding transportation issues for H.W. He further stated that for the few months prior to the hearing below, mother had been more punctual in dropping off H.W. for father's weekend visits, but that he has not been getting his Wednesday visits or any holidays. He did testify, however, that the previous summer schedule of alternating two-week visitation periods worked well and that mother was very cooperative with that schedule.

{¶ 10} Mother testified that she currently works second shift, which is 4:30 p.m. to 3:00 a.m., at a manufacturing plant in Kalida, Ohio, but is at the top of the list to be moved to first shift. Previously, she worked at the Kingston Residences of Sylvania. She stated that in April, 2012, she moved in with her boyfriend, now husband, in Leipsic, Ohio. They have since had a child together and her husband has custody of his child

from a previous marriage. Mother testified that she notified father of her impending move by letter, although she admitted that she did not send it by certified mail. Mother admitted that following her move to Leipsic, she unilaterally began following the Putnam County holiday visitation schedule so that H.W. and her husband's child would be on the same schedule. She would then notify father of the holidays when he could have H.W.

{¶ 11} Given mother's work hours, mother's husband cares for the children when mother is at work. Mother testified that she cares for the children most mornings, after she returns from work. She testified, however, that approximately seven days a month, when her husband works a swing shift, she sleeps in and her husband feeds the children and gets them ready for school. In addition, mother's husband cares for the children in the afternoon and evening. Mother's husband testified to his work hours and how he has assisted in transporting H.W. for parenting time with father. He also testified that approximately three quarters of the time, he gets the children up and ready for school. When he is unavailable to care for the children, either a sitter or his mother, who lives nearby, stays with the children until mother gets home from work. On cross-examination, mother admitted that it was important for H.W. that one of her parents be with her when she goes to bed at night and when she gets up in the morning.

{¶ 12} Mother testified that she has concerns with father having custody of H.W. because of his history of alcoholism and the fact that mental health issues run in his family. She acknowledged that transportation has been the biggest problem in getting H.W. to the Wednesday drop-off location, but felt that her husband could drive H.W. on two Wednesdays a month. She was also willing to extend father's weekend parenting

time to make up for the other two Wednesdays when her husband could not transport H.W. for the visits.

{¶ 13} Both the paternal grandmother (“PGM”) and maternal grandmother (“MGM”) testified at the hearing below. That testimony, as well as the testimony of mother and father, revealed that H.W. has a close relationship with her grandparents. PGM testified that H.W. has regularly stayed the night at her home on either a Friday or Saturday night since she was quite small and that when H.W. started school, PGM transported her to and from school approximately three days a week. Similarly, MGM testified that when mother has H.W. for the weekend, H.W. spends the night on occasion.

{¶ 14} Finally, Diana Bittner, the guardian ad litem for H.W., testified at the hearing below. Prior to the hearing, Bittner had submitted reports and a recommendation which detailed her investigation and concluded that a change of custody was in the best interest of H.W. Bittner testified that both mother and father are good parents but that mother’s move to Leipsic had created a number of problems as to father’s parenting time. She also expressed concerns about the effect mother’s working hours had on H.W. In talking with H.W., it was clear that H.W. often gets herself up at 5:30 in the morning, gets herself breakfast and gets herself ready for school. Although H.W. had waivered back and forth, she had primarily stated that she wanted to live with father. Bittner testified that H.W. is an excellent student and Bittner was not concerned that a change in schools would be detrimental to H.W.

{¶ 15} Following the testimony, the court conducted an in-camera interview of H.W. to evaluate H.W.’s maturity.

{¶ 16} On November 1, 2013, the magistrate issued his decision that included findings of fact. The magistrate determined that there had been a substantial change in mother's circumstances, that a change in custody to father was in the best interest of H.W., and that the harm likely to be caused by a change of environment was outweighed by the advantages of the change of environment to H.W. On the issue of change of circumstances, the court found:

that a change has occurred in the circumstances of the mother, the cumulative effect of which is substantial, namely: mother's marriage and relocation to Leipsic, Ohio, mother's work hours, and mother's repeated frustration of father's visitation and companionship with his daughter (i.e.: mother filed a domestic violence charge against father [father was acquitted after a bench trial], mother having father arrested for violating a CPO [when she didn't show up at the exchange point forcing father to take the child to mother's home], failure to facilitate a relationship between father and child [mother frequently was a no-show or was late when she was suppose [sic] to meet father to exchange the child.)

{¶ 17} Mother filed objections to the magistrate's decision, in which she specifically challenged a number of the court's findings of fact. On April 17, 2014, the lower court issued a judgment entry on those objections. The court addressed each objection, discussed the evidence in the case, and found the objections not well-taken. The court therefore affirmed and adopted the magistrate's decision that father should be named the residential parent and legal custodian of H.W.

{¶ 18} In her first assignment of error, mother asserts that the lower court erred in its adoption of the magistrate’s decision where the magistrate failed to make the required finding that the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

{¶ 19} Contrary to appellant’s assertion, the magistrate expressly found on the first page of his decision, that “the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.” Accordingly, the first assignment of error is not well-taken.

{¶ 20} In her second assignment of error, mother contends that the lower court’s finding that a change in custody was in the best interest of H.W. was against the manifest weight of the evidence.

{¶ 21} An appellate court reviews a trial court’s decision regarding a motion for modification of a prior allocation of parental rights and responsibilities under an abuse of discretion standard. *Davis v. Flickinger*, 77 Ohio St.3d 415, 674 N.E.2d 1159 (1997), paragraphs one and two of the syllabus. This is equally true in reviewing a trial court’s ruling on objections to a magistrate’s decision in such a case. *Biers v. Biers*, 6th Dist. Ottawa No. OT-11-039, 2013-Ohio-315, ¶ 12. An abuse of discretion implies that the trial court’s attitude in reaching its decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Absent an abuse of discretion, a trial court’s decision regarding these issues will be upheld. *Masters v. Masters*, 69 Ohio St.3d 83, 85, 630 N.E.2d 665 (1994).

{¶ 22} R.C. 3109.04(E) sets forth the standard for modifying a child custody order and reads in relevant part:

(1)(a) 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:

(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.

(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.

(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.

{¶ 23} R.C. 3109.04(F)(1) then provides, in relevant part, that in determining the best interest of the child, the court is to consider all relevant factors, including, but not limited to:

(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;

* * *

(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[.]

{¶ 24} While the trial court has broad discretion in matters regarding the custody of children, its exercise of that discretion “is not unlimited, but must always be rooted in the facts of the case.” *Beekman v. Beekman*, 96 Ohio App.3d 783, 787, 645 N.E.2d 1332 (4th Dist.1994). As such, a court’s decision to modify a prior decree allocating parental rights and responsibilities for the care of a child must be supported by sufficient factual evidence regarding the change in circumstances, the child’s best interest, and one of the factors identified under R.C. 3109.04(E)(1).

{¶ 25} We have thoroughly reviewed the record and find that there is competent, credible evidence to support the trial court’s conclusion that a change in custody is in the best interest of H.W. H.W. has a solid healthy relationship with both parents, and is attached to her half-sibling and step-sibling. She has also had a close relationship with her paternal grandparents and maternal grandmother since she was born. Mother’s move to Leipsic, however, interfered with father’s parenting time and with H.W.’s ability to regularly see her grandparents. The court conducted an in camera interview of H.W. to gain a sense of her maturity and to ascertain her wishes and concerns regarding custody. The court further considered the report and recommendation of the guardian ad litem, who testified as to H.W.’s relationships with her parents, siblings, and other family members, as well as other factors and concluded that a change in custody was warranted. Significantly, there was evidence to support the court’s finding that mother’s move to Leipsic interfered with father’s parenting time, and that mother had repeatedly frustrated father’s visitation and companionship with H.W. Moreover, given mother’s work hours,

H.W. often must fend for herself in the morning and is often in the care of a sitter or step-grandmother after school. Father's work hours are more in line with H.W.'s school time.

{¶ 26} We therefore conclude that the record supports the trial court's conclusion that a change in custody is in H.W.'s best interest, and the second assignment of error is not well-taken.

{¶ 27} Finally, in her third assignment of error, mother contends that the lower court used the wrong standard of review in its evaluation of mother's objections to the magistrate's decision.

{¶ 28} This assignment of error challenges the lower court's ruling on mother's first, second and third objections to the magistrate's findings of fact. Through those objections, mother asserted that the magistrate's findings that following mother's move to Leipsic father's visits were inconsistent, and that mother did not show up for an exchange, were against the manifest weight of the evidence. Under the third objection, mother asserted that the court's taking into consideration H.W.'s contact with the paternal grandparents was an abuse of discretion. In ruling on all of mother's objections, the lower court stated: "Based upon the Court's *de novo* review of this matter, including the objections, the record, and the transcript of the hearings before Magistrate Adya, the Court finds as follows." Then, when specifically addressing the first three objections, the court found that the magistrate's decision regarding father's visits, mother not showing up at an exchange, and H.W.'s contact with paternal grandparents, were not against the manifest weight of the evidence. That is, the court addressed the challenge raised by mother. The court then found mother's objections unpersuasive.

{¶ 29} Civ.R. 53(D)(4)(d) provides in relevant part:

If one or more objections to a magistrate’s decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law.

{¶ 30} Upon a thorough review of the lower court’s judgment ruling on mother’s objections, it is clear that the court applied the proper standard. The third assignment of error is not well-taken.

{¶ 31} On consideration whereof, the court finds that substantial justice has been done the party complaining, and the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

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