

[Cite as *Lumley v. Lumley*, 2009-Ohio-6992.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Curtis B. Lumley,	:	
	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-556
	:	(C.P.C. No. 08DR01-53)
Jessica L. Lumley,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 31, 2009

Harry Lewis Co. LPA, and Gregg R. Lewis and Eric E. Willson, for appellee.

Michael N. Oser, for appellant.

Lisa Slotnick, Guardian ad litem.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations

KLATT, J.

{¶1} Defendant-appellant, Jessica L. Lumley, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, awarding her a divorce from plaintiff-appellee, Curtis B. Lumley, and allocating the parties' parental rights and responsibilities. For the following reasons, we affirm.

{¶2} Jessica and Curtis wed on August 28, 1993. During the marriage, the couple had four children: Alyssa Shelby, born October 4, 1994; Cody Austin, born

March 13, 1996; Nicholas Levi, born May 10, 1999; and Lauren Kate, born September 3, 2002. The marriage was tumultuous, with both parties resorting to physical violence when they were angry or upset with the other party. On October 27, 2007, Jessica took the four children and moved to Idaho Falls, Idaho. Jessica claimed that two incidents precipitated the move. First, in early October, Jessica and Curtis had a physical altercation. Second, about a week later, Curtis hit Alyssa's leg while trying to spank her. Apparently, Alyssa had locked her then five-year-old sister out of the house, and while Curtis reprimanded her, she repeatedly smacked at his hand. When Curtis attempted to spank her, she kicked at him, causing him to hit her leg instead of her behind.

{¶3} Curtis filed for divorce on January 4, 2008. Jessica responded with an answer and counterclaim for divorce. The trial court conducted an evidentiary hearing on February 23, 24, 25, and 26, 2009. Curtis, Jessica, the guardian ad litem, and Jessica's mother testified at the hearing. Because the parties possessed relatively few assets, most of the hearing focused on issues pertaining to the custody of the children. Both parties sought to be named the sole residential parent and legal custodian of the children.

{¶4} After the close of the hearing, Jessica filed a motion requesting that the trial court interview the children. The trial court denied Jessica's motion.

{¶5} On May 12, 2009, the trial court issued a judgment entry and decree of divorce. In this judgment entry, the trial court found that while Curtis was "certainly not the perfect father," he "dearly loves" his children, and he was "genuinely distraught" when Jessica took them to Idaho. Judgment Entry/Decree of Divorce, at 24, 27. The trial court went on to find that:

[I]t will be impossible for Curtis to be even marginally involved in [the children's] lives if the children remain in Idaho, and that

is not in the children's best interest. While Jessica may want to replace Curtis in her life, he is the children's father and played a role in their lives, and should continue to do so. As it stands, he can not [sic] even play a minimal role in their lives, can not [sic] attend any of their daily activities and can not [sic] physically visit with them without great expense and significant travel time commitment.

Judgment Entry/Decree of Divorce, at 27. Therefore, the court determined that it was in the children's best interests for Jessica to be designated the sole residential parent and legal custodian as long as she relocated to Franklin County or its contiguous counties. If she did not relocate by August 10, 2009, then the trial court ordered that Curtis would be the sole residential parent and legal custodian. Presuming that Jessica moved back to central Ohio by the August deadline, the trial court awarded Curtis parenting time consistent with Loc.R. 27 of the Franklin County Court of Common Pleas, Division of Domestic Relations.

{¶6} Jessica now appeals and assigns the following errors:

[1.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY REQUIRING THE CUSTODIAL PARENT (APPELLANT-MOTHER) TO RESIDE IN FRANKLIN COUNTY, OHIO OR ANY OF ITS CONTIGUOUS COUNTIES BY AUGUST 10, 2009 OR ELSE FATHER-APPELLEE WOULD BECOME THE RESIDENTIAL PARENT.

[2.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN AWARDING UNSUPERVISED PARENTING TIME WITH THE APPELLEE-FATHER IN VIEW OF THE PHYSICAL ABUSE OF THE APPELLEE-FATHER TOWARDS THE APPELLANT AND HER CHILDREN AND CONTRARY TO THE RECOMMENDATIONS OF THE GUARDIAN AD LITEM.

[3.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO INTERVIEW THE CHILDREN AS REQUIRED BY OHIO REVISED CODE 3109.04(B)(1).

[4.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN CONSIDERING THE "PLAINTIFF'S CLOSING ARGUMENT" WITHOUT THE SAME BEING FILED WITH THE CLERK OF COURTS OR BEING SERVED UPON THE APPELLANT OR THE GUARDIAN AD LITEM.

[5.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO GIVE APPROPRIATE WEIGHT TO THE OPINION OF THE GUARDIAN AD LITEM AND BEST INTERESTS OF THE CHILDREN IN LIGHT OF THE EVIDENCE PRESENTED THAT THE APPELLEE-FATHER DRAGGED THE MINOR CHILD ALYSSA UP THE STAIRS BY HER ARMS, LOCKED HER IN THE BASEMENT, THREATENED HER WITH BEING SENT TO AN ORPHANAGE, PUNISHED THE MINOR CHILD CODY IN SIMILAR WAYS, THAT THE APPELLEE-FATHER SPANKED THE MINOR CHILD NICHOLAS WITH A STICK, HAD HIM SIT ON A BALL OR WALL AND NOT BEING ABLE TO GET UP FOR HOURS, AND THE MINOR CHILD LAUREN DESCRIBED BEING TAKEN TO THE CORNER BY HER NECK, AND SOMETIMES BEING PINCHED OR PUNCHED BY THE APPELLEE-FATHER.

{¶7} By Jessica's first assignment of error, she argues that the trial court erred by conditioning her status as the sole residential parent and legal custodian on her relocation to Franklin County or a contiguous county. We disagree.

{¶8} Pursuant to R.C. 3109.04(A)(1), if neither parent requests shared parenting, then the trial court, "in a manner consistent with the best interests of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children * * *." In determining the best interests of the children, the trial court must consider:

- (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) * * * [W]hether there is reason to believe that either parent has acted in a manner resulting 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.

R.C. 3109.04(F)(1)(a)-(j).

{¶19} Although a trial court must follow the dictates of R.C. 3109.04 in deciding child custody matters, it enjoys broad discretion when determining the appropriate allocation of parental rights and responsibilities. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74; *Parker v. Parker*, 10th Dist. No. 05AP-1171, 2006-Ohio-4110, ¶23. An appellate court

must afford a trial court's child custody determinations the utmost respect, "given the nature of the proceeding[,] the impact the court's determination will have on the lives of the parties concerned[, and the fact that] [t]he 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." *Pater v. Pater* (1992), 63 Ohio St.3d 393, 396 (quoting *Miller* at 74). Therefore, an appellate court will only reverse a trial court's custody determination if the trial court abused its discretion. *Miller* at 74; *Parker* at ¶23. "The term 'abuse of discretion' connotes more than an error of law or of 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 the case at bar, the trial court considered all of the R.C. 3109.04(F)(1) factors before making its custody determination. Contrary to Jessica's assertion, the trial court did not ignore evidence regarding "the child[ren's] adjustment to the child[ren's] home, school, and community." R.C. 3109.04(F)(1)(d). Specifically, the trial court found that "[t]he children are well-adjusted to their home[,] school[,] and community." Judgment Entry/Decree of Divorce, at 19. If the trial court had viewed only that one factor, it may have found that remaining in Idaho was in the Lumley children's best interests. The trial court, however, had to weigh that factor along with nine others.

{¶11} Second, Jessica argues that the trial court put undue emphasis on her out-of-state residence. R.C. 3109.04(F)(1)(j) requires a trial court to consider whether a parent has established a residence outside of Ohio. Nevertheless, "nonresidence alone should not deprive a parent of custody." *Marshall v. Marshall* (1997), 117 Ohio App.3d 182, 187. As we stated above, the trial court considered all of the R.C. 3109.04(F)(1)

factors. Thus, the trial court made its custody determination based on multiple considerations, not just Jessica's out-of-state residency. Furthermore, the trial court focused not so much on Jessica's non-residency, but her choice to relocate the children to a remote area 1,800 miles away from Columbus. The trial court found it troubling that travel between Columbus and Idaho Falls requires both great expense and significant time, making it "impossible for Curtis to be even marginally involved in [his children's] lives." Judgment Entry/Decree of Divorce, at 27. Thus, the trial court did not disfavor Jessica because of her non-residency, but rather, sought an arrangement conducive for both parents to actively participate in the raising of their children.

{¶12} Finally, relying upon *Wyatt v. Wyatt*, 11th Dist. No. 2004-P-0045, 2005-Ohio-2365, Jessica argues that the trial court created uncertainty as to who is the residential parent and legal custodian by conditioning its designation of that role on Jessica's relocation. In *Wyatt*, the appellate court reversed a trial court's order that initially designated the father the sole residential parent and legal custodian, but also named the mother the sole residential parent and legal custodian if she chose to maintain her Ohio residency. *Id.* at ¶7. Under those terms, if the mother remained in Ohio, both parents could claim status as the sole residential parent and legal custodian. Finding that the trial court committed error in the manner in which it structured its order, the appellate court ordered the trial court to resolve the uncertainty as to which of the parents would be the sole residential parent and legal custodian. *Id.* at ¶15-16.

{¶13} Unlike the order at issue in *Wyatt*, the trial court's judgment entry does not contain any ambiguity regarding whether Jessica or Curtis is the sole residential parent and legal custodian. The trial court selected a date—August 10, 2009—by which Jessica

had to reside in Franklin County or a contiguous county to retain her status as sole residential parent and legal custodian.¹ Failure to move by the deadline results in Curtis becoming the sole residential parent and legal custodian. Given this straightforward mandate, we do not find any uncertainty in the judgment entry warranting reversal.

{¶14} In sum, we conclude that none of Jessica's arguments in support of her first assignment of error have any merit. Accordingly, we overrule that assignment of error.

{¶15} By Jessica's second assignment of error, she argues that the trial court erred in granting Curtis unsupervised parenting time with the children. We disagree.

{¶16} R.C. 3109.051 governs parenting time rights. *Braatz v. Braatz*, 85 Ohio St.3d 40, 44, 1999-Ohio-203. When determining whether to grant parenting time and establishing a parenting time schedule, a trial court must consider the factors set forth in R.C. 3109.051(D) and, using its sound discretion, order the parenting time that is in the best interest of the child. *Id.* at 45. The R.C. 3109.051(D) factors include:

- (1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity * * *;
- (2) The geographical location of the residence of each parent and the distance between those residences * * *;
- (3) The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;
- (4) The age of the child;
- (5) The child's adjustment to home, school, and community;

¹ Due to the pendency of this appeal and the concomitant stay of the trial court's order, the August 10, 2009 deadline has passed, presumably without Jessica relocating to Ohio. Accordingly, the parties will have to ask the trial court to set another deadline for Jessica's relocation.

(6) If the court has interviewed the child in chambers, pursuant to division (C) of this section, regarding the wishes and concerns of the child as to parenting time by the parent who is not the residential parent * * *, as to a specific parenting time or visitation schedule, or as to other parenting time or visitation matters, the wishes and concerns of the child, as expressed to the court;

(7) The health and safety of the child;

(8) The amount of time that will be available for the child to spend with siblings;

(9) The mental and physical health of all parties;

(10) Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights * * *;

(11) * * * [W]hether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child.

* * *

(14) Whether either parent has established a residence or is planning to establish a residence outside this state;

* * *

(16) Any other factor in the best interest of the child.

R.C. 3109.051(D)(1)-(16).

{¶17} In order to further a child's best interest, a trial court has the discretion to limit parenting time rights. *Moore v. Moore*, 5th Dist. No. 04CA111, 2005-Ohio-4151, ¶7; *Hoppel v. Hoppel*, 7th Dist. No. 03 CO 56, 2004-Ohio-1574, ¶15; *Anderson v. Anderson*, 147 Ohio App.3d 513, 2002-Ohio-1156, ¶18. Trial courts may restrict the time and place of visitation, determine the conditions under which parenting time will take place, and deny parenting time rights altogether if parenting time would not be in the best interest of

the child. *Id.* Because trial courts have such broad discretion, reviewing courts will only reverse a decision on parenting time rights if the trial court abused its discretion. *Karales v. Karales*, 10th Dist. No. 05AP-856, 2006-Ohio-2963, ¶5; *Flynn v. Flynn*, 10th Dist. No. 03AP-612, 2004-Ohio-3881, ¶15; *In re Ross*, 154 Ohio App.3d 1, 2003-Ohio-4419, ¶5.

{¶18} Jessica first argues that the trial court erred in finding R.C. 3109.051(D)(11)—the factor that requires consideration of "whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child"—to be "not applicable." As used in R.C. 3109.051(D)(11), " 'abused child' has the same meaning as in section 2151.031 of the Revised Code." R.C. 3109.051(N)(1). Pursuant to R.C. 2151.031, an "abused child" is any child who:

(B) Is endangered as defined in section R.C. 2919.22 of the Revised Code, except that the court need not find that any person has been convicted under that section in order to find that the child is an abused child;

* * *

(D) Because of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child's health or welfare.

R.C. 2919.22(B) prohibits any person from endangering a child by:

- (1) Abus[ing] the child;
- (2) Tortur[ing] or cruelly abus[ing] the child;
- (3) Administer[ing] corporal punishment or other physical disciplinary measure, or physically restrain[ing] the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child[.]

{¶19} Jessica maintains that her children are "abused children" under: (1) R.C. 2151.031(B) because Curtis endangered them as described in R.C. 2919.22(B)(1), (2), and (3); and (2) R.C. 2151.031(D). We will address each provision in turn.

{¶20} Because R.C. 2919.22(B)(1) does not specifically define what actions constitute abuse of a child, the trial court, in its broad discretion, must make its determination of abuse on a case-by-case basis. *In the Matter of Horton*, 10th Dist. No. 03AP-1181, 2004-Ohio-6249, ¶16 (quoting *In re Schuerman* (1991), 74 Ohio App.3d 528, 531). In reaching its determination, the trial court should consider the circumstances giving rise to the harm to the child and the past history of the child. *Horton* at ¶16. Where the alleged abuse was inflicted as corporal punishment, the trial court should also take into account the nature, manner, and measure of the discipline, the age of the child, the child's response to non-corporal punishment in the past, and the behavior being punished. *Id.* Not all physical discipline arises to the level of abuse punishable by law. *In re K.B.*, 9th Dist. No. 21365, 2003-Ohio-3784, ¶14.

{¶21} In the case at bar, Jessica contends that Curtis' methods of disciplining the children constituted abuse. According to the guardian ad litem, Alyssa said that Curtis had dragged her up the stairs by her arms, twisted her fingers, told her that he would send her to an orphanage, hit her on her leg, tied the bedroom doors together so that the children could not leave their bedrooms, forced her and the other children to stay in an "up" push-up position, and locked her in the basement. Cody told the guardian that Curtis would chase the children to their rooms and hit them "if he got really mad." (Tr. 457.) Nicholas described to the guardian incidents wherein Curtis spanked him with a stick and forced him to sit on a ball. Lauren told the guardian that Curtis had spanked her and

thrown her by her neck into a corner for "time out." Lauren also said that her father pinched and punched, but the guardian was unsure whether Lauren meant that Curtis pinched and punched her or Lauren saw Curtis pinch and punch someone else.

{¶22} For some of these methods of discipline, the trial court found that Curtis provided reasonable explanations. Curtis explained that he made the children sit on the third step from the top of the basement stairs to give them time to calm down and think about their misbehavior. Sometimes the basement door was open; sometimes it was closed. He forced the children to place their hand on a wall during "time out" to prevent them from watching television during the punishment period. He testified that the children made a game of it; walking around the house, but keeping one hand on the wall. With regard to other punishments, the trial court accepted Curtis' denial of the children's allegations. Curtis denied ever twisting Alyssa's fingers, throwing Lauren into a corner by her neck, barring the children's bedroom doors, or threatening to send the children to an orphanage.

{¶23} Although Curtis admitted to spanking the children, he stated that he used other punishments first. Moreover, in the only incident of spanking testified about in detail, Curtis attempted to spank Alyssa only after she engaged in serious misbehavior—locking her younger sister out of the house and smacking at Curtis repeatedly. Overall, the trial court found that Curtis had imposed physical punishments, but none of those punishments rose to the level of abuse. Based upon the totality of the evidence, we conclude that the trial court did not abuse its discretion in so finding.²

² Based upon this conclusion, we need not consider whether Curtis' discipline of the children violated R.C. 2919.22(B)(2). If Curtis' actions do not amount to abuse, they cannot constitute the more egregious misconduct of torture or cruel abuse of a child.

{¶24} R.C. 2919.22(B)(3) prohibits excessive physical discipline that creates a substantial risk of serious physical harm to a child. "Serious physical harm" means:

- (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
- (b) Any physical harm that carries a substantial risk of death;
- (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
- (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
- (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

R.C. 2901.01(A)(5)(a)-(e).

{¶25} In the case at bar, Jessica and her mother both testified to seeing bruises on Alyssa and Cody after Curtis physically disciplined them. According to the guardian ad litem, when she met with Alyssa, Alyssa showed her a mark on her leg and stated that her father had hit her there. The guardian had difficulty seeing the mark. Generally, bruising is insufficient to establish serious physical harm. *In re J.L.*, 176 Ohio App.3d 186, 2008-Ohio-1488, ¶44; *In re K.B.* at ¶15. Given that the physical harm at issue here consists of bruising and an almost indiscernible mark, we conclude that the evidence does not establish the serious physical harm necessary for a violation of R.C. 2919.22(B)(3).

{¶26} Violation of R.C. 2919.22 is not a prerequisite for a trial court to find that a child is abused. *In the Matter of Kristen V.*, 6th Dist. No. OT-07-031, 2008-Ohio-2994,

¶70. Even if a parent could not be criminally liable for endangering a child, the trial court may still deem the child an "abused child" pursuant to R.C. 2151.031(D) because the parent inflicted "physical or mental injury that harms or threatens to harm the child's health or welfare." *Id.*

{¶27} Jessica's argument with regard to R.C. 2151.031(D) focuses largely on the mental injury she claims that Curtis' actions caused. As used in R.C. 2151.031(D), "mental injury" "means any behavioral, cognitive, emotional, or mental disorder in a child caused by an act or omission that * * * is committed by the parent * * *." R.C. 2151.011(B)(22). Jessica and the guardian ad litem testified that Alyssa and Nicholas saw a counselor to address anxiety stemming from Curtis' disciplinary tactics. However, the record contains no evidence that any of the children suffer from a behavioral, cognitive, emotional, or mental disorder caused by Curtis' actions or omissions.³

{¶28} Jessica also claims that the children suffered physical injury as a result of Curtis' corporal punishments. Because the Revised Code does not define "physical injury," we must apply the ordinary and common definition of that term. *Pruszynski v. Reeves*, 117 Ohio St.3d 92, 2008-Ohio-510, ¶8. In interpreting R.C. 2919.25, which prohibits domestic violence, the Supreme Court of Ohio stated that:

"Injury" is defined in Black's Law Dictionary (6 Ed.1990) 785, as " * * * [t]he invasion of any *legally protected interest* of another." (Emphasis added.) A child does not have any legally protected interest which is invaded by proper and reasonable parental discipline.

³ Although Nicholas has been diagnosed with attention deficit hyperactivity disorder, Jessica did not present any evidence to link this diagnosis to the corporal punishment Curtis imposed.

State v. Suchomski (1991), 58 Ohio St.3d 74, 75. Thus, a parent who properly and reasonably disciplines a child does not inflict physical injury on that child.

{¶29} A trial court must adjudge whether a particular disciplinary measure is proper and reasonable from the totality of the circumstances. *State v. Thompson*, 2d Dist. No. 04CA30, 2006-Ohio-582, ¶31; *State v. Craun*, 158 Ohio App.3d 389, 2004-Ohio-4403, ¶19. In so doing, the trial court should consider the child's age, behavior, and response to non-corporal punishment, as well as the location and severity of the punishment. *Id.* "[C]ourts should be slow to intervene between parent and child in resolving issues of discipline involving minimal physical harm." *Thompson* at ¶31.

{¶30} As we discussed above, Curtis admitted to sometimes resorting to physical discipline. While the trial court expressed concern regarding those episodes, the court did not find the punishments imposed so excessive and unreasonable to qualify as abuse. Given the evidence in the record, we conclude that the trial court did not abuse its discretion in so finding.

{¶31} Contrary to Jessica's contention, the trial court did not abuse its discretion in concluding that it had no reason to believe that Curtis had acted in a manner resulting in the children being abused. Thus, this factor does not weigh against the unsupervised parenting time that the trial court ordered.

{¶32} Jessica also argues that the trial court should have given two factors—the prior interaction between Curtis and the children and the health and safety of the children—more consideration. First, Jessica contends that by repeatedly seeking police intervention to resolve conflicts between him and the children, Curtis has demonstrated that he cannot control the children. Jessica points out that, during the week the children

visited with Curtis in March 2008, the police were involved three times. Initially, Curtis called the police early in the week when he could not control Alyssa's violent outburst against her younger brother. Curtis was also concerned that Jessica would blame him for the bruise Cody developed as a result of Alyssa's hitting. The second time the police visited Curtis' house, they came because Jessica's sister—not Curtis—had called them. Apparently, Alyssa became angry with Curtis because he had looked through her bag and then insisted on taking a family photograph before the children left for the airport. Alyssa called her mother via her cell phone. Whatever Alyssa said during that conversation caused her mother to initiate contact with the Columbus police from Idaho. The third time the police became involved, Curtis sought their help because Jessica's mother had slapped a video camera away from Curtis' sister's face. Jessica's mother had rendezvoused with Curtis and the children at the Columbus airport so she could fly with the children to Salt Lake City, the first leg of their trip back to Idaho. While Curtis' sister videotaped the children at the airport, Jessica's mother smacked the camera.

{¶33} Although the first incident reflects poorly on Curtis' ability to control Alyssa, the second two incidents actually demonstrate the animosity and mistrust that Jessica and her family has for Curtis. The trial court recounted each of these three incidents in more depth in its judgment entry, and ultimately found that none of these incidents indicated the need for supervised parenting time. We conclude that the trial court did not abuse its discretion in making this finding.

{¶34} Finally, we do not agree with Jessica that the trial court did not fully consider the health and safety of the children. While acknowledging that Curtis had engaged in physical altercations with Jessica and physically disciplined the children, the

trial court held that it did "not find that the health and safety of the children are so endangered as to deny Mr. Lumley unsupervised parenting time with the children." Judgment Entry/Decree of Divorce, at 29. Again, we conclude that the trial court did not abuse its discretion in so finding.

{¶35} In sum, we conclude that the trial court weighed each relevant R.C. 3109.051(D) factor and acted within its discretion in ordering unsupervised parenting time for Curtis. Accordingly, we overrule Jessica's second assignment of error.

{¶36} By Jessica's third assignment of error, she argues that the trial court erred in denying her request that the court interview the children. We disagree.

{¶37} According to R.C. 3109.04(B)(1):

In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for purposes of resolving any issues related to the making of that allocation, the court, in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

Such an interview "shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview." R.C. 3109.04(B)(2)(c).

{¶38} Absent a request, R.C. 3109.04(B)(1) allows a trial court to forego an in-chambers interview of the involved children. However, once a party requests an in-chambers interview pursuant to R.C. 3109.04(B)(1), the trial court must interview the children regarding their wishes and concerns. *Badgett v. Badgett* (1997), 120 Ohio

App.3d 448, 450 ("An interview is discretionary only if no party requests it; if a party to the allocation hearing makes the request, the court 'shall' interview the child or children.").

{¶39} Here, Jessica never asked for an in-chambers interview. In her motion, Jessica stated:

This is a request for the Court to speak with the children prior to rendering a decision in regards to the allocation of parental rights and responsibilities. * * * They can be reached via telephone at (208) ___ - ___ or Defendant Jessica Lumley will be happy to arrange a time when the children are available to the Court for an interview. She is happy to set the same up at a neutral location away from any interference.

Interpreting Jessica's motion in light of the distance between Columbus and Idaho Falls, we conclude that Jessica wanted the trial court to conduct a telephone conference with the children. Instead of offering to send the children to the trial court's Ohio chambers, Jessica contemplated setting up a "neutral location" at which the children could speak with the trial court from Idaho.

{¶40} Nothing in R.C. 3109.04(B)(1) or (B)(2) requires a trial court to interview the involved children via telephone. Moreover, a telephone interview would not fulfill the underlying purpose of R.C. 3109.04(B)(2)(c)—to insulate children from extraneous influences during the interview so that they can speak candidly about their feelings. *Chapman v. Chapman*, 2d Dist. No. 21652, 2007-Ohio-2968, ¶17 (quoting *Willis v. Willis*, 149 Ohio App.3d 50, 2002-Ohio-3716, ¶23). Despite Jessica's promise to find a "neutral location" for the children, the trial court could not control the children's environment to eliminate the possibility of "off-stage" coaching or pressure. Because the trial court could not ensure the children's privacy during a telephone interview, the court could not trust the authenticity of any feeling or opinion the children might express. Accordingly, we

conclude that the trial court did not err in refusing to conduct an interview of the Lumley children, and we overrule Jessica's third assignment of error.

{¶41} By Jessica's fourth assignment of error, she argues that the trial court erred in considering Curtis' written closing argument. Because the judgment entry contains no indication that the trial court committed the asserted error, we find this argument unavailing.

{¶42} At the close of the hearing, the trial court invited each party to submit a written closing argument. Curtis, who was acting pro se at the time, submitted his closing argument to the trial court, but failed to file it with the clerk or serve it upon Jessica. The trial court filed the closing argument with the clerk on Curtis' behalf. Besides stating that it had filed Curtis' closing argument, the trial court did not otherwise refer to the closing argument in its judgment entry.

{¶43} "A general principal of appellate review is the presumption of regularity; that is, a trial court is presumed to have followed the law unless the contrary is made to appear in the record." *Tonti v. East Bank Condominiums, LLC*, 10th Dist. No. 07AP-388, 2007-Ohio-6779, ¶26. Here, nothing in the record suggests that the trial court did anything with Curtis' closing argument other than file it with the clerk. Therefore, we presume that, pursuant to Civ.R. 5(D), the trial court did not consider Curtis' closing argument when rendering its decision. Accordingly, we overrule Jessica's fourth assignment of error.

{¶44} By Jessica's fifth assignment of error, she argues that the trial court abused its discretion in making Curtis the sole residential parent and legal custodian if she does not move to Ohio. We disagree.

{¶45} First, Jessica contends that the trial court erred in failing to consider the children's wishes and concerns as required in R.C. 3109.04(F)(1)(b). Jessica, however, misconstrues R.C. 3109.04(F)(1)(b). That provision only requires a trial court to consider the wishes and concerns of the involved children "[i]f the court has interviewed the child[ren] in chambers pursuant to division (B) of this section * * *." R.C. 3109.04(F)(1)(b). As the trial court did not conduct an in-chambers interview of the children, R.C. 3109.04(F)(1)(b) is inapplicable here.

{¶46} Second, Jessica argues that the trial court erred in failing to give "appropriate weight" to the guardian ad litem's recommendation that the court designate her the sole residential parent and legal custodian. We find this argument unavailing. A trial court is not bound to follow a guardian ad litem's recommendation. *Galloway v. Khan*, 10th Dist. No. 06AP-140, 2006-Ohio-6637, ¶70. As the fact finder, the trial court determines the guardian ad litem's credibility and the weight to be given to the guardian ad litem's recommendation. *Id.* Because assessment of the credibility and weight of the evidence is reserved for the trial court, we will not second guess the court's decision to disregard the guardian ad litem's recommendation. *Davis v. Flickinger*, 77 Ohio St.3d 415, 419, 1997-Ohio-260 (" 'The determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal * * *.' ") (quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81).

{¶47} Third, Jessica asserts that the trial court overlooked evidence of the children's fear of their father when evaluating the children's relationship with Curtis pursuant to R.C. 3109.04(F)(1)(c). The judgment entry, however, reflects that the trial court considered the guardian ad litem's testimony that the children called their father

"mean" and "like the devil." The trial court also considered the guardian's testimony that neither Alyssa nor Nicholas wanted contact with Curtis. Likewise, the trial court did not ignore evidence that Curtis tried to commit suicide in the past. In its consideration of the parties' mental health pursuant to R.C. 3109.04(F)(1)(e), the trial court recounted Jessica's testimony regarding Curtis' suicide attempts.

{¶48} Fourth, Jessica argues that the trial court abused its discretion in finding that Curtis is the parent more likely to honor and facilitate parenting time rights. We disagree. The trial court reasoned that Jessica's contempt for Curtis and her fear that he might hit her or the children will negatively impact Curtis' relationship with the children. To support this reasoning, the trial court pointed to evidence that the children do not timely return Curtis' telephone calls, and he rarely speaks with them. Additionally, during the children's March 2008 visit with Curtis, Alyssa's constant phone calls and text messaging with her mother made her increasingly agitated as the week went on.

{¶49} Jessica denigrates the court's reasoning as speculative. However, a trial court must engage in some conjecture to determine which parent will more likely honor parenting time rights when neither parent has yet to exercise those rights. As evidence supports the trial court's deduction in this case, we conclude that the court did not abuse its discretion.

{¶50} Finally, Jessica argues that the trial court erred in finding that R.C. 3109.04(F)(1)(h), which requires a court to consider whether the involved children are abused, was "not applicable." As we explained above in relation to R.C. 3109.051(D)(11), this argument does not have any merit.

{¶51} In sum, we conclude that the trial court did not abuse its discretion in designating Curtis the sole residential parent and legal custodian if Jessica does not relocate to central Ohio. Accordingly, we overrule Jessica's fifth assignment of error.

{¶52} For the foregoing reasons, we overrule all of Jessica's assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

McGRATH and CONNOR, JJ., concur.
