[Cite as *Thompson v. Cannon*, 2015-Ohio-2893.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

DAVID M. THOMPSON, II,	:	
		CASE NO. CA2015-02-003
Plaintiff-Appellee,	:	
		O P I N I O N
	:	7/20/2015
- vs -		
	:	
LEIGH CANNON,	:	
Defendant-Appellant.	:	

APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DRA 20120370

Jeffrey McCormick, 122 South Main Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Mary E. King, 153 East Court Street, P.O. Box 70, Washington C.H., Ohio 43160, for defendant-appellant

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S. POWELL, J.

{¶ 1} Defendant-appellant, Leigh Cannon (Mother), appeals a decision of the Fayette County Court of Common Pleas, Domestic Relations Division, terminating shared parenting and placing her son with the child's father, plaintiff-appellee, David M. Thompson, II (Father). For the reasons stated below, we affirm the decision of the trial court.

{¶ 2} Mother and Father are the parents of two children, a six-year old daughter, L.T., born on December 19, 2008, and a ten-year old son, T.T., born on September 12, 2004. Mother and Father divorced in October 2012 and entered into a shared parenting plan. Throughout the marriage and at the time of the divorce, Mother and Father resided in the city of Washington Court House located in Fayette County, Ohio. In August 2013, Father filed a notice of relocation informing the court he planned to relocate from Washington Court House to West Chester, Ohio in Butler County. Father, his new wife, Mindi Thompson (Wife), and her two sons would live in the West Chester residence, which is approximately an hour away from Washington Court House. Mother objected to the relocation and asked the court to terminate the shared parenting plan and give her sole custody of the children. Father opposed terminating shared parenting, but alternatively moved for custody of the children.

{¶ 3} While the motions were pending, the magistrate conducted an in camera interview of T.T. The magistrate held a hearing regarding the custodial issues on December 17, 2013. After the first hearing, the magistrate granted Mother's motion to supplement the record with evidence of an alleged domestic violence incident that occurred on December 20, 2013 between Father and Wife. At the hearing, Father testified that Wife initiated the altercation, he reacted in self-defense, and he and Wife are no longer together. After the presentation of evidence was complete, the magistrate conducted a second in camera interview of T.T. upon Father's request.

{¶ 4} On February 6, 2014, the magistrate issued an oral decision from the bench terminating shared parenting and splitting custody of the children between the parties. The magistrate granted Mother custody of L.T. and Father custody of T.T. Thereafter, Mother filed a motion to present new evidence regarding reunification of Father and Wife. The magistrate denied Mother's motion.

{¶ 5} On April 25, 2014, the magistrate issued its written decision explaining the

termination of shared parenting and the custodial decision. The magistrate stated it considered T.T.'s wishes and noted the children have a good relationship with both parents though L.T. is closer to Mother and T.T. is closer to Father. The magistrate discussed Father's unresolved domestic violence case regarding Wife but stated Father claims he reacted in self-defense and there is no evidence that any of the alleged violence occurred in front of the children or that either child has ever been harmed by Father. Therefore, the magistrate found it was in the best interest of the children to grant Mother custody of L.T. and Father custody of T.T.

{¶ 6} Mother and Father both objected to the magistrate's decision. On January 8, 2015, the trial court overruled the objections and adopted the magistrate's decision. The court noted it reviewed and found the in camera interviews of T.T. to be appropriate. The court also found no evidence suggesting reluctance of either parent regarding the exercise of parenting time rights and stated it considered all the alleged incidents of violence. The trial court ordered Father to have a mental health assessment to determine whether he has a propensity for violence or alcohol abuse and comply with the assessment's recommendations. Accordingly, the trial court found it was in the best interest of L.T. to be in Mother's custody and the best interest of T.T. to be in the custody of Father.

{¶ 7} Mother now appeals, asserting five assignments of error for review.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL (sic) ERRED IN NOT RULING ON DEFENDANT-APPELLANT'S MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

{¶ 10} In her first assignment of error, Mother argues error occurred when neither the magistrate nor the trial court issued a decision with findings of fact and conclusions of law as required by Civ.R. 53(D)(3)(a)(ii). We disagree.

{¶ 11} Civ.R. 53(D)(3)(a)(ii) provides: "[s]ubject to the terms of the relevant reference,

a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law." A magistrate has a mandatory duty under Civ.R. 53 to issue findings of fact and conclusions of law if a party has made a timely request. *Burke v. Brown*, 4th Dist. Adams No. 01CA731, 2002-Ohio-6164, ¶ 21. The purpose of separate conclusions of law and facts is to "aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment." *Werden v. Crawford*, 70 Ohio St.2d 122, 124 (1982). A magistrate's failure to issue findings of fact and conclusions of law when timely requested can constitute reversible error. *Larson v. Larson*, 3d Dist. Seneca No. 13-11-25, 2011-Ohio-6013, ¶ 16.

{¶ 12} Mother did not object to the magistrate's alleged failure to make findings of fact and conclusions of law, and therefore, has waived all but plain error on appeal. *Hamilton v. Digonno*, 12th Dist. Butler No. CA2012-05-108, 2013-Ohio-151, ¶ 18-19. Plain error in a civil case is an error that "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus.

{¶ 13} Upon a thorough review of the magistrate's decision, we find the decision contained findings of fact and conclusions of law and complied with Civ.R. 53(D)(3)(a)(ii). The magistrate issued its written decision on April 25, 2014, following Mother's motion requesting findings of fact and conclusions of law. The written decision began by terminating shared parenting, explaining it is in the children's best interest due to the inability of Mother and Father to get along as evidenced by their demeanor in court, the failure of Mother and Father to cooperate regarding the children's extracurricular activities and the CPO that was filed between Mother and Father. The magistrate noted that due to the termination of shared parenting, parental rights and responsibilities must be allocated pursuant to R.C. 3109.04(E)(2)(d).

{¶ 14} The magistrate then provided a detailed discussion regarding each of the best interest factors of R.C. 3109.04(F) in allocating parental rights and responsibilities. Specifically, the magistrate noted: (1) the children love both of their parents though L.T. is very close to Mother and T.T. is very close to Father, (2) T.T.'s wishes as expressed in the in camera interviews were considered, (3) there is no evidence Mother has mental health concerns, (4) the GAL believes Father has an alcohol problem, and (5) Father has a disorderly conduct conviction. Additionally, the magistrate discussed Father's unresolved domestic violence case in regards to Wife and stated its concerns with Father and Wife's consumption of alcohol. However, the court stated there is no evidence either child has been harmed by Father. Based on the factors in R.C. 3109.04(F), the court found it was in the best interest of the children to grant Mother custody of L.T. and Father custody of T.T.

{¶ 15} In light of the forgoing, while not captioned as such, it is clear from the magistrate's detailed discussion regarding each of the best interest factors and the evidence relating to that factor, the magistrate's decision issued findings of fact and conclusions of law. Additionally, we note Mother never requested the trial court to issue a decision stating findings of fact and conclusions of law. Mother's motion for findings of fact and conclusions of law specifically requested the magistrate to issue the decision and cited Civ.R. 53(D), which governs a magistrate's duty to make findings of fact and conclusions of law. Therefore, the trial court had no obligation to issue such a decision. *See* Civ.R. 52; *Graves v. Graves*, 4th Dist. Vinton No. 14CA694, 2014-Ohio-5812, ¶ 36. We find there was no error, plain or otherwise, as the magistrate's decision issued findings of fact and conclusion of law. Accordingly, Mother's first assignment of error is overruled.

{¶ 16} Assignment of Error No. 2:

{¶ 17} THE TRIAL COURT ERRED IN ALLOCATING PARENTAL RIGHTS AND RESPONSIBILITIES.

{¶ 18} In her second assignment of error, Mother challenges the trial court's designation of Father as the residential parent and legal custodian of T.T. Mother maintains it is in the best interest of T.T. for her to be awarded custody and argues that if Father was granted custody of T.T., custody should have been conditioned on Father moving back to Fayette County. Mother also asserts the magistrate improperly conducted a second in camera interview of T.T. We again disagree.

{¶ 19} If the trial court terminates a prior shared parenting plan, the court "shall proceed" and allocate parental rights and responsibilities as if no shared parenting plan had ever been granted. R.C. 3109.04(E)(2)(d). The court is obligated to designate one parent the residential parent and legal custodian of the child "in a manner consistent with the best interest of the" child. R.C. 3109.04(A)(1).

{¶ 20} Pursuant to R.C. 3109.04(F)(1), a court is required to consider all relevant factors when making a determination as to what is in a child's best interest. Those factors include,

> (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 either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of [R.C. 2919.25] or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense * * *;
>
> (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.

{¶ 21} An appellate court employs an abuse of discretion standard when reviewing a domestic relations issue so that the trial court's decision will only be reversed if it is unreasonable, arbitrary, or unconscionable. *Renner v. Renner*, 12th Dist. Clermont No. CA2014-01-004, 2014-Ohio-2237, ¶ 16, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Upon review, an appellate court may not substitute its judgment for that of the trial court because the "discretion which 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 will have on the lives of the parties concerned." *Id.*, quoting *Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988).

{¶ 22} After a thorough review of the record, we find the trial court's decision granting Father custody of T.T. was not unreasonable, arbitrary or unconscionable. The evidence established Father loves T.T., is an involved parent, and T.T. is very close to his Father. T.T.

is very involved and excels at sports, plays on several different teams, and Father coaches all of T.T.'s teams. Prior to the termination of shared parenting, T.T. has spent significant time with Father without adverse effect. While there are allegations of violence between Father and Wife, there is no evidence the violence occurred in the presence of the children, Wife has made inconsistent statements regarding the alleged incidents, and Father denied initiating any of the violence. Father also testified at the last hearing that he and Wife are no longer together. Father also denied consuming alcohol in excess or driving while under the influence of alcohol and there has been no evidence that Father failed to comply with the mental health assessment ordered by the trial court or that the assessment indicated Father has a propensity for violence or alcohol abuse.

{¶ 23} While T.T. has spent his entire life in Washington Court House, a child's adjustment to the community is only one factor for the trial court to consider. Father testified he will continue to provide all the driving for parenting time exchanges and extracurricular activities. Further, the trial court ordered T.T. to remain in Washington Court House city schools for the duration of the 2015 school year.

{¶ 24} The magistrate also conducted two in camera interviews with T.T. and the trial court stated it considered T.T.'s wishes in the custody decision. We disagree with Mother's assertion that it was error to conduct a second interview. As this court has stated, R.C. 3109.04 does not prohibit multiple interviews of a child or otherwise state that a court is limited in the amount of times it may interview a child. *See Caldwell v. Caldwell*, 12th Dist. Clermont Nos. CA2008-02-019 and CA2008-03-021, 2009-Ohio-2201, ¶ 17. Instead, it is within the trial court's discretion to grant an in camera interview of a child. Therefore, the magistrate did not abuse its discretion in conducting a second interview of T.T. Given the evidence presented, we find the trial court did not abuse its discretion in designating Father

the residential parent and legal custodian of T.T. Accordingly, Mother's second assignment of error is overruled.

{¶ 25} Assignment of Error No. 3:

{¶ 26} THE TRIAL COURT ERRED IN ALLOWING FATHER TO CHANGE THE CHILD'S SCHOOL DISTRICT.

{¶ 27} In her third assignment of error, Mother argues the trial court abused its discretion when it permitted Father to enroll T.T. in the school district Father chooses after the current school year. Initially, the magistrate ordered T.T. to remain in Washington Court House city schools. However, on objections to the magistrate's decision, the trial court modified the school district requirement and ordered T.T. to remain in Washington Court House city schools throughout the 2015 school year but thereafter allowed Father to enroll T.T. in the school district Father deems appropriate.

{¶ 28} As stated above, we review a trial court's decision regarding custody matters for an abuse of discretion. *Renner*, 2014-Ohio-2237 at ¶ 16. A trial court that terminates a prior shared parenting plan must designate one parent the residential parent and legal custodian of the child. R.C. 3109.04(A)(1) and (E)(2)(d). When there is no shared parenting of the child, the residential parent is primarily allocated the parental rights and responsibilities and has "care, custody, and control of the child." R.C. 3109.04(L)(2). The legal and physical control a residential parent has over the child includes the authority to decide the school the child attends. *Smith v. Smith*, 10th Dist. Franklin No. 98AP-1641, 1999 WL 1256584, *3 (Dec. 28, 1999). *See Oyler v. Oyler*, 5th Dist. Stark No. 2011CA-00065, 2011-Ohio-4390, ¶ 36.

{¶ 29} We do not find the trial court abused its discretion in permitting Father to choose the school district T.T. will attend. While Father testified at the hearing he would continue to drive T.T. to Washington Court House city schools, Father's new residence is

approximately an hour away from Washington Court House. Requiring T.T. to attend Washington Court House schools would entail an hour drive, each way, five days a week. As Father was designated residential parent and legal custodian of T.T., he may choose the school T.T. attends. Therefore, the court's decision granting Father the discretion to choose T.T.'s school district was not unreasonable, arbitrary or unconscionable. Accordingly, Mother's third assignment of error is overruled.

{¶ 30} Assignment of Error No. 4:

{¶ 31} THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE AND NOT REQUIRING ATTORNEY'S TESTIMONY TO BE SWORN.

{¶ 32} In her fourth assignment of error, Mother challenges several of the trial court's evidentiary decisions. The admission or exclusion of relevant evidence rests within the discretion of the trial court. *League v. Collins*, 12th Dist. Butler No. CA2013-03-041, 2013-Ohio-3857, ¶ 8. An appellate court will not disturb a decision of the trial court to admit or exclude evidence absent a clear and prejudicial abuse of discretion. *Cottrell v. Cottrell*, 12th Dist. Warren No. CA2012-10-105, 2013-Ohio-2397, ¶ 80.

{¶ 33} Mother argues the trial court erred in excluding Father's testimony regarding whether he failed to appear for a hearing concerning a March 23, 2013 domestic violence incident purportedly committed by Wife. Mother contends Father's answer is relevant to his ability to protect the children. Mother also asserts the magistrate should have admitted Wife's written statement to the Fayette County Sheriff's Office where Wife described an act of domestic violence involving Father. Mother maintains the statement was admissible as a prior statement consistent with the declarant's testimony and was offered to rebut Father's assertion that Wife wrote the statement in response to her pending domestic violence charges.

{¶ 34} "Relevant evidence" is evidence which has any tendency to make the existence

of any fact more or less probable. Evid.R. 401. All relevant evidence is admissible, unless specifically excluded. Evid.R. 402. Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and is generally inadmissible. Evid.R. 801(C); Evid.R. 802. However, a statement is not hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive." Evid.R. 801(D)(1)(b).

{¶ 35} At the hearing, Father was cross-examined as to a March 23, 2013 incident where Wife reportedly scratched Father and "busted" his nose. Father stated that as a result of this incident, Wife was charged with domestic violence and assault. The following exchange then occurred:

> [Mother's counsel]: Okay and were those charges later dropped?
>
> [Father]: They were dismissed.
>
> [Mother's counsel]: They were dismissed. Did you refuse to pursue the charges?
>
> [Father]: No. The case was dismissed for lack of evidence.
>
> [Mother's counsel]: Okay did you not show up for a hearing that you were required to show up for?
>
> [Father's counsel]: Objection relevance Your Honor.
>
> [Magistrate]: All right, I'll sustain that.

{¶ 36} Later, Wife further testified she sent a letter to the Fayette County Sherriff's Office on March 29, 2013. Wife stated the letter described an incident on October 4, 2012 where she sustained four fractures to her collarbone after Father "kneed" her several times. Wife acknowledged she gave the letter to the Sherriff's Office shortly after she was charged with domestic violence and she had previously told medical personnel that she sustained the

injuries from falling down the stairs. The domestic violence charges against her were ultimately dismissed. At the close Mother's case, the magistrate refused to admit Wife's written statement into evidence as inadmissible hearsay.

{¶ 37} We find the trial court did not err in refusing to admit these challenged statements because Mother has not demonstrated the alleged error was prejudicial to her substantial rights as required by Evid.R. 103(A). In regards to Father's failure to appear for a hearing concerning Wife's domestic violence charges, Father had already testified regarding the facts leading up to the charge and that the charge was dismissed for lack of evidence. Additionally, both Wife and Father agreed the March 23 incident did not occur in the presence of the children nor were the children aware of the altercation. Concerning Wife's written statement, while the statement was not admitted into evidence, Wife was permitted to testify at length about the incidents alleged in the statements. Wife was also thoroughly cross-examined regarding the statement. Consequently, Mother has failed to establish how not admitting these statements affected her substantial rights. We therefore find the exclusion of this evidence to be, at worst, harmless error.

{¶ 38} Mother also maintains the magistrate erred in failing to swear in the GAL and Wife's attorney, Attorney Wollschield, before permitting them to testify. Evid.R. 603 provides "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." It is error for unsworn testimony to be admitted as evidence. *State v. Bailey*, 7th Dist. Mahoning No. 11 MA 3, 2012-Ohio-1694, ¶ 21-23. However, such error is not prejudicial when the party is given the opportunity to present his side of the story, confront the witness and free to question the witness as he wishes. *Id.* at ¶ 24; *State v. Norman*, 137 Ohio App.3d 184, 198 (1st Dist.1999). *See* Evid.R. 103(A).

{¶ 39} At the hearings, Mother called both the GAL and Attorney Wollschield as witnesses in the presentation of her case. Both the GAL and Attorney Wollschield are attorneys licensed to practice law in the State of Ohio. Due to this fact, the magistrate declined to swear in the witnesses reasoning that they have an ongoing duty of candor to the court. Mother objected and the magistrate overruled her objection and permitted the GAL and Attorney Wollschield to testify without a formal oath or affirmation.

{¶ 40} We find that any error in failing to swear in the GAL and Attorney Wollschield before permitting them to testify was harmless because Mother has not demonstrated that the alleged error was prejudicial to her substantial rights. Mother conducted a thorough direct examination of both the GAL and Attorney Wollschield and presented her case through their testimony. In regards to the GAL, Mother questioned her as to the recommendation of granting Mother custody, the fact that both Mother and Father are good parents, and her concerns with Father's alcohol consumption and Father and Wife's relationship. Additionally, the GAL's testimony was largely redundant to the GAL report which was admitted into evidence.

{¶ 41} Mother was also able to question Attorney Wollschield in regards to her observation of Wife's injuries after the physical altercation between Wife and Father on December 20, 2013. Attorney Wollschield's testimony as to Wife's injuries was also redundant to the photographs of the injuries and the testimony of other witnesses. Further, both the GAL and Attorney Wollschield are attorneys licensed to practice law and have an ongoing ethical duty of candor to the tribunal. Prof.Cond.R. 3.3(a). In light of the forgoing, the failure to swear in the GAL and Attorney Wollschield was harmless as it did not prejudice Mother's substantial rights. Accordingly, Mother's fourth assignment of error is overruled.

{¶ 42} Assignment of Error No. 5:

{¶ 43} THE TRIAL COURT ERRED IN NOT INDEPENDENTLY RULING ON

APPELLANT'S MOTION TO HEAR ADDITIONAL EVIDENCE.

{¶ 44} In her fifth assignment of error, Mother challenges the trial court's denial of her motion to hear additional evidence and argues the court erred in failing to rule on her motion prior to ruling on objections to the magistrate's decision. Before the trial court ruled on Mother's objections, Mother filed a motion to admit additional evidence regarding Father's reunification with Wife. The magistrate denied Mother's motion. Thereafter, in its decision overruling objections to the magistrate's decision, the trial court also refused to admit the additional evidence.

{¶ 45} Civ.R. 53(D)(4)(d) provides a trial court shall rule on objections to a magistrate's decision. Before ruling on the objections, "the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate." Civ.R. 53(D)(4)(d). This court has noted that "Civ.R. 53(D)(4)(d) allows but does not require a trial court to accept additional evidence when ruling on objections to a magistrate's decision." *Gray v. King*, 12th Dist. Clermont No. CA2013-01-006, 2013-Ohio-3085, ¶ 24. Additionally, a trial court does not abuse its discretion in refusing to hear additional evidence on objections to a magistrate's decision when the objecting party does not demonstrate how he or she was unable to present such evidence to the magistrate. *Id.*

{¶ 46} We find the trial court did not abuse it discretion in denying Mother's motion to hear additional evidence and ruling on the motion in its decision on objections to the magistrate's decision. Under Civ.R. 53(D)(4)(D), a trial court has the discretion to hear additional evidence but is not required to do so. At the time Mother filed her motion to hear additional evidence, there had been four days of hearings regarding custodial issues during which the magistrate allowed Mother to supplement the record with additional evidence regarding Father and Wife's relationship. Additionally, while Father testified he would not be

getting back together with Wife, he was never ordered by either the magistrate or the trial court to refrain from further involvement with Wife. Neither the decision of the magistrate nor the decision of the trial court mentioned or even considered any testimony from Father regarding his separation from Wife as a factor in its custody decision. Accordingly, Mother's fifth assignment of error is overruled.

{¶ 47} Judgment affirmed.

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