[Cite as *McCarty v. Hayner,* 2009-Ohio-4540.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

JAMES MCCARTY,	:	
Plaintiff-Appellee,	:	Case No. 08CA8
vs.	:	
MYLISSA HAYNER,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Jennifer L. Ater, 72 North Paint Street, Chillicothe, Ohio 45601

COUNSEL FOR APPELLEE: K. Robert Toy, 50 ½ South Court Street, Athens, Ohio 45701

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOUNALIZED: 8-25-09

ABELE, J.

{¶ 1} This is an appeal from a Jackson County Common Pleas Court, Juvenile Division, judgment that designated James McCarty the custodial parent of the parties' minor child and allocated parenting time. Mylissa Hayner, defendant below and appellant herein, raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT BY APPROVING THE MAGISTRATE'S DECISION WHICH DESIGNATED APPELLEE AS THE CUSTODIAL PARENT OF THE PARTIES' MINOR CHILD, AS SUCH WAS AN ERROR OF LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AN ABUSE OF DISCRETION."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT BY APPROVING THE MAGISTRATE'S DECISION WHICH FAILED TO AWARD APPELLANT PARENTING TIME WITH THE PARTIES' MINOR CHILD ON AN EQUAL BASIS, AS SUCH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AN ABUSE OF DISCRETION."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT BY APPROVING THE MAGISTRATE'S DECISION WHICH FAILED TO AWARD APPELLANT REASONABLE PARENTING TIME WITH THE MINOR CHILD IN ACCORDANCE WITH THE COURT'S STANDARD COMPANIONSHIP SCHEDULE, SPECIFICALLY IN FAILING TO AWARD HER STANDARD WEEKDAY AND SUMMER PARENTING TIME, AS SUCH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AN ABUSE OF DISCRETION."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT IN FAILING TO DISQUALIFY ITSELF FROM PRESIDING OVER THE TRIAL COURT PROCEEDING."

{¶ 2} Appellant and appellee have one child, born on June 13, 2006. Following the child's birth, the parties lived together until the end of November 2006. After that time, appellant denied appellee visitation with the child until February 2, 2007, in spite of a court order that required appellant to allow appellee standard visitation.

{¶ 3} On December 5, 2006, appellee and the child filed a complaint and requested the court to enter a judgment that: (1) established the father-child relationship; (2) determined child support; and (3) designated him the sole residential

parent. Subsequently, the trial court granted appellee temporary custody of the child and awarded appellant parenting time in accordance with the trial court's standard companionship schedule. Later, the court altered the parenting time so that appellant had the child Sunday night through Thursday night and appellee had the child Thursday night through Sunday night.

{¶ 4} Appellant later denied appellee visitation eight times between May 8, 2007, and June 1, 2007. The trial court found her in contempt for doing so.

{¶ 5} On October 3 and 19, 2007, the magistrate held a hearing regarding appellee's complaint for custody. The evidence presented at the hearing reveals that the parties have a contentious relationship and are unable to communicate. Appellee presented several witnesses who stated that he is a good father and has a good relationship with the child. His witnesses also claimed that appellant has a violent temper and that she does not discipline the child.

{¶ 6} Appellant's witnesses testified that she is a good mother and shares a close relationship with the child. Appellant claimed that appellee has a violent temper, that she provided the primary care for the child since his birth, and that she administers appropriate discipline.

{¶ 7} Jackson County Job and Family Services child abuse investigator Laura Hollback testified that she investigated two abuse reports involving the child, but could not substantiate either one.

{¶ 8} The guardian ad litem testified that both appellant and appellee are appropriate caregivers for the child and that the parents should receive near-equal

companionship time with the child.

{¶ 9} Dr. Kevin R. Byrd, a psychologist, examined appellant, appellee, and the child and concluded: "[Appellee's] psychological profile, especially his openness and ability to acknowledge emotional stressors and difficulties, indicate that he is best suited for major custodial decisions regarding Grant's welfare such as those involving medical treatment, selection of baby-sitters, and later on choice of preschool and scholastic matters. Therefore, it is recommended that [appellee] be given the custodial duties and responsibilities of raising Grant." Dr. Byrd further noted that the child "has formed a healthy and secure attachment to both parents, and that disrupting either attachment would be detrimental to his long term psychological well-being. Both parents have demonstrated commitment to [the child's] well being and are competent to care for him. Therefore, it is also recommended that [the child's] visitation schedule be arranged for something reasonably close to half of his time in each home. It would be best if he were not away from either parent for more than two or three days at a time for the time being."

{¶ 10} On January 18, 2008, the magistrate recommended that the trial court designate appellee the child's custodial parent and award appellant parenting time every other weekend. In reaching its decision, the magistrate observed that: (1) appellant filed two domestic violence petitions against appellee during the pendency of the custody proceedings and both were dismissed following evidentiary hearings; (2) appellant had been convicted of disorderly conduct after an incident during the exchange of visitation with the child; (3) both appellee and appellant "are capable of caring for" the child; and (4) both are loving parents. The magistrate discounted

appellant's evidence that appellee has a violent temper. The magistrate also determined that "the real issues" impacting the child's best interest were: (1) appellee's and appellant's mental health; (2) which party would be more likely to honor visitation; and (3) the parties' respective judgment. The magistrate found that Dr. Byrd raised concern about both appellee and appellant, but that appellant's mental health issues were "a greater concern." The magistrate noted that Dr. Byrd observed:

> "[Appellant] presented such a highly disingenuous and defensive profile that there is little choice but to conclude that she made an outright effort to deceive others about her motives and psychological adjustment. [Appellant] made a clear effort to present herself in an extremely and unrealistically virtuous manner and was unwilling to acknowledge even minor flaws.
>
> * * * People with [appellant's] profile pattern do not usually experience debilitating mental disorders, but are experiencing moderately elevated degrees of fearfulness, tension, and worry. Ideas about being persecuted are likely to develop into marked concerns that someone is plotting against them."

The magistrate pointed out that Dr. Byrd concluded that appellee "is better suited to be the custodial parent and that [appellant's] visitation should be contingent upon initiating and continuing counseling." The magistrate further found that in light of appellant's past behavior denying appellee visitation, appellee would be more likely than appellant to honor court-ordered visitation. The magistrate further determined that appellant's judgment "has been suspect." The magistrate stated:

> "The Court ordered that visitation exchanges take place at the Jackson County Sheriff's Office. The reason for the order was to prevent outbursts between the parties. Such outbursts are not in any child's best interests. Yet, despite this court's order, such an outburst did occur. [Appellant] was found guilty of disorderly conduct concerning her actions during a visitation exchange at the Sheriff's Office. [The child] was present for this incident. [Appellant] has little insight concerning this incident. [Appellant's] justification for this incident was that she did not have a lawyer for the disorderly conduct case in Municipal Court. [Appellant] fails

> to recognize that the disorderly conduct incident might not have been in [the child's] best interests."

{¶ 11} Thus, the magistrate determined that: (1) appellee shall be the custodial parent; (2) appellant shall have visitation every other weekend; (3) the parties divide the holidays pursuant to the court's standard guidelines; and (4) appellant shall not have extended summer visitation until she complies with Dr. Byrd's recommendations regarding counseling.

{¶ 12} On January 25, 2008, appellant filed a request for findings of fact and conclusions of law. The magistrate, believing that its decision contained sufficient findings of fact and conclusions of law, denied this request. Appellant subsequently objected to the magistrate's decision.

{¶ 13} On May 16, 2008, appellant filed a motion requesting that the trial judge to recuse himself from further proceedings. Appellant alleged that the judge "may have a close friendship/social relationship with [appellee's] immediate family." The trial court denied the motion.

{¶ 14} On July 2, 2008, appellant filed a notice that she had completed counseling at the Family Health Center per Dr. Byrd's recommendation.

{¶ 15} On July 2, 2008, the trial court overruled appellant's objections. The next day, the trial court adopted the magistrate's decision. This appeal followed.

I

{¶ 16} In her first assignment of error, appellant asserts that the trial court abused its discretion by designating appellee the custodial parent of the parties' child.

She contends that the trial court failed to consider all of the relevant best interest factors and failed to consider her role as the child's primary caretaker. Appellant claims that the trial court merely "rubber-stamped" the magistrate's decision.

{¶ 17} We first address appellant's contention that the trial court simply adopted the magistrate's decision. Once a party objects to a magistrate's decision in accordance with Juv.R. 40, the trial court must "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." Juv.R. 40(D)(4)(d). This rule, like Civ.R. 53(D)(4)(d), "contemplates a de novo review of any issue of fact or law that a magistrate has determined when an appropriate objection is timely filed. The trial court may not properly defer to the magistrate in the exercise of the trial court's de novo review. The magistrate is a subordinate officer of the trial court, not an independent officer performing a separate function." Knauer v. Keener (2001), 143 Ohio App.3d 789, 793, 758 N.E.2d 1234. Accordingly, a trial court may not "merely rubber-stamp" a magistrate's decision. Roach v. Roach, (1992), 79 Ohio App.3d 194, 207, 607 N.E.2d 35. Thus, "[t]he trial court should not adopt challenged [magistrate's] findings of fact unless the trial court fully agrees with them-that is, the trial court, in weighing the evidence itself and fully substituting its judgment for that of the [magistrate], independently reaches the same conclusion." DeSantis v. Soller (1990), 70 Ohio App.3d 226, 233, 590 N.E.2d 886. In Hartt v. Munobe (1993), 67 Ohio St.3d 3, 5-6, 615 N.E.2d 617, the Ohio Supreme Court discussed the relationship between a referee (magistrate) and a trial court:

"*** Civ.R. 53 places upon the court the ultimate authority and

> responsibility over the referee's findings and rulings. The court must undertake an independent review of the referee's report to determine any errors. [Former] Civ.R. 53(E)(5); Normandy Place Assoc. v. Beyer (1982), 2 Ohio St.3d 102, 2 OBR 653, 443 N.E.2d 161, paragraph two of the syllabus. Civ.R. 53(E)(5) allows a party to object to a referee's report, but the filing of a particular objection is not a prerequisite to a trial or appellate court's finding of error in the report. Id., paragraph one of the syllabus. The findings of fact, conclusions of law, and other rulings of a referee before and during trial are all subject to the independent review of the trial judge. Thus, a referee's oversight of an issue or issues, even an entire trial, is not a substitute for the judicial functions but only an aid to them. A trial judge who fails to undertake a thorough independent review of the referee's report violates the letter and spirit of Civ.R. 53, and we caution against the practice of adopting referee's reports as a matter of course, especially where a referee has presided over an entire trial."

{¶ 18} Ordinarily, a reviewing court will presume that the trial court performed an independent analysis in reviewing the magistrate's decision. See Hartt v. Munobe (1993), 67 Ohio St.3d 3, 7, 615 N.E.2d 617. Thus, the party asserting error bears the burden of affirmatively demonstrating the trial court's failure to perform its duty of independent analysis. Arnold v. Arnold, Athens App. No. 04CA36, 2005-Ohio-5272, at ¶13; Mahlerwein v. Mahlerwein, 160 Ohio App.3d 564, 2005-Ohio-1835, 828 N.E.2d 153, at ¶47. Further, simply because a trial court adopted the magistrate's decision does not mean that the court failed to exercise independent judgment. State ex rel. Scioto County Child Support Enforcement Agency v. Adams (July 23, 1999), Scioto App. No. 98CA2617. Juv.R. 40(D)(4) allows the trial court to adopt the magistrate's decision if the court fully agrees with it. Id., citing In re Dunn (1995), 101 Ohio App.3d 1, 8, 654 N.E.2d 1303.

{¶ 19} In the case at bar, we do not believe that appellant has pointed to any circumstances present in the record to show that the trial court failed to independently review the magistrate's decision. Simply because the trial court did not issue a lengthy

decision that outlined its reasons for adopting the magistrate's decision does result in the conclusion that the court merely "rubber-stamped" the magistrate's decision.

{¶ 20} We next address appellant's argument that the trial court failed to consider all of the relevant best interest factors and that appellant was the child's primary caretaker.

{¶ 21} Initially, we recognize that in the case sub judice the trial court did not issue detailed findings of fact and conclusions of law. Because appellant did not request the court to do so, however, the court had no independent obligation to issue findings of fact and conclusions of law.[1] Consequently, we will presume that the trial

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[1] Although appellant requested the magistrate to enter findings of fact and conclusions of law, she made no such request of the trial court. We also note that appellant did not make a Civ.R. 52 request for findings of fact and conclusions of law. Civ.R. 52 states: "When questions of fact are tried by a court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law." The failure to request findings of fact and conclusions of law ordinarily results in a waiver of the right to challenge the trial court's lack of an explicit finding concerning an issue. See Pawlus v. Bartrug (1996), 109 Ohio App.3d 796, 801, 673 N.E.2d 188; Wangugi v. Wangugi (Apr. 12, 2000), Ross App. No. 2531; Ruby v. Ruby (Aug. 11, 1999), Coshocton App. No. 99CA4. When a party fails to request findings of fact and conclusions of law, we must generally presume the regularity of the trial court proceedings. See, e.g., Bunten v. Bunten (1998), 126 Ohio App.3d 443, 447, 710 N.E.2d 757; see, also, Cherry v. Cherry (1981), 66 Ohio St.2d 348, 356, 421 N.E.2d 1293; Security Nat. Bank and Trust Co. v. Springfield City Sch. Dist. Bd. of Educ. (Sept. 17, 1999), Clark App. No. 98-CA-104; Donese v. Donese (April 10, 1998), Green App. No. 97-CA-70. In the absence of findings of fact and conclusions of law, we generally must presume that the trial court applied the law correctly and must affirm if some evidence in the record supports its judgment. See, e.g., Bugg v. Fancher, Highland App. No. 06CA12, 2007-Ohio-2019, at ¶10, citing Allstate Financial Corp. v. Westfield Serv. Mgt. Co. (1989), 62 Ohio App.3d 657, 577 N.E.2d 383; see, also, Yocum v. Means, Darke App. No. 1576, 2002-Ohio-3803, at ¶7 ("The lack of findings obviously circumscribes our review."). As the court explained in Pettet v. Pettet (1988), 55 Ohio App.3d 128, 130, 562 N.E.2d 929:

> "[W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position superior

court considered all relevant best interest factors and will also presume the regularity of the trial court proceedings, in the absence of evidence to the contrary.

{¶ 22} When "an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court." Bechtol v. Bechtol (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus; see, also, Davis v. Flickinger (1997), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159. Furthermore, a reviewing court should afford the utmost deference to a trial court's decision regarding child custody matters. See, e.g., Miller v. Miller (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846. Consequently, absent an abuse of discretion, a reviewing court will not reverse a trial court's decision regarding child custody matters. See, e.g., Bechtol, supra.

{¶ 23} In Davis, the court defined the abuse of discretion standard that applies in custody proceedings:

> "'Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed

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> to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence. The message is clear: If a party wishes to challenge the* * * judgment as being against the manifest weight of the evidence he had best secure separate findings of fact and conclusions of law. Otherwise his already 'uphill' burden of demonstrating error becomes an almost insurmountable 'mountain.'"

See, also, Bugg; McClead v. McClead, Washington App. No. 06CA67, 2007-Ohio-4624.

> as being against the weight of the evidence by a reviewing court. (Trickey v. Trickey [1952], 158 Ohio St. 9, 47 O.O. 481, 106 N.E.2d 772, approved and followed.)' [Bechtol v. Bechtol (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus].
>
> The reason for this standard of review is that the trial judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page. As we stated in Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80-81, 10 OBR 408, 410-412, 461 N.E.2d 1273, 1276-1277:
>
> 'The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. * * *
>
> * * *
>
> * * * A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. The determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal, especially to the extent where the appellate court relies on unchallenged, excluded evidence in order to justify its reversal.'
>
> This is even more crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well."

Id. at 418-419. Thus, reviewing courts should give great deference to trial court child custody decisions. Pater v. Pater (1992), 63 Ohio St.3d 393, 396, 588 N.E.2d 794. Additionally, because child custody issues involve some of the most difficult and agonizing decisions that trial courts are required to decide, courts must have wide latitude to consider all of the evidence and appellate courts should not disturb a trial court's judgment absent a showing of an abuse of that discretion. See Davis, 77 Ohio St.3d 418; Bragg v. Hatfield, 152 Ohio App.3d 174, 787 N.E.2d 44, 2003-Ohio-1441, at

¶24; Hinton v. Hinton, Washington App. No. 02CA54, 2003-Ohio-2785, at ¶9; Ferris v. Ferris, Meigs App. No. 02CA4, 2003-Ohio-1284, at ¶20.

{¶ 24} When allocating parental rights and responsibilities, R.C. 3109.04(F)(1) requires that the trial court to consider the child's best interest. The statute provides:

> (F)(1) In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall 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;
>
> (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;
>
> * * * *.

{¶ 25} In the case at bar, we conclude that the trial court did not abuse its discretion by designating appellee as the child's custodial parent who would serve the child's best interest. First, we presume the regularity of the trial court proceedings and that the court considered all relevant factors. Second, the record reveals that both parents love the child and are capable parents. The court found, however, that appellant's mental health issues and her past history (including denying appellee court-ordered visitation) weighed against designating her the custodial parent.

Appellant's blatant disregard of the court-ordered visitation demonstrates that she may be unlikely to facilitate future court-ordered visitation were she designated the custodial parent. Again, we are unable to conclude that the trial court abused its discretion in weighing the best interest factors and in deciding to designate appellee the custodial parent.

{¶ 26} Moreover, we disagree with appellant that the trial court failed to consider that she had been the child's primary caretaker. Although not an enumerated statutory factor, a party's role as a primary caretaker is nevertheless a relevant factor to be considered in the best interest analysis. See Carr v. Carr, Washington App. No. 00CA26, 2001-Ohio-2466; Holm v. Smilowitz (1992), 83 Ohio App.3d 757, 776, 615 N.E.2d 1047; Thompson v. Thompson (1987), 31 Ohio App.3d 254, 259, 511 N.E.2d 412. However, a trial court should not rely on a determination of the primary caretaker as a substitute for a searching factual analysis of the relative parental capabilities of the parties, and the psychological and physical necessities of the children. Carr; Thompson. The primary caregiver doctrine is one factor that the court must consider in determining which parent will be the residential parent, but it is not given presumptive weight over other relevant factors. Carr; Thompson; Winters v. Winters (Feb. 24, 1994), Scioto App. No. 2112.

{¶ 27} In the case sub judice, we believe that even if the evidence reveals that appellant was indeed the child's primary caretaker, the trial court nonetheless reasonably could have determined that her actions, including her defiance of the court-ordered visitation, rendered appellee the best choice to safeguard the child's best interest, which includes visitation with both parents.

{¶ 28} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶ 29} Appellant combines the argument for her second and third assignments of error.[2] In her second assignment of error, appellant alleges that the trial court abused its discretion by failing to award her equal parenting time with the child. In her third assignment of error, appellant argues that the trial court erred by failing to award her reasonable parenting time with the child in accordance with the court's standard companionship schedule.

{¶ 30} Initially, we again note that appellant did not request findings of fact and conclusions of law. We, therefore, will presume the regularity of the trial court proceedings and that the court considered the relevant statutory factors. As with child custody matters, a trial court possesses broad discretion when allocating parenting time, i.e., a non-custodial or non-residential parent's visitation rights. Carr v. Carr, Washington App. No. 00CA26, 2001-Ohio-2466; Burik v. Johnson (Feb. 12, 1997), Pike App. No. 96CA570. Thus, an appellate court will not disturb a trial court's decision

[2]We note that while appellate courts may jointly consider two or more assignments of error, the parties do not have the same option in presenting their arguments. See, e.g., State v. Marcinko, Washington App. No. 06CA51, 2007-Ohio-1166, at ¶20; State v. Bloomfield, Ross App. No. 03CA2720, 2004-Ohio-749, at ¶10, fn.2. Appellate courts may thus disregard any assignments of error that are not separately argued. App.R. 12(A)(2). Consequently, we would be within our authority to simply disregard appellant's second and third assignments of error and summarily overrule them. See Park v. Ambrose (1993), 85 Ohio App.3d 179, 186, 619 N.E.2d 469; State v. Caldwell (1992), 79 Ohio App.3d 667, 677, 607 N.E.2d 1096, at fn.3. Nevertheless, in the interests of justice, we will review appellant's second and third assignments of error. See In re Jack Fish & Sons Co., Inc., 159 Ohio

regarding visitation absent an abuse of discretion. See, e.g., Booth v. Booth (1989), 44 Ohio St.3d 142, 144.

{¶ 31} R.C. 3109.051 provides the following guidance to trial courts when determining whether to grant parenting time:

> (D) In determining whether to grant parenting time to a parent pursuant to this section or section 3109.12 of the Revised Code or companionship or visitation rights to a grandparent, relative, or other person pursuant to this section or section 3109.11 or 3109.12 of the Revised Code, in establishing a specific parenting time or visitation schedule, and in determining other parenting time matters under this section or section 3109.12 of the Revised Code or visitation matters under this section or section 3109.11 or 3109.12 of the Revised Code, the court shall consider all of the following factors:
>
> (1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation if that person is not a parent, sibling, or relative of the child;
>
> (2) The geographical location of the residence of each parent and the distance between those residences, and if the person is not a parent, the geographical location of that person's residence and the distance between that person's residence and the child's residence;
>
> (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;
>
> (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 or companionship or visitation by the grandparent, relative, or other person who requested companionship or visitation, 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;

App.3d 649, 2005-Ohio-545, 825 N.E.2d 171.

> (10) Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights, and with respect to a person who requested companionship or visitation, the willingness of that person to reschedule missed visitation;
>
> (11) In relation to parenting time, whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; and whether 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;
>
> (12) In relation to requested companionship or visitation by a person other than a parent, whether the person previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether the person, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code 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 previously has been convicted of an 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; and whether there is reason to believe that the person has acted in a manner resulting in a child being an abused child or a neglected child;
>
> (13) 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;
>
> (14) Whether either parent has established a residence or is planning to establish a residence outside this state;
>
> (15) In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court;
>
> (16) Any other factor in the best interest of the child.

{¶ 32} In the case at bar, we are unable to conclude that in the case sub judice the trial court abused its discretion when it allocated parenting time. We agree with the argument that appellee presents in his appellate brief, i.e., that the court determined

that appellant's demeanor and her deceptive behavior would be detrimental to the child's well-being and, thus, her time with the child should be minimized until she resolves those issues. The magistrate noted that appellant had an outburst during a visitation exchange while the child was present. The court could have thus determined that until appellant could demonstrate better judgment, visitation exchanges should be minimized to prevent any negative effects upon the child. We emphasize that the trier of fact is in the best position to judge the parties' demeanor, and that we, a court reviewing a cold record, are not well-suited to judging a party's demeanor. In this case, after our review of the record we simply cannot conclude that the trial court abused its discretion by concluding that the child's best interest would be served by limiting appellant's visitation. Even if we may have decided the parties' visitation schedule differently, the abuse of discretion standard of review does not allow us to simply substitute our judgment for that of the trial court.

{¶ 33} Furthermore, to the extent appellant claims that she has resolved her alleged mental health issues by undergoing counseling, she may file in the future a motion to modify the court's visitation order.

{¶ 34} Accordingly, based upon the foregoing reasons, we overrule appellant's second and third assignments of error.

III

{¶ 35} In her fourth assignment of error, appellant asserts that the trial judge abused his discretion by failing to recuse himself from presiding over the proceedings. She alleges that the trial judge was biased because he had a social relationship with appellee's immediate family.

{¶ 36} "Judicial bias is 'a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by law and the facts.'" In re Adoption of C.M.H., Hocking App. No. 07CA23, 2008-Ohio-1694, at ¶34, quoting State ex rel. Pratt v. Weygandt (1956), 164 Ohio St. 463, paragraph four of the syllabus. See, also, Cleveland Bar Association v. Cleary (2001), 93 Ohio St.3d 191, 201; Hirzel v. Ooten, Meigs App. Nos. 06CA10, 07CA13, 2008-Ohio-7006 at ¶62.

{¶ 37} As noted in In re Adoption of C.M.H. and Hirzel, we have "held that such challenges of judicial prejudice and bias are not properly brought before this Court. 'Rather, appellant must make such a challenge under the provisions of R.C. 2701.03, which requires an affidavit of prejudice to be filed with the Supreme Court of Ohio.'" Hirzel at ¶63, quoting Baker v. Ohio Dept. of Rehab. and Corr. (2001), 144 Ohio App.3d 740, 754. This court, an intermediate appellate court, does not have the authority to void the judgment of a trial court because of alleged judicial bias.

{¶ 38} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J. & McFarland, J.: Concur in Judgment & Opinion
For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.