[Cite as *McCoy v. Sullivan*, 2016-Ohio-8276.]

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

BRENT McCOY,	:	
Plaintiff-Appellee,	:	Case No. 16CA3751
vs.		
VERONICA SULLIVAN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Frederick C. Fisher, Jr., Ironton, Ohio, for appellant.

Roxanne Hoover, Portsmouth, Ohio, for appellee.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-8-16
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court, Domestic Relations Division, judgment that designated Brent McCoy, plaintiff below and appellee herein, the residential parent and legal custodian of four-year-old G.S.M.

{¶ 2} Appellant, Veronica Sullivan (G.S.M.'s biological mother), assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE COURT'S FAILURE TO TAKE INTO CONSIDERATION THE APPELLANT BEING THE MINOR CHILD'S PRIMARY CARETAKER FOR HER ENTIRE LIFE. [SIC]"

SECOND ASSIGNMENT OF ERROR:

"THE COURT'S CONSIDERATION OF THE GUARDIAN AD LITEM'S REPORT AND TESTIMONY DESPITE BEING BELOW MINIMUM STANDARDS SET FORTH BY THE OHIO SUPREME COURT WAS ERROR. [SIC]"

THIRD ASSIGNMENT OF ERROR:

"THE COURT'S APPLICATION OF THE RELEVANT FACTS TO THE REMAINING FACTORS UNDER THE BEST INTEREST STANDARD ENUMERATED IN [R.C] ORC § 3109.04(F), WAS IN ERROR."

{¶ 3} After appellant and appellee met, they twice engaged in sexual relations. In 2012, appellant gave birth to G.S.M. Two years later, on September 9, 2014, appellee filed a complaint to "determine parentage and vest custody of the minor child with plaintiff." Appellant filed a motion for child support on October 24, 2014. On October 27, 2014, the parties agreed to establish paternity, establish appellee's visitation and deferred the remaining issues to mediation. On April 7, 2015 the magistrate held a hearing to consider the allocation of parental rights and responsibilities.

{¶ 4} At the hearing, appellee testified that he is a second grade teacher and has taught for eight years. Appellee also explained that after learning that G.S.M. may be his child, he submitted to a DNA test and later filed his complaint because he had "concerns about her stability, her structure, and her safety." Appellee also feared that appellant would again move out of state and he that would not get to see his daughter.

{¶ 5} Appellant testified that she met her boyfriend, Gene Brown, when she was five months pregnant with appellee's child, and while married to William O'Toole. She explained that she listed O'Toole's name on the birth certificate, but gave G.S.M. her boyfriend's surname (Brown). Appellant also stated that although she corrected G.S.M. when she calls appellant's boyfriend "daddy Gene," she "would actually like for her to still call him daddy."

{¶ 6} Appellant acknowledged that she moved out of state for three weeks, and that she returned to Ohio because her HUD voucher would not transfer. Further, appellant also acknowledged that she filed a request for a civil protection order against appellee, but was later determined to be without merit.

{¶ 7} During the course of the testimony, appellant also answered questions about parenting her other children. For example, appellant stated that she had her middle daughter's IEP (Individualized Education Program) terminated because she was taking her to a different school, and that "[t]hey removed it but they stated it was against their judgment to do it, do so." Appellant also described her middle daughter's hospitalization: "It wasn't actually suicide, it was a pencil. A, not,[sic]a pencil that she broke in class and barely scratched her skin. She just wanted the attention that it got from some of her friends saying oh wow I cut myself so she thought she would make it up, I tried to kill myself * * * [t]o get attention." Appellant's mother testified that appellant's middle daughter was hospitalized for an attempted suicide, and that the same daughter also had an interest in vampires and werewolves similar to appellant.

{¶ 8} During the course of the hearing, appellant also explained that she likes "paranormal, vampires, werewolves, It's just interesting [* * *] I used to do paranormal hunts like where you go do (inaudible) and graveyards and stuff." Appellant also stated that she

thought it would be "cool" to have dental implants with one tooth "slightly longer like a vampire," and that she used an internet fund-raising site in an attempt to raise $350,000 for dental work. Evidence also documented appellant's "liking" of Facebook pages such as "Satanist," "Occult," "Demonology," "Wolfs Are Awesome," "WereWolf," "GET Vampire Wars Book of Secrets," "Vampires," "Horror CORP," and "Creepy and disturbing * * *." Additional evidence was introduced to support appellant's fascination with vampires, including a photograph of appellant's car with a sticker denoting "VAMPYRE [sic] GIRL" and a Facebook post that noted her interest in vampire teeth implants.

{¶ 9} The last witness to testify was Charles Kirby, the guardian ad litem. Although Kirby acknowledged that this was a difficult case, he testified that it is his belief that appellee's home situation is a better environment for G.S.M. Kirby noted that when he went to appellee's house, he observed "multiple educational toys [G.S.M.] was playing with." He also recounted observing appellee play a word game with G.S.M. and highlighted the fact that both appellee and his mother are teachers. Kirby contrasted appellee's home environment with appellant's home environment, stating that when he visited appellant's home, Gene Brown watched television while G.S.M. tried to fall asleep, referring to it as "just [* * *] two (2) different worlds [* * *]." Further, Kirby testified that after speaking to both parties, "it was clear to me [* * *] that [appellee] is a much more structured individual than [appellant] is." Kirby also highlighted appellee's long work history and home environment, and noted that appellee's house is very organized in contrast to appellant's house. "[I]t struck me [* * *] as an individual that goes to work every day, same job same employer [* * *] you know gets home has a set dinner time." "[I]t again struck me as [appellee] would be much more structured [* * *] be able to offer more

structured environment [* * *]for [G.S.M.].”

{¶ 10} On May 26, 2015, the magistrate found appellee to be the child’s natural and biological father. The magistrate additionally (1) changed the child’s name, (2) designated appellee the child’s residential parent and legal custodian, and (3) granted appellant parenting time. The magistrate, based on the testimony adduced at the hearing and after a review of the guardian ad litem’s report, further noted that the “Mother previously attempted to deny the Father contact with the minor child by filing a Civil Protection Order against the Father. This CPO was denied by this Court and the Court found that it did not have merit.” Additionally, the magistrate noted that he found “the testimony of the Father to be more credible than the testimony of the Mother.”

{¶ 11} On June 5, 2015, appellant objected to the magistrate’s decision and asserted, inter alia, that (1) her filing of the civil protection order was not baseless because she believed that her child was in a frightened state when she returned from an overnight with her father, (2) her fascination with vampires has little to do with the matter, (3) she did not lack insight into her middle daughter’s mental health issues, and (4) appellee will not provide a more stable home than she for G.S.M.

{¶ 12} On December 1, 2015, the trial court overruled all objections but one. The court sustained an objection that related to the magistrate’s mistake with respect to the child’s name, and the magistrate’s failure to issue a separate finding that a change in the child’s last name is in the child’s best interest. As a result, the court instructed the magistrate to hold a hearing regarding the child’s name. Subsequently, the parties agreed to change the child’s name to G.S.M.

{¶ 13} On April 7, 2016, the trial court overruled appellant's objections and adopted the magistrate's May 26, 2015 decision. The court (1) found appellee to be the child's natural and biological father, (2) changed the name of the child to G.S.M., (3) designated appellee the residential parent and legal custodian, (4) designated appellant the non-residential parent and granted her parenting time, (5) established no child support due to the parties' income disparities, (6) required appellee to obtain health insurance for G.S.M., and (7) ordered the parties to take tax deductions every other year. This appeal followed.

I

{¶ 14} Appellant's first and third assignments of error both challenge the propriety of the trial court's decision to designate appellee the child's residential parent. For ease of discussion, we combine them.

{¶ 15} In her first and third assignments of error, appellant argues, in essence, that the trial court's decision to designate appellee the child's residential parent is against the manifest weight of the evidence. In her first assignment of error, appellant contends that the trial court failed to consider her role as the child's primary caregiver. In her third assignment of error, appellant challenges the trial court's R.C. 3109.04(F)(1) best interest finding.

A

STANDARD OF REVIEW

{¶ 16} Initially, we note that 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*, 49 Ohio St.3d 21, 550

N.E.2d 178 (1990), syllabus; see also *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). Furthermore, a reviewing court should afford the utmost deference to a trial court's decision regarding child custody matters. *Miller v. Miller*, 27 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). Therefore, absent an abuse of discretion, a reviewing court will not reverse a trial court's decision regarding child custody. *Bechtol*. Further, deferring to the trial court on matters of credibility 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." *Davis*, 77 Ohio St.3d at 419, 674 N.E.2d at 1163.

B

R.C. 3109.04

{¶ 17} R.C. 3109.04(B)(1) requires a trial court that is considering the allocation of parental rights and responsibilities to consider the child's best interest. R.C. 3109.04(F)(1) states that in determining a child's best interest, a court must "consider all relevant factors, including, but not limited to" the following:

> (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) Whether either parent or any member of the household of 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 an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code 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; 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;
> (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."

{¶ 18} In the case at bar, after our review of the record we believe that (1) the evidence adduced at the hearing amply supports the trial court's judgment and (2) the trial court's designation of appellee as the child's residential parent does not constitute an abuse of discretion.

{¶ 19} One argument appellant raises is that the trial court failed to fully consider her role as the child's primary caregiver. We believe, however, that the record reveals that the court did, in fact, fully consider appellant's role. The trial court wrote in its April 7, 2016 decision that "the Magistrate was well aware that the minor child was in the Defendant's care and custody during the child's tender years. Moreover, as the Defendant aptly stated, 'statutory factors preclude any sort of presumptive quality being given to the tender years doctrine.'"

{¶ 20} As we held in *Liming v. Damos*, 2009-Ohio-6490, 2009 WL 4725982, ¶¶ 21-22 (4th Dist. Athens), "[a]lthough 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, 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 primary caretaker determination 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.* Thus, the primary caregiver doctrine is but one factor that a court should consider in order to determine which parent should be the residential parent, but it should not given presumptive weight over other relevant factors. *Carr; Thompson*; *Winters v. Winters* (Feb.24, 1994), Scioto App.No. 2112." That was the trial court's approach when it considered the evidence in this case. We therefore disagree with appellant that the trial court failed to fully consider her role in the child's life.

{¶ 21} Appellant next argues that the trial court's determination that it is in the child's best interest to designate appellee the child's residential parent constitutes an abuse of discretion. In particular, appellant argues that the court appeared to put considerable weight on appellant's filing of a civil protection order against appellee, which included the child as a protected person. Appellant argues that the record reflects no competent evidence that appellee would be more likely to facilitate parenting time over that of the appellant.

{¶ 22} In engaging in its best interest analysis, the trial court reviewed the magistrate's decision and indicated that the minor child has had a positive relationship with both parents, but emphasized that the "father has a more stable home environment and is surrounded by loving and caring relatives, including several teachers and educators." Further, the magistrate explained that "the Father's family will be able to provide many educational opportunities and developmental advantages for the minor child."

{¶ 23} In analyzing the mental and physical health of all parties involved, the magistrate noted that while appellee admitted to taking medication for anxiety, "from all indications this appears to be under control at the present time." The magistrate further commented on the appellant's fascination with vampires, her middle child's struggles with mental health issues, and that appellee is more likely to facilitate parenting time, noting that appellant "continues to allow the minor child to refer to [appellant's] boyfriend as 'daddy' and has previously attempted to deny the Father contact with the minor child by filing a Civil Protection Order against the Father."

{¶ 24} The trial court concluded, after having reviewed the evidence, that the magistrate properly considered and weighed the evidence and properly applied the usual tests of credibility. After our review, we conclude that (1) the trial court thoroughly and appropriately considered the factors enumerated in R.C. 3109.04(F)(1), (2) the trial court's designation of the appellee as the child's residential and custodial parent does not constitute an abuse of discretion and (3) the evidence adduced at the hearing amply supports the trial court's conclusion.

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

II

{¶ 26} In her second assignment of error, appellant asserts that the trial court erred by considering the guardian ad litem's report and testimony. In particular, she contends that the guardian ad litem's investigation and report are not "at least done at the minimum standards set forth by the Ohio Supreme Court" because the guardian ad litem did not visit appellant's new place of residence, and that his recommendation is based primarily on appellee's "better financial

situation."

{¶ 27} Initially, we point out that appellant did not specifically object to the trial court considering the guardian ad litem's report and testimony. At the beginning of the hearing, the court inquired "does either party have any opposition to the Court considering a report err the report and recommendations from Mr. Kirby?" Appellant's counsel replied, "No your honor. [sic]"

{¶ 28} Generally, "'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.'" *State v. Quarterman*, 130 Ohio St.3d 464, 2014 -Ohio- 4034, 19 N.E.3d 900, ¶ 15, citing *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. Consequently, we are limited to plain-error review of this issue concerning the guardian ad litem's report and investigation. Courts should exercise extreme caution when invoking the plain error doctrine, especially in civil cases. Courts should therefore limit applying the doctrine to cases "involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process * * *." *Goldfuss v. Davidson*, 79 Ohio St.3d, 122-123, 679 N.E.2d 1099 (1997).

{¶ 29} After our review, we do not believe that the case sub judice warrants the application of the plain error doctrine. Appellant argues that the guardian ad litem's report and testimony fell below the minimum standards of Sup.R. 48(D)(13). Sup.R. 48 sets forth appointment procedures, report requirements, and roles and responsibilities for guardians ad

litem. In particular, Sup.R. 48(D)(13) provides requirements for the guardian ad litem's responsibility to make an "informed recommendation as to the child's best interest."

{¶ 30} The "Rules of Superintendence are designed (1) to expedite the disposition of both criminal and civil cases in the trial courts of this state, while at the same time safeguarding the inalienable rights of litigants to the just processing of their causes; and (2) to serve that public interest which mandates the prompt disposition of all cases before the courts." *Nolan v. Nolan*, 4th Dist. Scioto No. No. 11CA3444, 2012-Ohio-3736, citing *State v. Singer*, 50 Ohio St.2d 103, 109-110, 362 N.E.2d 1216 (1977). Courts have interpreted the Rules of Superintendence as general guidelines for the conduct of the courts that do not create substantive rights. *Singer* at 110 (stating that the Rules of Superintendence are not meant "to alter basic substantive rights"); *see also In re K.G.*, 9th Dist. Wayne No. 10CA16, 2010-Ohio-4399, at ¶ 11; *Allen v. Allen*,11th Dist. Trumbull No. 2009-T-0070, 2010-Ohio-475, at ¶ 31. "They are not the equivalent of rules of procedure and have no force equivalent to a statute. They are purely internal housekeeping rules which are of concern to the judges of the several courts but create no rights in individual defendants." *Nolan.* Accordingly, application of the plain error doctrine is not warranted in this case.

{¶ 31} Assuming, arguendo, that appellant had properly raised this issue, appellate courts will not reverse trial court decisions to admit a guardian ad litem's testimony and recommendation unless the court abused its discretion. *Miller v. Miller*, 4th Dist. Athens 2014, No. 14CA6, 2014-Ohio-5127. In the case sub judice, we do not believe that the trial court abused its discretion by considering the guardian ad litem's testimony and recommendation. Appellee had the opportunity to fully question the guardian ad litem about his recommendation

and the extent and quality of his investigation. Although we recognize that the guardian ad litem did not visit appellant's new home, he testified that based on the photographs that he observed, the new home appeared to be appropriate. Further, we find no evidence to support the argument that the guardian ad litem made his decision simply based upon the parties' financial positions, but rather on his opinion that appellee will provide a more stable and structured environment.

{¶ 32} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second 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 Scioto County Common Pleas Court, Domestic Relations 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.

Harsha, J.: Concurs in Judgment & Opinion
McFarland, J.: Concurs in Judgment Only

For the Court

_____
Peter B. Abele, Judge

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.