[Cite as *Sarchione-Tookey v. Tookey*, 2018-Ohio-2716.]

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

GINA SARCHIONE-TOOKEY, nka SARCHIONE,	:	Case No. 17CA41
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
JAMES TOOKEY,	:	
Defendant-Appellant.	:	**RELEASED: 06/28/2018**

APPEARANCES:

Susan L. Gwinn, Athens, Ohio, for appellant.[1]

Harsha, J.

{¶1} James Tookey appeals from the post-divorce judgment granting him limited supervised parenting time with his two minor sons. Tookey asserts that the trial court erred by failing to correctly apply the appropriate statutory parenting provisions because it did not provide him with more frequent and continuing contact with his sons, and did not establish a specific parenting time or visitation schedule for him.

{¶2} Tookey points to the testimony of his expert to support his contentions. Although Tookey's expert testified that increased parenting time and communication between Tookey and his children would be in the best interest of the children, he also conceded that his primary job was to assess the threat level that Tookey might pose to the children. Likewise he did not witness the children's "explosive behavior" and "act[ing] out violently" or other behavioral problems after visits with Tookey. In addition because the parties reside in different states and his ex-wife continues to suffer trauma

[1] Sarchione acted pro se during the trial court proceedings and did not file an appellate brief.

from the domestic violence she experienced during her marriage to Tookey, the trial court was justified in ordering flexible parenting time based upon the parties' schedules; the order was sufficiently specific to comply with the statute. We reject Tookey's assertion.

{¶3} Next Tookey contends that the trial court erred in ruling on his objections to the magistrate's decision on parenting time by misapplying R.C. 3109.051(D). But Tookey never specifically objected to the magistrate's discussion of those statutory factors. Thus Tookey forfeited all but plain error in the court's adoption of the magistrate's application of those factors. However, Tookey does not argue plain error. And he cannot establish error, much less plain error, because the trial court considered all of the statutory factors. Moreover, as the trier of fact, it did not need to accept all or any particular part of Tookey's expert's (or any other witness's) testimony. We reject this contention.

{¶4} Tookey also claims that the trial court lacked in personam jurisdiction over his sister Emma, who the court named in the parenting order as the "go-between" to relay communications between the parties and assist in making the necessary arrangements, i.e., time and place for the exchange of the children. However, Tookey again forfeited all but plain error by not raising this specific objection to the magistrate's decision. And he does not claim plain error on appeal. Moreover, he cannot establish error, much less plain error, because he has no standing to raise this claim on behalf of his sister in the absence of any evidence that he incurred any specific prejudice or injury by virtue of his sister's inclusion in the order. We find his claim to be meritless also.

{¶5} Finally Tookey argues that the trial court committed plain error in relying on the final guardian ad litem report as substantive evidence. Because the GAL report was not introduced into evidence and the guardian ad litem did not appear for the hearing and was not available for cross-examination, Tookey contends the court improperly relied upon the report. Tookey did not raise this specific objection to the magistrate's decision even though the magistrate relied on the report in determining the appropriate parenting-time award. So he forfeited all but plain error. We discern no plain error here because limitations on his visitation were supported by other evidence, including Sarchione's testimony that the children exhibited bad behavior following visits with him. Likewise, Caitlan Acre, a licensed professional counselor who had worked with Sarchione and the children, testified that the two boys had "explosive behavior" and they "often act[ed] out violently," which led her to recommend limited, therapeutic supervised visits. And the primary case that Tookey cites in support of this proposition was, in fact, not resolved on the basis of plain error. We reject his argument.

{¶6} We overrule Tookey's assignments of error and affirm the trial court's parenting-time order.

I. FACTS

{¶7} James Tookey ("Tookey") and Gina Sarchione-Tookey nka Sarchione ("Sarchione") were married and had two sons, born in 2002 and in 2005, respectively. In March 2014, the Athens County Court of Common Pleas granted a divorce to Sarchione, designated her the residential parent and legal custodian of the children, and ordered Tookey to pay child support. Tookey was incarcerated at the time of the divorce for crimes relating to his domestic abuse of Sarchione and another of her sons.

Therefore, the court suspended his parenting time and required Tookey to petition the court after his release from prison to establish parenting time with the children.

{¶8} In June 2015, Tookey obtained his release from prison upon serving his four-year sentence. A couple months later Tookey filed a motion for parenting time with his two children. In the next month Sarchione moved with the children to Colorado, claiming she was afraid that Tookey would harm her and the children based on his extensive past abuse of them. She did not notify the court or Tookey of their relocation.

{¶9} In June 2016, the trial court ordered Sarchione to permit Tookey to have supervised visitation with his two sons, to be arranged by Dr. Gregory Janson. The first 60-minute visit occurred in a mediation room in the Athens County Courthouse and the second 90-minute visit occurred in a Mexican restaurant in Athens. The children's guardian ad litem supervised a third visit, which occurred in a community center and park.

{¶10} A few months later the trial court held a hearing on Tookey's motion for parenting time and some other matters. Dr. Janson, an associate professor of child and family studies at Ohio University and a professional clinical counselor, testified that his job in the case was to assess the threat level that Tookey might pose to his children. He opined that the children suffered from "ambiguous loss" when they did not have contact with him for several years while he was incarcerated. According to Dr. Janson the abandonment of a parent "is probably the worst insult that a child can suffer," and can lead to bad behavior by the children like "acting out."

{¶11} Based on his supervision of Tookey's first two visits with his children and his interviews and evaluation of Tookey, Dr. Janson concluded that Tookey posed a

very low risk to the children; therefore visitation was in the children's best interest. Dr. Janson testified that he did not agree that Tookey had intermittent explosive disorder; instead, the doctor attributed his past bad behavior to being "a person who used a lot of drugs and * * * suffered from impaired judgment as a result of that." Although Dr. Janson acknowledged that Sarchione had a very real fear of Tookey because of his long history of abusing her, Dr. Jansen felt the best antidote to allay those fears was increased parenting time for Tookey and the children.

{¶12} Dr. Janson recommended that Tookey have contact with his children at least once or twice a week by telephone or Skype. He also recommended the standard parenting time for parents living far apart, e.g., four weeks during the summer. According to Dr. Janson, Tookey's sister Emma would be an appropriate person to oversee Tookey's future parenting time and she could intervene if she thought something inappropriate had occurred.

{¶13} Tookey lives in Athens, his mother lives in Pittsburgh, and his father and sister Emma live in California. His older son experiences intermittent epileptic seizures, but Tookey is willing to follow any physician orders and do whatever is necessary to provide adequate care for him. Tookey testified that after he was incarcerated, Sarchione broke off any communication between him and the children in 2012. When he was released from prison in 2016, he did not know where they were and had to hire a private investigator to locate them after they moved to Colorado. Since his release from prison, Tookey has abided by Sarchione's wishes that he not contact her directly because of her fear of him. Tookey took responsibility for his domestic abuse of

Sarchione; he spent his time in prison reflecting on his problems and participating in programs designed to help him.

{¶14} Sarchione testified that any visitation by Tookey with their children should be limited to therapeutic supervised visits, the children did not want extended visitation with him, extended visitation was not appropriate because they remained fearful of him, and they exhibited behavioral problems after visiting with him.

{¶15} Caitlan Acre, a licensed professional counselor who had been working with Sarchione and the children for a few months, testified that the children had "explosive behavior" that made them "often act out violently." She had seen the children immediately after their visits with Tookey, and Sarchione reported to her that their bad behavior was consistently more escalated following the visits. Because of the significant domestic violence that the children had witnessed, Acre recommended structured therapeutic supervised visits.

{¶16} Although she did not testify, the children's guardian ad litem, Sonya Marshall, filed three reports in the case. Marshall initially recommended that Tookey be awarded no parenting time pending further investigation, but in her final report, she recommended that: (1) Tookey have supervised parenting time with the children during the summer and Christmas vacation; (2) the visits be six hours long; (3) Tookey be permitted twice-weekly contact with the boys via Skype or similar application; and (4) Tookey should familiarize himself with his oldest son's medical needs.

{¶17} The magistrate issued a decision containing detailed findings of fact and conclusions of law. The magistrate recommended that Tookey receive the following supervised visitation with his two sons: (1) beginning in June 2017, two visits during the

summer when the boys are out of school, preferably in June and August, with each visit consisting of two six-hour daytime visits on consecutive days; (2) a visit over Christmas vacation consisting of two six-hour visits on consecutive days; (3) the visits should occur in Colorado and be supervised by Tookey's sister Emma; (4) Emma would be the go-between and relay communications between the parties and assist in arranging the time and place for the exchange of the children, with Tookey not to be present during the exchange; (5) Sarchione must keep Emma notified of her e-mail address to communicate; (6) Tookey had to become familiar with his oldest son's medical needs, with Sarchione providing Emma with necessary instructions to help Tookey care for his older son during parenting time; (7) Tookey would have contact with his sons via Skype or similar application once a week on Wednesdays at 7:00 p.m. as initiated by the children with Sarchione's help; and (8) the children must remain in counseling as long as deemed therapeutically necessary by the counselor.

{¶18} Tookey filed objections to the magistrate's decision and argued that the decision violated R.C. 3109.051 by failing to include more frequent and continuing contact with his children and by not including a specific parenting-time schedule. (*Id.*) Tookey also claimed that by ignoring the uncontroverted testimony of his expert, Dr. Janson, the magistrate's parenting-time decision was not in the children's best interests. (*Id.*) Tookey did not argue that the court misapplied the factors in R.C. 3109.051(D) in its de novo review of the record, that the court lacked personal jurisdiction over his sister Emma, or that the court erred in relying on the guardian ad litem reports as substantive evidence.

{¶19} The trial court overruled Tookey's objections to the magistrate's decision and entered a judgment adopting the magistrate's decision in its entirety, including the parenting-time provisions. (OP207) The court concluded that the magistrate duly considered Dr. Janson's opinion, but based upon other evidence, determined that a more limited provision of parenting time was appropriate. (*Id.*) The court also found that the parenting-time order was sufficiently specific. (*Id.*)

II. ASSIGNMENTS OF ERROR

{¶20} Tookey assigns the following errors for our review:

1. THE TRIAL COURT MISAPPLIED O.R.C. § 3109.051(D) IN ITS DE NOVO REVIEW OF THE RECORD.

2. THE TRIAL COURT MISAPPLIED O.R.C. § 3109.051(A), (C), AND (D) IN ITS ORDER OF VISITATION.

3. THE TRIAL COURT LACKED *IN PERSONAM* JURISDICTION OVER A PARTY NAMED IN ITS ORDER, RENDERING THE ORDER UNENFORCEABLE AND VOID.

4. THE TRIAL COURT COMMITTED PLAIN ERROR IN RELYING UPON THE GUARDIAN AD LITEM REPORT AS SUBSTANTIVE EVIDENCE WITHOUT NOTICE TO THE APPELLANT, WHEN THE REPORT WAS NOT INTRODUCED INTO EVIDENCE AND WHEN THE GUARDIAN AS LITEM FAILED TO APPEAR AT THE HEARING AND WAS NOT AVAILABLE FOR EXAMINATION.

III. STANDARD OF REVIEW

{¶21} "Appellate courts generally review 'the propriety of a trial court's determination in a domestic relations case' under the 'abuse of discretion' standard." *Clifford v. Skaggs*, 4th Dist. Gallia No. 17CA6, 2017-Ohio-8597, ¶ 9, quoting *Booth v. Booth*, 44 Ohio St.3d 142, 144, 541 N.E.2d 1028 (1989) (abuse of discretion standard applies to child support, custody, visitation, spousal support, and division of marital property). Under this highly deferential standard, we must affirm the decision of the trial

court unless it is unreasonable, arbitrary, or unconscionable. *See State v. Beasley*, __ Ohio St.3d __, 2018-Ohio-16, __ N.E.3d __, ¶ 12, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶22} "This standard is warranted because trial courts must have wide latitude in considering the evidence and assessing the parties' demeanor, attitude, and credibility." *Robinette v. Bryant*, 4th Dist. Lawrence No. 14CA28, 2015-Ohio-119, ¶ 32, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 418-419, 674 N.E.2d 1159 (1997). The factfinder can accept or reject all, part, or none of the testimony of each witness. *Jenkins v. Jenkins*, 4th Dist. No. 14CA30, 2015-Ohio-5484, ¶ 23; *see also McKay Mach. Co. v. Rodman*, 11 Ohio St.2d 77, 82, 228 N.E2d 304 (1967) ("The [trier of fact] can accept all, part, or none of the testimony of any witness whether it is expert opinion or eyewitness fact, whether it is merely evidential or tends to prove the ultimate fact").

{¶23} The entry that Tookey contests is the trial court's judgment overruling his objections to the magistrate's decision. We review the trial court's decision to adopt, reject, or modify a magistrate's decision under an abuse of discretion standard. *See Robinette* at ¶ 32, citing *In re S.H.*, 8th Dist. Cuyahoga No. 10091, 2014-Ohio-4476, ¶ 7.

{¶24} Under Civ.R. 53(D)(3)(b)(i), a party must file objections within 14 days of the filing of the magistrate's decision. Thus a "party forfeits or waives the right to challenge the trial court's adoption of a factual finding or legal conclusion unless the party objects in accordance with Civ.R. 53(D)(3)(b)." *See Faulks v. Flynn*, 4th Dist. Scioto No. 13CA3568, 2014-Ohio-1610, ¶ 17 and cases cited; Civ.R. 53(D)(3)(b)(iv). Any objections must be "specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). And objection to findings of fact must be "supported by a transcript

of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." Civ.R. 53(D)(3)(b)(iii). "Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." Civ.R. 53(D)(3)(b)(iv). " 'In essence, the rule is based on the principle that a trial court should have a chance to correct or avoid a mistake before its decision is subject to scrutiny by a reviewing court.' " *Liming v. Damos*, 4th Dist. Athens No. 08CA34, 2009-Ohio-6490, ¶ 14, quoting *Barnett v. Barnett*, 4th Dist. Highland No. 04CA13, 2008-Ohio-3415, ¶ 16.

IV. LAW AND ANALYSIS

A. Application of R.C. 3109.051(A), (C), and (D)

{¶25} For ease of analysis we initially consider Tookey's second assignment of error. He asserts that the trial court erred by failing to correctly apply R.C. 3109.051(A), (C), and (D) by not providing for more frequent and continuing contact with his children, and failing to establish a specific parenting time for his visitation. Tookey's claims that the trial court failed to follow statutory requirements necessitate interpretation of the statute, which presents a question of law that we review de novo. *See Clifford*, 2017-Ohio-8597, at ¶ 39, quoting *Hayslip v. Hanshaw*, 2016-Ohio-3339, 54 N.E.3d 1272, ¶ 12 (4th Dist.).

{¶26} Under R.C. 3109.051(A), the court "shall make a just and reasonable order or decree permitting each parent who is not the residential parent to have parenting time with the child at the time and under the conditions that the court directs,

unless the court determines that it would not be in the best interest of the child to permit that parent to have parenting time with the child and includes in the journal its findings of fact and conclusions of law. *Whenever possible, the order or decree permitting the parenting time shall ensure the opportunity for both parents to have frequent and continuing contact with the child, unless frequent and continuing contact by either parent with the child would not be in the best interest of the child. The court shall include in its final decree a specific schedule of parenting time for that parent.* * * *" (Emphasis added.) R.C. 3109.051(C) and (D) refer to factors for the trial court to consider "when establishing a specific parenting time or visitation schedule."

{¶27} First Tookey argues that the trial court violated R.C. 3109.051(A) by not awarding him more frequent and continuing parenting time with his children in the absence of a finding or evidence that additional parenting time would not be in their best interest. Although Tookey relied on Dr. Janson's testimony to support his request for parenting time, Dr. Janson conceded that his role in the case was to assess the threat level that Tookey posed to the children. And he acknowledged that Sarchione had a real fear of Tookey because of his long history of abusing her. Sarchione and the family's counselor testified about the children's explosive and violent behavior following their supervised visits with Tookey and recommended limited, therapeutic supervised visits.

{¶28} Under the statute the court is required to make specific findings that it is not in the child's best interest to permit parenting time if it is to totally preclude such contact. However, there is no mandate for a specific finding where contact is minimized but not precluded. The trial court's decision overruling Tookey's objections reflects its

implicit finding that more parenting time than ordered would not be in the children's best interest. We find no violation of R.C. 3109.051(A) in the court's award of parenting time; moreover its judgment was supported by competent, credible evidence in the record.

{¶29} Next Tookey contends that the trial court's parenting-time order violated R.C. 3109.051(A), (C), and (D) by not establishing a sufficiently "specific schedule of parenting time." The trial court granted parenting time based in part on the unique challenges involved in the case:

> Regarding the alleged lack of specificity in the scheduling order, this case involves a supervised visitation order in which one party lives in Ohio, the proposed supervisor lives in California and the mother and children live in Colorado. It would be imprudent to issue a rigid order which failed to take into account these unique factors. The Magistrate's order clearly establishes the permitted time, and accounts for the travel requirements of the several involved parties. Given the geographic distance between Movant in Ohio, his sister in California and the children in Colorado, it was entirely appropriate to allow for some minor degree of flexibility in arranging for the visits within the context of a specific order.

{¶30} The specific schedule requirement of R.C. 3109.051 should be appropriate to the parties involved and may involve some flexibility. *See Gaul v. Gaul*, 11th Dist. Ashtabula No. 2009-A-0011, 2010-Ohio-2156, ¶ 40, citing *Farias v. Farias*, 5th Dist. Licking No. 92-CA-61, 1992 WL 398085, *2 (Dec. 10, 1992). The unique factors present here include: (1) the geographic distance between Tookey in Ohio, Sarchione and the children in Colorado, and the appropriate go-between recommended by Tookey's expert, Dr. Janson: his sister Emma in California; and (2) because of Tookey's long history of past domestic abuse of Sarchione, he could not be present for the exchange of the children for his parenting time. The visitation schedule specifically provides for two separate summer visits consisting of a total of four daytime

interactions, one Christmas visit consisting of two interactions, and weekly telephone or Skype contacts. Because Tookey is limited to supervised visitation, the court did not err in making the decree flexible enough to allow the parties to work out visitation in accordance with their respective schedules. *See Farias* at *2. Tookey cites no persuasive authority to the contrary.

{¶31} The trial court properly applied these provisions of R.C. 3109.051 in awarding Tookey limited supervised parenting time with his children. We overrule his second assignment of error.

B. Application of the Factors in R.C. 3109.051(D)

{¶32} In his first assignment of error Tookey asserts that the trial court misapplied R.C. 3109.051(D) in its award of parenting time. When a trial court determines parenting time under R.C. 3109.051, it must do so consistent with the best interests of the children involved after consideration of the factors mentioned in R.C. 3109.051(D). *See In re K.M.L.*, 2018-Ohio-344, __ N.E.3d __, ¶ 6 (9th Dist.), citing *Pirkel v. Pirkel*, 9th Dist. Lorain No. 13CA010436, 2014-Ohio-4327, ¶ 9. A trial court need not make explicit reference to these factors provided that it is apparent from the record that the court considered these factors. *Id.*

{¶33} R.C. 3109.051(D) provides:

> 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;

(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.

{¶34} Tookey argues that the trial court's decision was erroneous because it failed "to articulate" any of the R.C. 3109.051(D) factors, and also entirely omitted a discussion of R.C. 3109.051(D)(7), (9), (10), (13), and (14). We cannot locate the word "articulate" among the duties referenced in the statute, which requires the court to "consider" the listed factors.

{¶35} The trial court overruled Tookey's objections and adopted the magistrate's decision on parenting time in its entirety. However, Tookey failed to specifically raise error in the application of the factors in R.C. 3109.051(D), much less objections based on R.C. 3109.051(D)(7), (9), (10), (13), and (14), in his objections to the magistrate's decision. Consequently, he forfeited all but plain error for this claim. Civ.R. 53(D)(3)(b)(iv); *Faulks*, 2014-Ohio-1610, ¶ 17-18. And because he does not claim plain error for this contention we need not address it. *See, e.g., Selbee v. Van Buskirk*, 4th Dist. Scioto No. 16CA3777, 2018-Ohio-1262, ¶ 34, citing *Faulks* at ¶ 35 (by not addressing the fact that the appellant did not raise the issue in the trial court, appellant failed to present exceptional circumstances to justify finding of plain error).

{¶36} Moreover, even if his claim were properly before us, Tookey has not met his heavy burden of establishing plain error. "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case 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, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus. Because parental rights determinations are difficult to make and appellate courts accord wide latitude to the trial court's consideration of evidence in these cases, "[p]lain error is particularly difficult to establish." *Robinette v. Bryant*, 4th Dist. Lawrence No. 12CA20, 2013-Ohio-2889, ¶ 28.

{¶37} Notwithstanding Tookey's claim to the contrary, the trial court's judgment contains a detailed analysis of each of the factors in R.C. 3109.051(D), including R.C. 3109.051(D)(7), (9), (10), (13), and (14). (OP183, 207)

{¶38} Regarding R.C. 3109.051(D)(7) (health and safety of the child), Tookey claims that the trial court erred by failing to credit Dr. Janson's testimony that increased parenting time would promote the health and stability of the children. But the trial court was free to credit all, part, or none of his testimony, despite his status as an expert witness. *See Jenkins*, 2015-Ohio-5484, at ¶ 23. As the trial court appropriately observed, Dr. Janson did not have the opportunity to witness the children's post-visit explosive and violent behavior that Sarchione and her family counselor did.

{¶39} Under R.C. 3109.051(D)(9) (mental and physical health of all parties), the trial court properly determined that Sarchione was still traumatized from the past domestic violence she suffered from Tookey during their marriage. The testimony of Sarchione, as well as her counselor, and even Dr. Janson and Tookey himself, all support this finding.

{¶40} Looking to R.C. 3109.051(D)(10) (each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting-time rights), Tookey argues that the trial court did not consider Sarchione's failure to communicate with him. However, the trial court specifically concluded that this factor weighed in favor of Tookey based on her past behavior, e.g. Sarchione would not be very willing to reschedule missed visitation or facilitate any visitation.

{¶41} As for R.C. 3109.051(D)(13) (whether the residential parent has continuously and willfully denied the other parent's right to parenting time in accordance

with a court order), the trial court concluded that there was no testimony or evidence relevant to this factor. Tookey disputes this, claiming that the evidence established Sarchione's continuous and willful denial of his visiting time with the children. But the testimony he cites does not support his claim; although Sarchione may have denied him visitation with their children, she never did so in contravention of any court order. To the contrary, she fully complied with the trial court's temporary order scheduling the three supervised parenting-time visits during the pendency of the case.

{¶42} Under R.C. 3109.051(D)(14) (whether either parent has established a residence or is planning to establish a residence outside Ohio), Tookey claims that the trial court did not consider Sarchione's unlawful relocation to Colorado without notifying the court. But a review of the magistrate's decision, which the trial court adopted, indicates that the trial court did consider this information by stating: "Post-divorce, Respondent relocated to Colorado and did not file the notice required pursuant to Ohio Revised Code §3109.051(G)."

{¶43} In sum, the trial court properly applied the factors in R.C. 3109.051(D) and properly exercised its broad discretion in fashioning its limited supervised parenting-time order. We overrule Tookey's first assignment of error.

C. In Personam Jurisdiction over Tookey's Sister

{¶44} In his third assignment of error Tookey contends that the trial court lacked in personam jurisdiction over his sister Emma, who the court designated as the go-between for the parties and supervisor of the parenting time at the recommendation of his expert, Dr. Janson,. Tookey claims this error renders the order unenforceable and void.

{¶45} Tookey once again must establish plain error. *See* ¶ 24. However, in the absence of any prejudice to Tookey, which he fails to assert on appeal, he lacks standing to raise any service issue concerning his sister Emma. *See, e.g., In re I.J.*, 6th Dist. Lucas No. L-12-1306, 2013-Ohio-1083, ¶ 11; *In re M.M.*, 8th Dist. Cuyahoga No. 79947, 2002-Ohio-472, 2002 WL 207610, *5 (Feb. 7, 2002); *In re Kincaid*, 4th Dist. Lawrence No. 00CA3, 2000 WL 1683456, *4 (Oct. 27, 2000). Thus he cannot establish error, let alone plain error.

{¶46} We overrule Tookey's third assignment of error.

D. Plain Error in Relying on Guardian Ad Litem Report

{¶47} In his fourth assignment of error Tookey argues that the trial court committed plain error by relying on the guardian ad litem's final report as substantive evidence because the report was not introduced into evidence and the guardian ad litem did not appear at the hearing.

{¶48} Again, as Tookey acknowledges, he forfeited all but plain error by failing to raise this specific ground in his objections to the magistrate's decision.

{¶49} To prevail on a claim of plain error appellant must establish that an error occurred, that the error was plain, and that but for the error, the outcome of the trial clearly would have been otherwise. *See generally State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69. In addition, "[a]n appellate court 'must proceed with the utmost caution' in applying the doctrine of plain error in a civil case." *Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015–Ohio–3731, 42 N.E.2d 718, ¶ 27, quoting *Goldfuss*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099. "Plain error should be strictly limited 'to the extremely rare case involving

exceptional circumstances when the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself.' " (Emphasis sic.) *Risner* at ¶ 27, quoting *Goldfuss*, 79 Ohio St.3d at 122, 679 N.E.2d 1099.

{¶50} We have held that a trial court errs to the extent it admits and considers a guardian ad litem's report as substantive evidence in a permanent custody case. *See, e.g., In re N.S.*, 4th Dist. Hocking No. 14CA23, 2015-Ohio-1510, ¶ 23, citing *In re Hilyard*, 4th Dist. Vinton Nos. 05CA630, 05CA631, 05CA632, 05CA634, 05CA636, 05CA637, 05CA637, 05CA638, and 05CA639, 2006-Ohio-1977, ¶ 58. Tookey primarily relies on *Hilyard* in support of his claim of plain error. But unlike either *N.S.* or *Hilyard*, this case is not a permanent custody case. In addition, neither *N.S.* nor *Hilyard* were decided based on plain error; timely objections to the reports occurred in those cases.

{¶51} The trial court's reliance upon the GAL final report is at best, problematic. If the trial court wanted to consider the report of the guardian ad litem as evidence, "it must afford the parties 'sufficient due process protection by making the [guardian ad litem] available for cross-examination.' " *In re C.D.M.*, 4th Dist. Hocking No. 13CA1, 2013-Ohio-3792, ¶ 25, quoting *Webb v. Lane*, 4th Dist. Athens No. 99CA12, 2000 WL 290383, *3 (Mar. 15, 2000). "Put another way, 'in order to consider a guardian ad litem's report without violating the parties' due process rights, [the court] must afford all parties the opportunity to cross-examine the guardian ad litem regarding his or her report.' " *Id*. The court thus erred by considering the guardian ad litem's report without affording the parties the opportunity to cross-examine the guardian ad litem concerning her report.

{¶52} Nevertheless, mere error is insufficient to establish plain error. Tookey must establish that "but for the error, the outcome of the trial clearly would have been otherwise." *Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69. Tookey argues that the court's consideration of the report constituted plain error because "there is no other support in the record for the de facto denial of visitation." We disagree.

{¶53} Here, the trial court's award of only limited, supervised visitation was supported by other evidence apart from the guardian ad litem's final report. Sarchione testified that the children exhibited bad behavior following their visits with Tookey, and counselor Acre testified that she witnessed the children following their visitation and they exhibited explosive, violent behavior, which led to her recommendation of limited, supervised therapeutic visits between Tookey and the children.

{¶54} In light of evidence apart from the guardian ad litem's report to support the court's parenting-time order, we overrule Tookey's fourth assignment of error.

V. CONCLUSION

{¶55} Tookey cannot establish reversible error, plain or otherwise. Thus we affirm the judgment of the trial court, which adopted the magistrate's parenting-time order.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Hoover, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, 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.