[Cite as *Lutton v. Briggs*, 2015-Ohio-1910.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
JONATHAN LUTTON	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 2014CA00214
SAMANTHA BRIGGS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Juvenile Division, Case No. 2014JCV00053
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 18, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROSEMARY RUBIN Victorian Professional Building 1435 Market Avenue North Canton, OH 44714	GREGORY RUFO 900 Chase Tower 101 Central Plaza South Canton, OH 44702

Gwin, P.J.

{¶1} Appellant appeals the November 7, 2014 judgment of the Stark County Court of Common Pleas, Juvenile Division, overruling her objections to the magistrate's decision, approving and adopting the magistrate's decision, and ordering it entered as a matter of record.

Facts & Procedural History

{¶2} Appellant Samantha Briggs and appellee Jonathan Lutton were never married, but had one child together, G.L, born on June 18, 2009. On January 23, 2014, appellee filed a complaint for custody of G.L. During the pendency of the litigation, the parties rotated the custody of G.L. on a three-week basis.

{¶3} A magistrate held a trial on August 14, 2014. The Guardian Ad Litem for G.L., Holly Davies, ("Davies") testified that both appellant and appellee are good parents, their homes are both appropriate, and G.L. is bonded to both. However, since appellant moved to North Carolina and appellee moved to Michigan, one of them had to be designated the residential parent for school purposes as part of a shared parenting plan. G.L.'s paternal grandparents and maternal grandmother live in Louisville in Stark County and G.L.'s maternal grandfather lives in Bolivar. Davies testified that the parents had communication difficulties, moved a lot during G.L.'s life, and the end of their relationship was difficult.

{¶4} On cross-examination, Davies testified that, prior to appellee's filing of the complaint and after the parties separated, appellee visited G.L. for a couple of week stretches and some week-ends. While the parties' communication was good prior to the litigation, since the litigation, Davies stated that each party is positioning. Davies

testified that the school principal at the school in North Carolina told her that there had been a school-wide problem with the last year's test scores and this year's test scores should return to being higher, so the North Carolina test scores would be closer to the Michigan school's test scores. Davies is concerned that appellant would not facilitate as much as appellee would the relationship between the non-residential parent. Davies testified that appellant acknowledged unless appellee deals with her directly, she did not deal with communication issues, even if appellant knew about communication issues between the grandparents and appellee. Davies does not believe that appellant interfered with the father/son relationship between appellee and G.L. Davies testified that while appellant believes appellee should have visitation, it is done from a point of view that appellant is G.L.'s mom and appellee is the visitor; thus, appellant does not conceptualize it as being equal.

{¶5} On re-direct, Davies testified that she gave a fair amount of weight to who cared for G.L. when the parties were together and that while both parties acknowledge appellant was the primary caregiver of G.L., the parties dispute the level of interaction appellee had with G.L.

{¶6} Davies recommended that the parties have shared parenting with appellee as the residential parent for school purposes and that each parent should spend as much time as possible with G.L. Davies testified that if she was to select the residential parent based solely on the school districts where appellant and appellee reside, she would pick what she views to be the better school, which is located in appellee's district. The other factor that weighed heavily in her recommendation is that appellant and appellee need to communicate better and they are not flexible with each other. Davies

believes appellee is more able to facilitate a relationship between appellant and G.L. than appellant is able to do between appellee and G.L. Davies testified that even if appellant moved back to Stark County, she would recommend more visitation between appellant and G.L. due to the closer distance between them, but would not change her recommendation regarding appellee being the residential parent for school purposes.

{¶7} Appellee stated that when G.L. was born, both he and appellant lived in Stark County. When G.L. was four months old, they moved to Orlando, Florida, so he could go to school and they remained there for approximately twenty-one months until he obtained his degree. After appellee's school concluded in 2011, he got an internship in Nashville, Tennessee. Subsequently, he took a job with Ricoh in copier sales while appellant went to school in Nashville. Appellee testified that his relationship with appellant was extremely rocky while they were in Nashville because of their differing schedules. Appellee testified that appellant would take care of G.L. during the day while he worked and he would take care of G.L. when she worked and went to school on nights and weekends. Appellee stated that he did not force appellant out of the apartment in Nashville and appellant left with G.L. while he was out-of-town for work. While the parties were away from Stark County, appellant would go to Ohio each summer to work at a golf course and take G.L. with her.

{¶8} Appellee testified that when he applied for a transfer with his company (Paychex), he was told he would be working in Toledo and this is what he told appellant. However, appellee ended up working and living in Livonia, Michigan. Appellee testified that in October of 2014, he did not tell appellant he was living with his now-wife. Appellee stated that he met his current wife in July of 2013 at a work conference in

Florida, started dating her in September of 2013, and married her in December of 2013. Appellee testified that G.L. has a good relationship with his step-sisters. Appellee started his own business called America's Energy Efficient Solutions.

{¶9} Appellee testified that it was common for appellant to change the times and lengths of his visits with G.L. Appellee stated appellant changed the holiday schedule they had agreed to and frequently would say G.L. needed to be home to spend time with her and appellant was not there when appellee dropped G.L. off at the time and place appellant requested. Appellee testified that during the holiday break, appellant's mother called appellee and told him that appellant went to North Carolina without G.L., so appellee could get G.L. and keep him until appellant returned on New Year's Day. Appellee testified that he would like shared parenting and also wants to be the residential parent for school purposes.

{¶10} On cross-examination, appellee confirmed that since G.L. was born, he has had seven jobs. Further, that when the parties separated, he knew appellant was supposed to take G.L. to Ohio and though he did not really agree with this, he knew she was going. Appellee testified that he thinks appellant is a good mother and that when they are not arguing about scheduling and have to discuss other issues related to G.L., he and appellant can do so.

{¶11} Karen Hathaway ("Hathaway"), G.L.'s maternal grandmother and appellant's mother, testified that appellant was G.L.'s primary caregiver while they were in both Florida and Tennessee. Thus, appellant should continue to be his primary caregiver according to Hathaway. Hathaway was not sure who watched G.L. when appellant worked while they were in Florida. Hathaway testified she would like to move

south in approximately one to two years. Hathaway stated that G.L. is happy and doing well in North Carolina and that appellant was not unreasonable on visitation issues with appellee.

{¶12} Appellant testified that when they lived in Florida, she worked part-time and, in both Florida and Tennessee, she put G.L. to bed, cooked, and appellee did not help her with G.L. When appellant returned to Ohio during the summers, both grandmothers would help to watch G.L. Appellant testified that when they were in Tennessee, appellee told her to "get out now" and then she told him she was taking G.L. to Ohio. Further, that appellee told her that he was moving to Toledo, but really moved to Michigan. Appellant testified that she did not deny appellee visitation, including on Christmas Eve. Appellant moved to North Carolina to be closer to her boyfriend, a friend she knew previously and started dating in October of 2013, and to obtain better employment.

{¶13} Appellant stated that she checked out multiple schools in North Carolina and the one she selected for G.L. would be a year-round school with flexibility for him to visit appellee for multiple weeks during the year. Appellant currently works as a bridal consultant. Appellant testified she would like shared parenting, but it is in the best interest for G.L. to reside with her as she is the primary caregiver.

{¶14} On cross-examination, appellant testified that she made visitation rules for appellee based upon the best interest of G.L. Appellant stated she did tell appellee that he could not see G.L. if he was with his new girlfriend, but only because it was in the best interest of G.L.

{¶15} At the conclusion of the trial, the court and the parties questioned Davies as to whether her opinion had changed based upon any of the testimony she heard during the balance of the trial after her testimony. Davies testified that she was aware of most of the information obtained during the trial, although sometimes there was more specific information provided. Davies stated that her opinion and recommendation as to shared parenting with appellee as the residential parent for school purposes did not change based upon anything she heard during the trial.

{¶16} The parties submitted written closing arguments. In addition, each of the parties submitted a proposed shared parenting plan with themselves as the residential parent for school purposes. Appellant filed an additional proposed shared parenting plan if the court were to designate appellee as the residential parent for school purposes.

{¶17} The magistrate issued a decision on September 16, 2014. The magistrate found that both parties are good parents and the child is bonded to both parents and grandparents on each side. Further, that the extended families provide a support system for the parties. The magistrate specifically stated that it considered the relevant portions of R.C. 3109.04, including the best interest factors in R.C. 3109.04(F). The magistrate listed these best interest factors in his decision.

{¶18} The magistrate stated that the parties, their counsel, and Davies agree that a shared parenting plan with time as equal as possible is in G.L.'s best interest and the only disagreement between the parties is that each wants to be the residential parent for school purposes. The magistrate noted that Davies recommends that appellee be the residential parent for school purposes. The magistrate concluded that

appellant's proposed shared parenting plan with appellee designated as the residential parent for school purposes is in G.L.'s best interest. Further, that appellee should be responsible for transportation to and from summer visitations with appellant.

{¶19} Appellant filed objections to the magistrate's decision on September 22, 2014. Appellant argued the magistrate failed to provide any analysis of the relevant portions of R.C. 3109.04 and that it is in the best interest of the child to award appellant residential status under the shared parenting plan. The trial court held an objections hearing on November 4, 2014. Appellant argued that the North Carolina school system is better than the one in Michigan, that the year-round school in North Carolina is more flexible for the shared-parenting agreement, and that, due to the testimony presented, appellee's credibility is questionable.

{¶20} The trial court issued a judgment entry on November 7, 2014. The trial court found there is ample evidence, beyond the school ratings, to support the magistrate's decision and the magistrate is in the best position to judge the credibility of the witnesses. Further, that Davies specifically testified: even if appellant relocated back to Stark County, she would still recommend that appellee would be the residential parent for school purposes; appellee would be more likely to facilitate a relationship with the other parent; and if the schools were comparable her recommendation would not change. The trial court stated it made an independent analysis of the facts and law; overruled appellant's objections; approved and adopted the magistrate's decision; and ordered it entered as a matter of record.

{¶21} Appellant appeals the November 7, 2014 judgment entry of the Stark County Common Pleas Court, Juvenile Division, and assigns the following as error:

{¶22} "I. THAT THE MAGISTRATE AND THE TRIAL COURT ERRED IN NOT PROPERLY CONSIDERING THE FACT THAT THE DEFENDANT/APPELLANT WAS THE PRIMARY CAREGIVER FOR THE MINOR CHILD.

{¶23} II. THAT THE DECISION OF THE MAGISTRATE AND THE TRIAL COURT WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I. & II.

{¶24} Appellant argues that the trial court abused its discretion in naming appellee the residential parent of G.L. for school purposes. Appellant contends the judgment is against the manifest weight of the evidence. Appellant also specifically argues that the magistrate and trial court erred in not properly considering the fact that appellant was the primary caregiver for G.L.

{¶25} The parties were never married and the order appealed from is an initial custody decision between the parties. The standard of review in initial custody cases is whether the trial court abused its discretion. *Davis v. Flickinger*, 77 Ohio St.3d 415, 674 N.E.2d 1159 (1997). An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). Given the nature and impact of custody disputes, the juvenile court's discretion will be accorded paramount deference because the trial court is best suited to determine the credibility of testimony and integrity of evidence. *Gamble v. Gamble*, 12th Dist. Butler No. CA2006-10-265, 2008-Ohio-1015. Specifically, "the knowledge a trial court gains through observing witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *Miller v. Miller*, 37 Ohio St.3d 71, 523 N.E.2d 846 (1988). Therefore, giving the trial court due

deference, a reviewing court will not reverse the findings of a trial court when the award of custody is supported by a substantial amount of credible and competent evidence. *Davis v. Flickinger*, 77 Ohio St.3d 415, 674 N.E.2d 1159 (1997).

{¶26} The juvenile court must exercise its jurisdiction in child custody matters in accordance with R.C. 3109.04. R.C. 3109.04(B)(1) governs initial custody awards and provides, in pertinent part, "when making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding * * * the court shall take into account that which would be in the best interest of the children."

{¶27} Because this action involved an original determination of custody of a child of an unmarried mother, R.C. 3109.042 confers a default status on appellant as the residential parent until an order is issued by the trial court designating the residential parent and legal guardian. *Williams v. Tumblin,* 5th Dist. Coshocton No. 2014CA0013, 2014-Ohio-4365. However, when making an initial custody determination of the child of an unmarried mother, R.C. 3109.042 requires the court to treat each parent as standing upon equal footing. *Id.* Under these circumstances, the trial court's custody determination need only be based on the best interests of the child according to R.C. 3109.04(F). See *In re Cihon*, 5th Dist. Guernsey No. 09 CA 00002, 2009-Ohio-5805.

{¶28} R.C. 3109.04(F)(1) provides:

> 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 * * * 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 interactions 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***;

(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 * * *;

(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.

{¶29} In addition, R.C. 3109.04(F)(2) provides:

> In determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors, including, but not limited to, the factors enumerated in division (F)(1) of this section, the factors enumerated in section 3119.23 of the Revised Code, and all of the following factors:
>
> (a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;
>
> (b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;
>
> (c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;
>
> (d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;
>
> (e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem.

{¶30} Appellant first argues that the trial court failed to properly consider the fact that she was the primary caregiver of G.L. when it designated appellee as the residential parent as part of the shared parenting plan. We disagree.

{¶31} Ohio has never formally adopted the primary caregiver doctrine. *Ream v. Ream*, 5th Dist. Licking No. 02-CA-000071, 2003-Ohio-2144. However, the doctrine is inherently a part of the best interest of the child and is included in the language of R.C. 3109.04(F)(1)(c), i.e. “the child’s interactions and interrelationship with the child’s

parents." *Id.*, See *Thompson v. Thompson*, 31 Ohio App.3d 254, 511 N.E.2d 412 (4th Dist. 1987).

{¶32} We find the fact that the magistrate and trial court did not designate appellant as the residential parent for school purposes does not establish that the magistrate and trial court disregarded or failed to consider the primary caregiver doctrine. The transcript shows that the trial court was clearly aware of appellant's earlier role as the primary caregiver. Appellant, during her testimony and in her written closing arguments, emphasized that she was the primary caregiver of G.L. The guardian ad litem testified that her recommendation was that appellee be designated the residential parent in the shared parenting plan despite the fact that she recognized appellant was the primary caregiver of G.L. and gave a fair amount of weight to who cared for the child when the parties were together. The magistrate, in his findings of fact, stated that while in Florida, appellee attended school while living with appellant and G.L.; that appellant would return to Stark County with G.L. for the summer to work and appellee was only available to visit one week each summer; and that appellee had an unpaid internship and later found employment when in Nashville while appellant completed her degree.

{¶33} Without an affirmative record demonstration to the contrary, we presume the magistrate and the trial court considered appellant's role in the upbringing of G.L. in determining the residential parent in the shared parenting plan. The trial court was in the best position to conduct such an analysis, and we cannot find anything in the record to suggest the trial court's review was improper. See *Ream v. Ream*, 5th Dist. Licking No. 02-CA-000071, 2003-Ohio-2144; *Stalnaker v. Stalnaker*, 5th Dist. Stark No.

2000CA00099, 2000 WL 1785734 (Dec. 4, 2000). In this case, the magistrate and the trial court considered the factors enumerated in R.C. 3109.04(F)(1) and (2). R.C. 3109.04(F) provides the court with discretion to weigh the relevant factors and determine how those factors apply to the child's best interests. *Wooten v. Casey*, 4th Dist. Gallia No. 03CA15, 2004-Ohio-55. Appellant's first assignment of error is overruled.

{¶34} Appellant also argues the trial court's decision was against the manifest weight of the evidence. We disagree. In his judgment entry, the magistrate specifically set forth each of the factors enumerated in R.C. 3109.04(F)(1) and (2) and stated he considered them in reaching his decision. The magistrate found that both parents were good parents, both of their homes were appropriate, and that both were bonded to and had a good relationship with G.L.

{¶35} The parties, Davies, the magistrate, and the trial court agreed that the parties should have a shared parenting plan with as much time with each parent as possible. Due to the distance between the parties' current locations in Michigan and North Carolina, the magistrate and trial court were faced with the task of selecting a parent to serve as the residential parent for school purposes. Davies recommended that appellee be designated the residential parent for school purposes. She further testified that even if the school systems were equal and even if appellant moved back to Stark County, she would still recommend appellee as the residential parent for school purposes, though she would seek increased visitation for appellant if she were in Stark County due to the shorter distance. Davies stated she is concerned that appellant would not facilitate as much as appellee would the relationship with the non-residential

parent. Though appellant asserts appellee is not credible in his assertion that appellant changed visitation hours, days, and lengths of his visitation with G.L. and this was one of the primary reasons for Davies' recommendation, the magistrate and the trial court are in the best position to judge the credibility of the witnesses and weigh the evidence. *Miller v. Miller*, 37 Ohio St.3d 71, 523 N.E.2d 846 (1988). At the request of appellant, Davies listened to all the testimony at trial and, at the conclusion of the testimony, stated that nothing she heard changed her recommendation. Upon review of the record, we find the trial court's decision was supported by substantial, credible evidence and was not an abuse of discretion. Appellant's second assignment of error is overruled.

{¶36} Based on the foregoing, we overrule appellant's assignments of error. The November 7, 2014 judgment entry of the Stark County Court of Common Pleas, Juvenile Division, is affirmed.

By Gwin, P.J.,

Wise, J., and

Baldwin, J., concur