[Cite as *Smith v. McLaughlin*, 2010-Ohio-2739.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

DOUGLAS S. SMITH	C.A. No. 24890
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
SOMIER L. MCLAUGHLIN	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 2001-05-01898

DECISION AND JOURNAL ENTRY

Dated: June 16, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Douglas Smith and Somier McLaughlin were once married and are now disagreeing about parenting and child support orders for their two children. Years after the divorce decree, Mr. Smith moved for a modification of parental rights and responsibilities and Ms. McLaughlin moved for a modification of the child support order. After a hearing, the magistrate issued a decision, to which Ms. McLaughlin objected. The trial court overruled her objections and entered judgment modifying the parenting time schedule, increasing child support for their daughter, and terminating child support for their son. This Court affirms the trial court's judgment to the extent that it modified the parenting time schedule and the child support calculation for S.S., but reverses the judgment regarding the termination of the child support order for J.B.S.

BACKGROUND

{¶2} Mr. Smith and Ms. McLaughlin were divorced in January 2002 in Summit County, Ohio. They have two minor children subject to the decree: one son, born in 1996, and one daughter, born in 1998. The parties' son, J.B.S., is the natural child of Ms. McLaughlin and was adopted during the marriage by Mr. Smith. Their daughter, S.S., is the natural child of both parties. At the time of the divorce, the trial court named Ms. McLaughlin the residential parent and legal custodian of both minor children and granted Mr. Smith standard visitation rights.

{¶3} On October 19, 2007, Mr. Smith filed a motion in the Domestic Relations Division of the Summit County Court of Common Pleas captioned "Motion for Modification of Parental Rights & Responsibilities." In March 2008, due to a high degree of conflict between the parties, a magistrate issued a temporary order that was to be "strictly followed by the parties to avoid future altercations." The modifications to the decree included liberal telephone contact between Mr. Smith and his daughter and required that the parties meet to exchange S.S. for visitation purposes at the McDonald's in Macedonia.

{¶4} In April 2008, while Mr. Smith's motion remained pending, Ms. McLaughlin moved the trial court for a modification of child support and for attorney fees. On May 15, 2008, the magistrate issued a provisional order/case management plan referring the case to Family Court Services and noting that a guardian ad litem may be assigned in the future. The magistrate scheduled the final evidentiary hearing for "October 30, 2008, at 9:00 a.m. for 3 hours." On May 20, 2008, the magistrate issued an order appointing Cindy Zanin to serve as the guardian ad litem for both children. In early June, the magistrate continued the evidentiary hearing from October 30 to December 12, 2008. Both of the parties appeared and testified before the magistrate at the

hearing on their motions in December 2008. The only additional witness was the guardian ad litem.

{¶5} The magistrate issued his decision, including findings of fact and conclusions of law, with a child support worksheet attached, on December 23, 2008. On the same day, the trial court adopted the magistrate's decision. Ms. McLaughlin timely filed objections to the magistrate's decision and later filed supplementary objections. The trial court overruled Ms. McLaughlin's objections and issued its order on July 9, 2009.

{¶6} The trial court modified the child support order by terminating child support for J.B.S., based on its finding that he was not living with Ms. McLaughlin. The court also increased Mr. Smith's child support payments for S.S. from $327.18 to $628.81 per month. The trial court did not modify custody, but reaffirmed that Ms. McLaughlin would remain the residential parent and legal custodian of both children.

{¶7} The court modified the parenting time schedule in several ways. First, in regard to J.B.S., the trial court ordered that visitation would be "as agreed between Father and [J.B.S.]." The court also modified the parenting time schedule for S.S. The original decree required that the parties adhere to the standard order of visitation, which allowed Mr. Smith visitation with his children every Wednesday evening from 5:30 p.m. until 8:00 p.m. and every other weekend from 5:30 p.m. on Friday until 7:00 p.m. Sunday. The trial court's order terminated Wednesday night visits and extended the alternating weekend visits so that Mr. Smith could pick S.S. up from school and drop her off at school on Mondays or Tuesdays if S.S. does not have school on a Monday that is not affected by the standard parenting time order regarding holidays and days of special meaning. The trial court also eliminated the temporary exchange site and ordered the receiving party to be responsible for all transportation.

{¶8} Ms. McLaughlin has timely appealed the trial court's order overruling her objections to the magistrate's decision. She has assigned eleven errors on appeal, which we have combined and reorganized for clarity. Ms. McLaughlin has contested the trial court's modification of the child support orders regarding both children and the parenting time order regarding S.S.

{¶9} Mr. Smith did not file an appellate brief in this matter. Therefore, this Court "may accept [Ms. McLaughlin's] statement of the facts and issues as correct and reverse the judgment if [Ms. McLaughlin's] brief reasonably appears to sustain such action." App. R. 18(C).

ADOPTION OF THE MAGISTRATE'S DECISION

{¶10} Ms. McLaughlin's seventh assignment of error is that the trial court incorrectly failed to adopt the magistrate's decision as an order of the court. Ms. McLaughlin supported her assignment of error with some recitation of law, but no references to the record or "reasons in support of [her] contentions" as required by Rule 16(A)(7) of the Ohio Rules of Appellate Procedure. Ms. McLaughlin failed to support her argument with any explanation of how the trial court allegedly erred in this regard and how its action prejudiced her case.

{¶11} Under Rule 53(D)(4)(a) of the Ohio Rules of Civil Procedure, a magistrate's decision does not become effective unless it is adopted by the trial court. "Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification." Civ. R. 53(D)(4)(b). Civil Rule 53 requires that, in addition to adopting, rejecting, or modifying a magistrate's decision, the trial court must also enter a judgment. Civ. R. 53(D)(4)(e). Thus, although the trial court may adopt or reject a magistrate's decision in whole or in part, no part of the magistrate's decision will become effective until adopted by the trial court. Civ. R. 53(D)(4).

{¶12} In this case, the trial court entered an order on December 23, 2008, adopting the magistrate's decision. After Ms. McLaughlin timely filed objections to the magistrate's decision, the trial court ruled on the objections and entered final judgment on July 9, 2009. In the final judgment entry, the trial court included a complete statement of relief, but did not reiterate its prior adoption of the magistrate's decision. Ms. McLaughlin has not argued why the trial court's action should be considered reversible error and has offered no supporting authority for the proposition. See App. R. 12(A)(2); 16(A)(7). Her seventh assignment of error is overruled.

HEARING TIME LIMIT

{¶13} Ms. McLaughlin's fourth assignment of error is that the trial court improperly permitted the magistrate to limit the final evidentiary hearing to three hours, based on an incorrect finding that, prior to the hearing, the magistrate had notified the parties of the time limit. The trial court overruled her objection because it determined that the magistrate had issued an order on May 15, 2008, notifying the parties that the final evidentiary hearing would be held "for 3 hours." Ms. McLaughlin has argued that it was improper to limit the time allowed for the evidentiary hearing without giving prior notice to the parties. At the beginning of the hearing, Ms. McLaughlin's lawyer objected to the time limit and asserted that the magistrate had just "established these new parameters as soon as we walked in [to court] today."

{¶14} The trial court correctly overruled Ms. McLaughlin's objection because the record reflects that on May 15, 2008, the magistrate issued a scheduling order notifying the parties that the evidentiary hearing was scheduled for "October 30, 2008, at 9:00 a.m. for 3 hours." Although the hearing was initially scheduled for the end of October, it did not go forward until December 12, 2008. Thus, Ms. McLaughlin had seven months to move the magistrate for

additional time to present her evidence, but she never objected to the time limit until after the hearing began. Having failed to object to the time limit and request a continuance to provide additional time for her presentation, Ms. McLaughlin cannot now be heard to complain that she was "greatly prejudiced" by the time limit. She neither proffered any evidence at the hearing that she would have presented if not prevented from doing so by the time limit nor argued to this Court how the time limit prejudiced her. Ms. McLaughlin's fourth assignment of error is overruled.

CHILD SUPPORT CALCULATIONS

The worksheet

{¶15} The first part of Ms. McLaughlin's fifth assignment of error is that the trial court's modified child support order must be reversed for failure to attach the required worksheet to the judgment entry. None of the cases Ms. McLaughlin has cited support her proposition.

{¶16} In *Marker v. Grimm*, the Ohio Supreme Court held that, in computing child support, a trial court must use the child support computation worksheet format required by the Ohio Revised Code. *Marker v. Grimm*, 65 Ohio St. 3d 139, paragraph one of the syllabus (1992) (citing R.C. 3113.21.5). The Supreme Court also held that the trial court must make the completed worksheet part of the record. *Id.*

{¶17} Although the Code section cited in *Marker* was repealed in 2001, the same mandatory language regarding the trial court's responsibility to use the statutory child support schedule and worksheet is included in the current version of Sections 3119.02 through 3119.24 of the Ohio Revised Code. See, e.g., R.C. 3119.02 ("[T]he court or agency shall calculate the amount of the obligor's child support obligation in accordance with the basic child support schedule, the applicable worksheet, and the other provisions of sections 3119.02 to 3119.24 of

the Revised Code."); see also *Cameron v. Cameron*, 10th Dist. No. 04AP-687, 2005-Ohio-2435, at ¶11. Therefore, *Marker* supports the proposition that the trial court must use the appropriate statutory worksheet and must make it a part of the record. *Marker v. Grimm*, 65 Ohio St. 3d 139, paragraph one of the syllabus (1992).

{¶18} In this case, the trial court record included a completed child support computation worksheet that was attached to the magistrate's decision filed December 23, 2008, and adopted by the trial court the same day. The trial court complied with the *Marker* requirements because the magistrate filed his decision with the statutory worksheet attached, thereby making it a part of the record. See also *Hayne v. Hayne*, 9th Dist. No. 07CA0100-M, 2008-Ohio-4296, at ¶19. The fifth assignment of error is overruled to the extent that it addressed the argument that the worksheet must be attached to the judgment entry.

Current spouse's income

{¶19} The second part of Ms. McLaughlin's fifth assignment of error is that the trial court improperly calculated child support based on an incomplete analysis of Mr. Smith's gross income because it failed to include his current wife's income as required by statute. Ms. McLaughlin cited Section 3119.23 of the Ohio Revised Code in support of this argument. Section 3119.23 provides a list of factors a trial court "may consider . . . in determining whether to grant a deviation [from the basic child support schedule] pursuant to section 3119.22 of the Revised Code." R.C. 3119.23. As Section 3119.23 does not deal with the initial step of calculating income, it is unclear why Ms. McLaughlin relied on it. In any event, the Ohio Revised Code forbids the trial court from including income earned by a parent's current spouse in the calculation of the parent's gross income for child support purposes. R.C. 3119.05(E). This part of Ms. McLaughlin's fifth assignment of error is overruled.

Self-employment income

{¶20} Ms. McLaughlin has also argued that the trial court improperly calculated child support by failing to consider all of Mr. Smith's self-employment income because Mr. Smith did not fully respond to a subpoena. According to Ms. McLaughlin, prior to the hearing, she issued a subpoena duces tecum requiring Mr. Smith to produce his personal financial documents, including his most recent tax return to discover his self-employment income. Mr. Smith brought little with him to the hearing in response. He testified that he attempted to comply with her requests, but had difficulty obtaining many of the documents before the hearing. According to Mr. Smith, he received the subpoena, demanding production of forty-three types of documents, just eight days before the hearing.

{¶21} Under the Ohio Rules of Civil Procedure, a party cannot use a subpoena to obtain the production of documents from a party. Civ. R. 45(A)(1); see also Civ. R. 75(J) ("When the continuing jurisdiction of the court is invoked pursuant to this division, the discovery procedures set forth in Civ. R. 26 to 37 shall apply."). In order to obtain documents from a party, one must adhere to the requirements of Rule 34 of the Ohio Rules of Civil Procedure. Civ. R. 45(A); see also Civ. R. 34(A). Absent a court order, a party who is served with a request for production of documents must be given at least 28 days to comply. Civ. R. 34(B)(1). If the responding party fails to produce the documents, the requesting party may move the trial court for an order compelling discovery under Civil Rule 37. *Id.*

{¶22} Ms. McLaughlin's lawyer entered an appearance in this matter in December 2007. In mid-May 2008, the magistrate scheduled an evidentiary hearing for October. In early June, the magistrate continued the hearing until December 12, 2008. There is no indication in the record that Ms. McLaughlin ever served Mr. Smith with a request for production of documents,

nor did she move the trial court for an order compelling discovery. Mr. Smith testified that he received the subpoena eight days before the hearing. Despite the fact that the child support motion had been pending for eight months, Ms. McLaughlin did not make any effort to obtain Mr. Smith's financial documents until shortly before the hearing. The trial court did not err by overruling Ms. McLaughlin's objection and determining that the magistrate's calculation of child support comports with the law.

{¶23} Finally, to the extent that Ms. McLaughlin has argued that the magistrate failed to do various things and improperly found or ordered others in regard to the child support calculation, this Court must disregard the argument. When appealing a trial court's adoption of a magistrate's decision, "[a]ny claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision." *Citibank v. Masters*, 07CA0073-M, 2008-Ohio-1323, at ¶9 (quoting M*ealey v. Mealey*, 9th Dist. No. 95CA0093, 1996 WL 233491 at *2 (May 8, 1996)). Additionally, this Court requires appellants to explain their arguments and cite relevant authority, which requires more than merely copying a list of grievances from one's objections to the magistrate's decision. See App. R. 12(A)(2); 16(A)(7). This Court will not address Ms. McLaughlin's undeveloped arguments regarding the magistrate's actions. Ms. McLaughlin's fifth assignment of error is overruled.

TERMINATION OF CHILD SUPPORT

{¶24} Ms. McLaughlin's sixth assignment of error is that the trial court incorrectly terminated the child support order for the benefit of the couple's son, J.B.S. The trial court based its decision on its finding that J.B.S. was not residing with Ms. McLaughlin. Ms. McLaughlin has argued that, absent a change in legal custody, the law does not support the termination of child support based on a child residing with grandparents. She has further argued that the

termination was improper because Mr. Smith did not move to terminate child support, the finding that the boy did not reside with Ms. McLaughlin was not supported by the manifest weight of the evidence, and the trial court failed to support the termination with findings of fact as required.

{¶25} Section 3119.88 of the Ohio Revised Code provides a list of reasons to terminate child support orders. The only statutory reason that might be relevant in this case is found in subsection (H). Under Section 3119.88(H), one "[r]eason for which a child support order should terminate" is a "[c]hange in legal custody of the child." There is no dispute that Ms. McLaughlin has been and remains J.B.S.'s residential parent and legal custodian.

{¶26} As the magistrate pointed out, however, this Court has held that Section 3119.88 is not an exhaustive list of reasons to terminate child support. *O'Neill v. Bowers*, 9th Dist. No. 21950, 2004-Ohio-6540, at ¶17. In *O'Neill*, this Court wrote that "lengthy possession" of a child by the parent ordered to pay child support may be sufficient to justify abatement of the support during the "lengthy" period of "possession," even without a change of legal custody. *Id.* at ¶18. In *O'Neill*, there were "numerous court journal entries giving Father possession of [the child]," which this Court deemed "the equivalent of a change of legal custody." *Id.* at ¶17. Additionally, the trial court in *O'Neill* had designated the father as temporary residential parent and later noted that legal custody was subsequently restored to the mother. *Id.* at ¶19. Therefore, this Court determined that "legal custody . . . did change" temporarily. *Id.* In dicta, this Court wrote that "a trial court has discretion to apply [Section 3119.88] to other factors or circumstances it deems relevant." *Id.* at ¶17.

{¶27} At the hearing, Ms. McLaughlin testified that J.B.S. came to her house most days after school, but admitted that he had no bedroom there. She testified that her son often slept at

her parents' home, but that she was looking for a new home that would provide a bedroom for J.B.S. Thus, the trial court's finding that J.B.S. lived with his grandparents was supported by the manifest weight of the evidence.

{¶28} *O'Neill* does not support the proposition that "possession" of a child by someone other than the residential parent, without a change of legal custody, justifies termination of the nonresidential parent's child support obligation. *O'Neill v. Bowers*, 9th Dist. No. 21950, 2004-Ohio-6540, at ¶17. In *O'Neill*, the child who was the subject of the support order temporarily moved from the home of her residential parent to the home of her non-residential parent under trial court orders. In this case, the trial court agreed with the magistrate's finding that the child moved to his maternal grandparents' home in the absence of a trial court order. Thus, unlike the child in *O'Neill*, J.B.S. was not living with his father, nor had he apparently even visited with him over the past couple of years.

{¶29} The only issue before this Court in regard to the termination of child support is whether Mr. Smith's support obligation depends on whether J.B.S. is living with his mother or her parents. Under Ohio law, anyone who is the natural or adoptive parent of a minor child must financially support that child. R.C. 3103.03(A). Child support is for the benefit of the child. Regardless of where he lives, J.B.S. is entitled to the benefit of financial support from both of his parents, provided he has not triggered Section 3119.88 by, for example, attaining the age of majority, getting married, or becoming emancipated. Section 3119.88(A), (D), (E). There is no dispute that this boy is a minor and is neither married nor emancipated and has not triggered any other prong of Section 3119.88. There is no evidence that Mr. Smith has ever had legal custody or even temporary "possession" of the child to justify the termination or abatement of his obligation, as the nonresidential parent, to pay child support for his son. The trial court erred by

terminating Mr. Smith's child support obligation for the benefit of his son based on its finding that the boy did not reside with his mother. Ms. McLaughlin's sixth assignment of error is sustained. Her additional arguments on this point will not be addressed as they have been rendered moot.

EVIDENTIARY ISSUE

{¶30} Ms. McLaughlin's ninth assignment of error is that the trial court improperly admitted an unidentified and unauthenticated exhibit into evidence. Without describing "Father's Exhibit '1,'" Ms. McLaughlin has argued that the magistrate improperly admitted it because it was not identified or authenticated at the hearing as required by Rule 901(A) of the Ohio Rules of Evidence.

{¶31} "An improper evidentiary ruling constitutes reversible error only when the error affects the substantial rights of the adverse party or the ruling is inconsistent with substantial justice." *Beard v. Meridia Huron Hosp.*, 106 Ohio St. 3d 237, 2005-Ohio-4787, at ¶35; see also Civ. R. 61. Ms. McLaughlin has not explained to this Court what the offending exhibit is or how the trial court relied on it to her detriment. Regardless of whether the admission of the contested exhibit was erroneous, Ms. McLaughlin has not argued that it prejudiced her. Therefore, Ms. McLaughlin's ninth assignment of error is overruled. Civ. R. 61.

MODIFICATION OF PARENTING TIME

{¶32} Ms. McLaughlin's second and third assignments of error are that the trial court sua sponte modified the existing parenting order, violating her due process rights by issuing a ruling without giving her prior notice. According to Ms. McLaughlin, without either party moving for a modification of parenting time, the magistrate recommended a modification and the trial court ordered it. The trial court overruled Ms. McLaughlin's objection to the recommended

modification, determining that, in addition to an oral motion at the hearing, Mr. Smith had made a written request for both a change of custody and a modification of parenting time rights.

{¶33} A party may invoke the continuing jurisdiction of the common pleas court in a divorce proceeding by filing a motion in the original action and serving it according to Civil Rule 4. Civ. R. 75(J). Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Section 16 Article I of the Ohio Constitution, parties are entitled to reasonable notice of judicial proceedings and a reasonable opportunity to be heard. *Ohio Valley Radiology Assocs. Inc. v. Ohio Valley Hosp. Ass'n*, 28 Ohio St. 3d 118, 125 (1986) (quoting *State, ex rel. Allstate Ins. Co. v. Bowen*, 130 Ohio St. 347, paragraph five of the syllabus (1936)). "The United States Supreme Court has held that . . . '[a]n elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 124-25 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

{¶34} A trial court's decision to modify visitation is governed by Section 3109.05.1 of the Ohio Revised Code while the decision to modify custody rights is governed by Section 3109.04. *Braatz v. Braatz*, 85 Ohio St. 3d 40, 43-44 (1999). In either case, the trial court must consider the appropriate factors, but has discretion to issue orders that it determines are in the best interest of the children. R.C. 3109.04(F)(1); 3109.05.1(A); *Braatz*, 85 Ohio St. 3d at 45.

{¶35} On October 19, 2007, Mr. Smith filed a written motion he captioned, "Motion for Modification of Parental Rights & Responsibilities." In the memorandum in support of his motion, Mr. Smith accused his ex-wife of attempting to alienate him from their son, interfering with his mid-week visitation with their daughter, and attempting to limit and control his

parenting time with both children, in addition to other things. He requested that "he be named as [r]esidential [p]arent and [l]egal [c]ustodian of [his] minor [daughter] and that the current [o]rder with respect to parental rights and responsibilities of [his] minor [son] be modified as in the best interest of this child." Although Ms. McLaughlin has claimed that Mr. Smith orally withdrew his entire parenting motion at the start of the hearing, the trial court determined that Mr. Smith represented to the court that he no longer wished to pursue his written request for a complete change of custody. It also determined that there was both a written and an oral request for a modification of the visitation schedule.

{¶36} Ms. McLaughlin has argued that nobody orally requested a modification of the visitation schedule at the hearing. Despite the fact that some part of the conversation apparently took place before the transcription began, it is clear that Ms. McLaughlin's own lawyer orally moved for a modification of visitation at the beginning of the hearing. Her lawyer said, "we are requesting this Court to modify the visitation if the Court is going to entertain that in reference to curtailing the visitation in light of the father's actions."

{¶37} Ms. McLaughlin has also argued that the trial court's interpretation of Mr. Smith's written motion as requesting a modification of both custody and visitation was improper because it deprived her of an opportunity to adequately prepare for the evidentiary hearing. Once Mr. Smith invoked the continuing jurisdiction of the trial court, the court was charged with determining an allocation of parental rights and responsibilities that would be in the best interest of the children.

{¶38} Regardless of whether Mr. Smith's written motion explicitly mentioned visitation issues, his motion for custody under Section 3109.04 put many of the visitation statute's best interest factors at issue. R.C. 3109.05.1. The Ohio Supreme Court has written that Section

3109.04 of the Ohio Revised Code, governing custody, also addresses visitation rights to the extent that it requires a "determin[ation] [of] the best interest of the child in order to allocate parents' rights and responsibilities." *Braatz v. Braatz*, 85 Ohio St. 3d 40, 43 (1999). Thus, a motion for a change of custody should alert the opponent that the trial court may also entertain modifications to the visitation schedule that, based on the evidence, are found to be in the best interest of the children. See, e.g., *Braden v. Braden*, 5th Dist. No. 2006-P-0028, 2006-Ohio-6878, at ¶13.

{¶39} The trial court did not violate Ms. McLaughlin's due process rights by modifying the visitation order. The memorandum in support of the parenting motion provided Ms. McLaughlin with "notice reasonably calculated, under all the circumstances, to apprise [her] of the pendency of the action and afford [her] an opportunity to present [her] objections." *Ohio Valley Radiology Assocs. Inc. v. Ohio Valley Hosp. Ass'n*, 28 Ohio St. 3d 118, 124-25 (1986) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Ms. McLaughlin appeared at the hearing, represented by counsel, and was afforded an opportunity to cross-examine each witness. She also put on evidence in support of her own motion to limit Mr. Smith's parenting time. Ms. McLaughlin received reasonable notice and an opportunity to be heard. Her second and third assignments of error are overruled.

PARENTING TIME: BEST INTEREST ANALYSIS

{¶40} Ms. McLaughlin's first and tenth assignments of error are similar. Her first assignment of error is that the trial court improperly modified the parenting order by issuing a decision that is not in the best interest of the children and by failing to undertake the appropriate statutory analysis. She has generally argued that the trial court's decision to modify the parenting time order regarding S.S. was not in the child's best interest, but she has not

specifically targeted any of the individual modifications the trial court made to the order. Ms. McLaughlin has argued generally that the trial court's "increase" in Mr. Smith's parenting time is not supported by the evidence. Ms. McLaughlin's tenth assignment of error makes the same argument. She has alleged that "[t]he trial court's decision is against the manifest weight of the evidence," but she has supported that broad assertion with just two arguments. She has claimed that the evidence did not support the finding that she withheld parenting time from Mr. Smith and that the evidence did not support the guardian ad litem's recommendations.

{¶41} Both the first and tenth assignments of error boil down to an assertion that the order modifying parenting time and certain findings in support of it are not supported by the manifest weight of the evidence. Therefore, this Court must apply the civil-manifest-weight-of-the-evidence standard of review. See *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶24 ("Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.") (quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St. 2d 279, syllabus (1978)). But see *Huntington Nat'l Bank v. Chappell*, 183 Ohio App. 3d 1, 2007-Ohio-4344, at ¶17-75 (Dickinson, J., concurring in judgment only).

{¶42} Section 3109.05.1(A) directs trial courts to "make a just and reasonable order . . . [regarding] parenting time . . . ensur[ing] the opportunity for both parents to have frequent and continuing contact with the child, unless [that] . . . would not be in the best interest of the child." The Ohio Supreme Court has held that a trial court has discretion to modify visitation orders, based on a consideration of the factors enumerated in Section 3109.05.1(D), to create visitation conditions that are in the best interest of the children. *Braatz v. Braatz*, 85 Ohio St. 3d 40, 45 (1999). It has also held that "a court's discretion regarding visitation is broader" than its

discretion regarding custody matters. *State ex rel. Scordato v. George*, 65 Ohio St. 2d 128, 129 (1981). Because it is trusted to the discretion of the trial court, a decision regarding visitation rights will not be disturbed on appeal absent an abuse of discretion implying that "the court's attitude is unreasonable, arbitrary or unconscionable.'" *Booth v. Booth*, 44 Ohio St. 3d 142, 144 (1989) (quoting *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219 (1983)).

{¶43} Ms. Zanin testified that she watched S.S. with Mr. Smith and found the interaction was "family-oriented[,] . . . very relaxed and comfortable." She noted that S.S. showed her Mr. Smith's house "like it was her own home." She testified that she recommended expanding the weekend visits in the summer because she "felt that Mr. Smith's prime interest was in spending more time with his daughter, and that [S.S.] wanted to spend more time with him." Ms. Zanin also testified that she made her recommendations based on an effort to "keep peace for [S.S.], because . . . the conflicts that are happening [between the parents] are counter productive for her." Ms. Zanin further testified that she observed Ms. McLaughlin with S.S. and recommended that Ms. McLaughlin remain the residential parent and legal custodian.

{¶44} In addition to the guardian ad litem, both parents testified at the hearing. Each parent testified that the other made exchanges of the child difficult and stressful. They also accused each other of refusing to allow telephone contact with S.S. while she was in the other's care. Ms. McLaughlin testified that S.S. had suffered several injuries while in her father's care, including a bicycle accident that caused a concussion. Ms. McLaughlin testified that Mr. Smith failed to seek timely medical care for their daughter on those occasions. Mr. Smith testified that Ms. McLaughlin had repeatedly interfered with his parenting time, including keeping the kids from him for a three-month period after he had filed a police report against her.

{¶45} Although the trial court did not mention the statute, the magistrate wrote that he applied the factors of Section 3109.05.1 to the facts and concluded that a modification of the parenting time schedule was in the children's best interest. At the evidentiary hearing, the parties presented evidence implicating a number of the factors the trial court needed to consider under Section 3109.05.1(D). The court heard evidence relating to the children's interaction and interrelationships with their parents and other related persons; the geographical location of the parents' residences and the distance between them; the parents' employment schedules; the children's ages; the children's adjustment to home, school, and community; health and safety of the children; each parent's willingness to facilitate the other parent's parenting time rights; whether the residential parent has continuously and willfully denied the other parent's visitation rights. R.C. 3109.05.1(D)(1-5), (7), (10), (13). Given the factual situation as described by both parties at the hearing, there was no evidence that the remaining factors were relevant to the visitation decision in this matter.

{¶46} Despite the evidence emphasized by Ms. McLaughlin in her brief, this Court cannot say that the trial court's attitude was unreasonable, arbitrary, or unconscionable. The trial court heard evidence that S.S. enjoys a good relationship with both parents and has been doing well in school and at home. Both parties testified, however, that there has been increased tension between them since they have been dealing with the fallout of a visitation dispute that ended with Ms. McLaughlin's arrest and subsequent acquittal followed by her filing a federal lawsuit against Mr. Smith and the police involved in the incident. There was evidence that, in disregard of the prior parenting order, neither parent would permit S.S. to speak by telephone to her other parent. The parties testified that they now live in Akron and Sagamore Hills and have been exchanging their daughter for visitation purposes at the McDonald's in Macedonia. Mr. Smith expressed his

displeasure with the exchange location due to the fact that it is not centrally located between the two residences. Although the location is more convenient for Ms. McLaughlin than it is for Mr. Smith, Ms. McLaughlin testified that she does not like the exchange location because police officers are frequently present in the parking lot. She testified that S.S. gets upset when she witnesses negative, stressful interactions between her parents.

{¶47} Based on a review of the record, including the transcript of the hearing, the trial court did not abuse its discretion by modifying the visitation order to eliminate the mid-week visits and slightly extend Mr. Smith's weekend parenting time by permitting him to pick his daughter up and drop her off at school. The new arrangement will allow the parents to interact less frequently and avoid the conflicts they both reported regarding the pick up and drop off location. It is not clear to this Court that the trial court's order meaningfully increases Mr. Smith's parenting time and Ms. McLaughlin has not explained how she reached that conclusion. In any event, this Court holds that, to the extent the trial court's order increases Mr. Smith's parenting time, it is not the result of an abuse of discretion.

{¶48} Ms. McLaughlin has argued that the magistrate's finding that "[Ms. McLaughlin] has withheld parenting time from [Mr. Smith]" is against the manifest weight of the evidence. The relevant paragraph of the magistrate's decision begins: "According to Father, Mother has withheld parenting time from him. However, Father could not provide specific testimony of the same." Thus, the magistrate did not find that Ms. McLaughlin withheld parenting time from Mr. Smith. The magistrate summarized Mr. Smith's testimony on that topic. He did not make a finding regarding the truth of that allegation.

{¶49} As part of her first assignment of error, Ms. McLaughlin has argued that the trial court failed to engage in the required statutory analysis to modify an existing visitation order.

Under Ohio law, a trial court that is "establishing a specific parenting time or visitation schedule" or "determining other parenting time matters," as between two parents, must consider fourteen of the sixteen factors listed in Section 3109.05.1(D). R.C. 3109.05.1(D). Ms. McLaughlin's argument, however, is aimed at the trial court's failure to consider the best interest factors found in the custody statute rather than the visitation statute. The trial court did not modify the existing custody order, but only the visitation order. Therefore, Section 3109.04 does not apply. *Braatz v. Braatz*, 85 Ohio St. 3d 40, 44-45 (1999) ("We hold that . . . the specific rules for determining when a court may modify a custody decree as set forth in R.C. 3109.04 are not equally applicable to modification of visitation rights."). Ms. McLaughlin's arguments about a change in circumstances since the prior order and whether the temporary harm of a change in custody is likely to be outweighed by its advantages are irrelevant to the question of a modification of visitation. Compare R.C. 3109.04(E)(1)(a) with R.C. 3109.05.1(D). Ms. McLaughlin's first and tenth assignments of error are overruled.

GUARDIAN AD LITEM

{¶50} The first part of Ms. McLaughlin's eighth assignment of error is that the trial court improperly took judicial notice of Cindy Zanin's qualifications as guardian ad litem. She has argued that she was prevented from fully exploring Ms. Zanin's qualifications because of the time limit imposed at the hearing and "the fact that the [t]rial [c]ourt maintains the alleged Guardian ad Litem's report in a confidential court file." She has further argued that, because Mr. Smith called the guardian ad litem as a witness at the hearing, he bore the burden of establishing her qualifications and qualifying her as an expert witness before presenting opinion testimony.

{¶51} Under Rule 201 of the Ohio Rules of Evidence, a court may take judicial notice of an adjudicative fact that is "not subject to reasonable dispute in that it is either (1) generally

known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evid. R. 201(B). Evidence Rule 702 requires that a witness be qualified to render expert opinions if her testimony "either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons." Evid. R. 702(A). Under Evidence Rule 701, a witness who is not qualified as an expert may offer "testimony in the form of opinions or inferences" provided the testimony is "rationally based on the perception of the witness and . . . helpful to a clear understanding of the witnesses' testimony or the determination of a fact in issue."

{¶52} "The role of the guardian ad litem is to assist in determining the best interest of the child(ren). Guardians [must] provide a comprehensive assessment of the parenting issues related to the allocation of parental rights and responsibilities." Summit County Dom. Rel. Ct. R. 34.03. Under the Rules of Practice and Procedure of the Domestic Relations Division of the Summit County Court of Common Pleas, anyone wishing to be included on the court's appointment list, must have an advanced degree in law, social work, counseling, or other related field and at least fives years of practice involving domestic relations law. Summit County Dom. Rel. Ct. R. 34.02. Following a formal application process, candidates must complete annual training and must be evaluated annually in order to remain on the court's appointment list.

{¶53} By order dated May 20, 2008, the magistrate appointed Ms. Zanin to serve as guardian ad litem for both of the parties' minor children. The clerk of court served each party and their lawyers with a copy of that order. Neither party objected to the appointment. Seven months later, the magistrate issued his decision on the parenting and child support motions, indicating that "Ms. Zanin is a court-approved Guardian ad litem." The magistrate continued,

writing: "[t]he Court takes judicial notice that she is qualified. Neither party objected to her appointment."

{¶54} One's qualifications to serve as guardian ad litem are not adjudicative facts meeting the requirements of the judicial notice rule. Evid. R. 201. Although it was improper for the magistrate to use the term "judicial notice" in his decision, the trial court did not repeat the error. In properly overruling Ms. McLaughlin's objection, the trial court pointed out that the guardian ad litem was appointed by the court without objection by either party. The court also highlighted the fact that the guardian's job is to make recommendations to the court and that Ms. McLaughlin cross-examined Ms. Zanin at the hearing. The trial court did not, however, repudiate the magistrate's use of the words "judicial notice" in this context.

{¶55} The trial court's appointment of an individual whose name appears on the court's official appointment list creates a rebuttable presumption that the person has satisfied the requirements to serve as a guardian ad litem. See Summit County Dom. Rel. Ct. R. (describing the process for inclusion on the court's list of guardians ad litem); see also Sup. R. 48(G) (effective 3/1/09). A party wishing to overcome the presumption should object to the appointment in a timely manner, certainly before the guardian ad litem has fulfilled her duties by completing her investigation and submitting her report.

{¶56} Ms. McLaughlin did not object to the order near the time of the appointment, nor has she ever substantively attacked Ms. Zanin's qualifications. Ms. McLaughlin has not argued that the trial court's overruling of her objection on this point affected her substantial rights. Therefore, to the extent that the trial court's entries could be read as an endorsement of the magistrate having taken "judicial notice" of Ms. Zanin's qualifications to serve as a guardian ad litem, the error is harmless and must be disregarded. Civ. R. 61.

{¶57} Ms. McLaughlin objected to Ms. Zanin's testimony at the hearing, and has argued in her brief that it was inappropriate for Ms. Zanin to offer opinions regarding the best interest of the children without first being qualified as an expert witness. Ms. McLaughlin has not offered any authority for the proposition that Rule 702 of the Ohio Rules of Evidence applies to bar Ms. Zanin's testimony. According to Summit County Domestic Relations Division Local Rules, the role of the guardian ad litem is "to assist in determining the best interest of the child(ren)." Summit County Dom. Rel. Ct. R. 34.03. A guardian ad litem is required to engage in a complete assessment and create a written report in order to provide the court with an informed recommendation regarding the child's best interest. See *id.*; Summit County Dom. Rel. Ct. R. 34.04.

{¶58} According to Ms. Zanin, she testified based on her review of various records, meetings with each parent and child, and her observations and impressions of the living arrangements and relationships at issue. See Summit County Dom. Rel. Ct. R. 34.04. She said that both parents got along with S.S. and provided an appropriate home for her. Ms. Zanin made recommendations to the court, including that Mr. Smith should be permitted to return the children two hours later during the summer, that the exchange location should be moved closer to Mr. Smith's home, and that grandparents should be permitted to help facilitate timely exchanges. Ms. McLaughlin has not argued that Ms. Zanin's testimony was "beyond the knowledge or experience possessed by lay persons" or that it "dispels a misconception common among lay persons" so as to require qualification as an expert witness. Evid. R. 702(A). Lay people are capable of understanding the parenting issues Ms. Zanin addressed at the hearing of this matter. Ms. Zanin's testimony is governed by Evidence Rule 701 rather than Evidence Rule 702. This part of the eighth assignment of error is overruled.

CONFIDENTIAL FAMILY COURT SERVICES FILE

{¶59} The second part of Ms. McLaughlin's eighth assignment of error is that the trial court violated her due process rights by relying on the court's confidential file containing hearsay. Ms. McLaughlin has based her argument on her allegation that the trial court's policy of keeping the guardian ad litem's report in a separate "confidential court file" violates Rule 48 of the Rules of Superintendence for the Courts of Ohio.

{¶60} Rule 48(F)(2) of the Rules of Superintendence for the Courts of Ohio provides that "[a] copy of the final [guardian ad litem] report shall be provided to the court at the hearing. The court shall consider the recommendation of the guardian ad litem in determining the best interest of the child only when the report or a portion of [it] has been admitted as an exhibit." In this case, the guardian's report was not admitted as evidence during the hearing.

{¶61} Superintendence Rule 48 does not apply to this case, however, because it was not enacted until March 2009, months after Ms. Zanin submitted her report and testified about her recommendations at the hearing of this matter. Ms. McLaughlin has not developed her argument by identifying any hearsay contained in the report or explaining how she believes the court's policy of maintaining a separate file has violated her due process rights. She has further failed to cite any relevant authority in support of this part of this assignment of error. Ms. McLaughlin's eighth assignment of error is overruled. See App. R. 12(A)(2); 16(A)(7).

INDEPENDENT ANALYSIS

{¶62} Ms. McLaughlin's eleventh assignment of error is that the trial court abused its discretion by failing to undertake an independent analysis of the issues, evidence, and record. Ms. McLaughlin's only specific complaint, however, is the trial court's "failure to acknowledge

the fact that [Mr. Smith] withdrew his [m]otion for [m]odification at the hearing and . . . [therefore], no parenting motion [was] pending before the trial court . . . ."

{¶63} Under Rule 53(D)(4)(d) of the Ohio Rules of Civil Procedure, if a party timely files objections to a magistrate's decision, the trial court "shall 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." "In the course of this review, a trial court should not adopt the magistrate's report as a matter of course, but should 'carefully examine' the report and the evidence before the magistrate." *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶14 (quoting *Miller v. Miller*, 9th Dist. No. 07CA0061, 2008-Ohio-4297, at ¶15). Civil Rule 53 does not require the court to support its rulings on objections to a magistrate's decision with any substantive analysis. Civ. R. 53(D)(4)(d).

{¶64} In this case, the trial court explained that it did not overrule Ms. McLaughlin's objections until after it had reviewed them in addition to her supplemental objections, the magistrate's decision, and the transcript of the hearing. Furthermore, Ms. McLaughlin's argument is faulty because the trial court did not ignore the fact that, at the hearing, Mr. Smith withdrew his motion for a change of custody. The trial court simply disagreed with Ms. McLaughlin's interpretation of the scope of Mr. Smith's written motion. The trial court explained in its judgment entry that it interpreted Mr. Smith's motion as one requesting anything from a modification of visitation schedule to a complete change in custody, depending on what the court would find is in the best interest of the children. This Court has previously addressed this argument in overruling Ms. McLaughlin's assignments of error numbers two and three. The record does not support Ms. McLaughlin's argument that the trial court failed to conduct an

independent analysis regarding her objection on this point. Therefore, Ms. McLaughlin's eleventh assignment of error is overruled.

CONCLUSION

{¶65} This Court reverses the order of the trial court to the extent that it terminated the child support order for the benefit of J.B.S. Assuming the trial court correctly found that J.B.S. is living with his maternal grandparents rather than his mother, the trial court erred by holding that, for that reason, J.B.S. is not entitled to the financial support of his father. R.C. 3119.88.

{¶66} This Court affirms the order in all other respects because: the trial court adopted the magistrate's decision; gave the parties prior notice of the time limit for the evidentiary hearing; incorporated the required statutory child support worksheet into the record; properly modified the child support order for the benefit of S.S.; and permitted appropriate testimony from a guardian ad litem whose qualifications were never challenged. The trial court did not violate Ms. McLaughlin's due process rights, considered the statutory factors, and exercised discretion to modify the parenting time order. The trial court also adhered to the requirements of Rule 53 of the Ohio Rules of Civil Procedure in handling Ms. McLaughlin's objections to the decision of the magistrate. The decision of the Domestic Relations Division of the Summit County Common Pleas Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

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