

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: E.L.,
: APPEAL NO. C-160040
: TRIAL NO. F11-467X
: *JUDGMENT ENTRY.*

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See Rep.Op.R.3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiff-appellant mother appeals from the judgment of the Hamilton County Juvenile Court overruling her objections and adopting the magistrate's decision granting defendant father's motion to modify custody by designating him sole residential parent and legal custodian of their daughter, E.L., and denying her motion to remove the guardian ad litem ("GAL").

In her first and second assignments of error, mother challenges the trial court's decision granting father's motion to modify custody.

The modification of parental rights can occur only if there is a change in circumstances since the last decree, the modification is deemed to be in the child's best interest, and one of the three factors listed in R.C. 3109.04(E)(1)(a)(i),(ii), and (iii) applies. See R.C. 3109.04(E)(1)(a) and 3109.04(F)(1); *Davis v. Flickinger*, 77 Ohio St.3d 415, 417, 421, 674 N.E.2d 1159 (1997); *In re Kruthaupt*, 1st Dist. Hamilton

No. C-080405, 2009-Ohio-1372, ¶ 13. We review a trial court's custody determination under an abuse-of-discretion standard. *Davis* at 418; *Kruthaupt* at ¶ 15.

Mother does not challenge the juvenile court's finding that a change of circumstances occurred. Rather, she contends in her first assignment of error that the juvenile court abused its discretion by determining that a modification of parental rights and responsibilities was in E.L.'s best interest. She argues the evidence does not support the best-interest findings. We disagree.

The record reflects that the magistrate issued a 12-page decision, in which she considered the evidence and best-interest factors set forth in R.C. 3109.04(F). In ruling on mother's objections and adopting the magistrate's decision, the juvenile court acknowledged that E.L. was bonded to both parents and all family members and was adjusted to both homes, and that both parents are appropriate care givers, but that the testimony at the hearings showed that mother had been unwilling to facilitate E.L.'s parenting time with father.

The trial court stated that it shared the magistrate's concerns that mother had fabricated the physical-and-sexual-abuse allegations against father and his live-in girlfriend based upon mother's inconsistent responses to the allegations, and that the allegations and two protection orders sought by mother had been manifestations of mother's desire to control father's relationship and parenting time with E.L. The court concluded that a change of custody would be in E.L.'s best interest, as father had been an active part of E.L.'s life since birth, including consistently exercising parenting time and providing support, and the change in custody would reduce the conflict between the parties, while allowing E.L. to benefit from the nurturing relationship she has with both parties. The evidence in the record supports the trial

court's conclusion. Thus, trial court did not abuse its discretion in determining that it was in E.L.'s best interest to effectuate a change of custody. *See Wheeler v. Wheeler*, 2d Dist. Greene No. 2000 CA 27, 2000 Ohio App. LEXIS 4857, *8 (Oct. 20, 2000).

Mother next argues that the trial court erred by modifying custody absent an express finding under R.C. 3109.04(E)(1)(a)(iii) weighing the harm versus the benefit of a change in custody. But there is no requirement that the express statutory language be used. *See In re R.S.*, 2d Dist. Clark No.2010-CA-56, 2011-Ohio-5981, ¶ 25-27 (although the express statutory language had not been utilized, a review of the trial court's decision revealed it had weighed the harm versus the benefit by a change in environment); *Sayre v. Hoelzle-Sayre*, 100 Ohio App.3d 203, 212, 653 N.E.2d 712 (3d Dist.1994) (holding that the trial court complied with the statute in the absence of language expressly balancing harm versus benefit). Moreover, this finding was made, albeit inferentially, when the court acknowledged that mother and father have had a high conflict relationship, mother's need to exert control over father's parenting time had caused her to fabricate abuse allegations against father, placing great stress on E.L. and the parties' already strained relationship, and that the best way to reduce the conflict between the parties and the stress to E.L., while permitting E.L. to have a healthy relationship with both parents, was to shift the day-to-day responsibility of E.L. from mother to father, but to permit mother to have substantial parenting time so she may continue her close, loving relationship with E.L. We, therefore, overrule mother's first and second assignments of error.

In her third assignment of error, mother maintains the trial court erred by admitting father's psychological evaluation absent proper authentication under Evid.R. 901.

The record reflects that the magistrate admitted father's psychological report, over mother's objection, on the basis that mother's prior counsel, the GAL, and father's counsel had agreed to admit the psychological reports without expert testimony to reduce the costs of the litigation. We have reviewed the record and can find no such agreement. Thus, we are hesitant to conclude that mother invited any error with respect to the admission of the unauthenticated report.

We, nonetheless, conclude that any error in the admission of father's psychological report was harmless, where the GAL had previously testified to the contents and conclusion of the report without any objection from mother's counsel, and where the report was relevant to but one of multiple factors the juvenile court considered in making its change-of-custody determination. *See* R.C. 3109.04(F); *Collins v. Collins*, 8th Dist. Cuyahoga No. 58035, 1991 Ohio App. LEXIS 509, *10-12 (Feb. 7, 1991). As a result, we overrule mother's third assignment of error.

In her fourth assignment of error, mother argues the trial court erred by denying her motion to remove the GAL. Mother's counsel made an oral motion to remove the GAL during the best-interest hearing, which she withdrew after a lengthy discussion on the record with the magistrate, the GAL, and father's counsel. Two days before the hearing on her objections, mother filed a written motion to remove the GAL based upon the GAL's alleged failure to comply with Sup.R. 48. Mother attached to the motion a notarized statement from the family therapist, and an email addressed to mother's counsel from a Hamilton County sheriff's detective, which she argued refuted the part of the GAL's testimony regarding her investigation and demonstrated the GAL's bias against her. The trial court denied the motion without analysis.

After reviewing the record, we cannot conclude the trial court abused its discretion by denying the motion. *See King v. Craig*, 9th Dist. Medina No. 12CA0060-M, 2013-Ohio-3070, ¶ 7. Sup.R. 48 merely sets forth the guidelines for GALs to follow. It does not create any substantive rights or carry the weight of a rule of law. *See Miller v. Miller*, 4th Dist. Athens No. 14CA6, 2014-Ohio-5127, ¶ 16-17. Contrary to mother's assertions, there is no evidence that the GAL failed to perform her duties. Rather, the record reflects that the GAL was critical of mother in her testimony and reports. This prompted mother's counsel to cross-examine the GAL extensively at both the change-of-circumstances and best-interest hearings, highlighting what mother perceived to be deficiencies in the GAL's performance of her duties. Mother additionally raised these deficiencies in her objections to the magistrate's decision. Consequently, both the magistrate and the juvenile court were aware that mother disapproved of the GAL's performance during her investigation, she disagreed with the GAL's final recommendation that custody be granted to father, and she desired the magistrate and juvenile court to accord little weight to the GAL's opinion.

Mother's argument that the GAL was so biased against her that she fabricated portions of her investigation is disingenuous and not supported by the record. While mother attached "additional evidence" to her motion to remove the GAL, the trial court was not required to accept this evidence where mother could have presented this evidence at the best-interest hearing before the magistrate, but she failed to do so. *See Juv.R. 40(D)(4)(d)*. We, therefore, overrule the fourth assignment of error and affirm the judgment of the juvenile court.

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Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DEWINE, P.J., MOCK and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on September 21, 2016
per order of the court _____.
Presiding Judge