ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. Amanda Wilson Iler
121 E. Sixth St
Seaman, Ohio 45679

Case No. 15-0146

Relator,

v.

Judge Brett M. Spencer
Court of Common Pleas
110 West Main St. #112
West Union, Ohio 45693

and

Michael T. Farahay
1200 Mineral Springs Rd
Peebles, Ohio 45660

Respondents.

ORIGINAL ACTION IN HABEAS, MANDAMUS AND PROHIBITION
RESPONDENT'S MOTION TO DISMISS ACTION

Amanda Wilson Iler
121 E. Sixth Street
Seaman, Ohio 45679
(937) 779-6637

RELATOR

Michael Farahay
1200 Mineral Springs Road
Peebles, OH 45660

RESPONDENT

Jonathan Coughlan #0026424
Asst. Prosecutor
110 W. Main St. #112
West Union, OH 45693
(614) 462-5400
jcoughlan@keglerbrown.com

COUNSEL FOR RESPONDENT JUDGE SPENCER

FILED
FEB 25 2015
CLERK OF COURT
SUPREME COURT OF OHIO

Table of Contents

Table of Authorities i

Statement of the Facts.....1

Motion to Dismiss 3

Argument.....3

Appendix.....8

Table of Authorities

State ex rel. Bell v. Pfeiffer, 131 Ohio St.3d 114, 2012-Ohio-54.....3

State ex rel. Carter v. Wilkinson, 70 Ohio St.3d 65, 637 N.E.2d 1 (1994).....6

State ex rel. Corn v. Russo, 133 Ohio App.3d 57, 726 N.E.2d 1052 (1999).....4, 5, 6

State ex rel. Crebs v. Court of Common Pleas of Wayne County, Probate Division, 38 Ohio St.2d 51, 309 N.E.2d 926 (1974).....5

State ex rel. Fontanella v. Kontos, 117 Ohio St.3d 514, 2008-Ohio-1431.....6

State ex rel. Jackson v. McFaul, 73 Ohio St.3d 185, 1995-Ohio-228.....3, 4

State ex rel. Jones v. Suster, 84 Ohio St.3d 70, 1998-Ohio-275.....4, 5

State ex rel. Kuczak v. Saffold, 67 Ohio St.3d 123, 616 N.E.2d230 (1993).....6

Civ. R. 12 (B) (6).....3, 7

R.C. 2725.01.....3

R.C. 2725.04.....3

R.C. 2725.....3, 4

Statement of the Facts

Relator is a party in Adams County Juvenile Case No. 20035123 captioned Amanda Wilson v. Michael Farahay. Relator is the biological mother of M.F. Michael Farahay is the biological father. In 2013, Michael Farahay filed a motion for Change of Custody of M.F. who was, at that time, in relator's custody. A post decree action for modification of custody in the Adams County Juvenile Court was initiated by the father, Michael T. Farahay, on April 11, 2013, when he filed a motion to modify custody, alleging a change in circumstances. A hearing was held on November 5, 2013 and December 3, 2013. The matter was heard before a magistrate who issued a decision changing custody from relator to Michael Farahay. Relator filed objections to the magistrate's decision. On June 26, 2014, respondent, the trial judge, overruled the objections and affirmed the magistrate's decision.

Relator, through her counsel, appealed the trial court's decision to the Fourth Department Court of Appeals. On July 9, 2014, the Court of Appeals, Fourth Department, received the notice of appeal filed by relator. On appeal, relator has raised three assignments of error: (1) The decision of the [trial] court is against the manifest weight of the evidence; (2) The trial court erred in considering the deficient report of the GAL; and (3) the trial court erred in not permitting the plaintiff to suggest questions for the in-camera interview. Michael Farahay, through his counsel, has filed an appellee's brief. The record has been filed, both parties have filed their briefs and the matter is pending before the Court of Appeals.

On October 23, 2014, relator, pro se, filed a "Complaint for a Writ of Prohibition" in the Court of Appeals, Fourth Department. In her complaint for a writ of prohibition, relator sought: an order requiring video surveillance in the magistrate's courtroom of Adams County Court of Common Pleas; reimbursement of her court costs; to allow M.F. "to have an independent voice and be heard;" and for the reversal of the trial court's judgment. On November

12, 2014, respondent, Judge Brett M. Spencer, filed a motion to dismiss the complaint for a writ of prohibition. On December 18, 2014, relator responded to the motion to dismiss. Also on December 18, 2014, the Court of Appeals, Fourth Department, dismissed the complaint for a writ of prohibition.

Relator filed for reconsideration in the Court of Appeals and respondent filed in opposition. On January 14, 2015, the Court of Appeals denied the motion for reconsideration.

On January 27, 2015, the relator filed an "Emergency Complaint for Writs of Habeas, Mandamus and Prohibition in this Court.

Relator's requested relief includes the following:

1.) Immediately VACATE the orders of Adams County in 20035123 on behalf of a child that has literally been deprived of a voice.
2.) Demand explanation as to the posting online of ordering in camera transcript then knowingly omitting it from higher court.
3.) Allow Relator audio CD of hearings for comparison of 11/5 and 12/3 transcripts to show discrepancies of what's written and what's not but should have been.
4.) Allow Relator to submit transcripts of another case to show they were redone by outside entity and over 20 pages that were never sent to Court of Appeals despite the court approving the request to supplement the record.
5.) Allow Relator chance to supply Highland Co transcripts from 8/5/13 and phone records that became available AFTER the hearings in Adams County that show the blatant dishonesty of Testimony from Matt Iler & Chase Gleason in 11/5/13 hearing.
6.) Demand explanation as to the delay between 7/10 and 7/23 in sending appeal notice.

Motion to Dismiss

Relator's complaint fails to state a claim upon which relief can be granted and must be dismissed pursuant to Civ. R. 12 (B) (6). Dismissal of the complaint under Civ. R. 12(B)(6) is appropriate if, after all factual allegations of the Complaint are presumed true and all reasonable inferences are made in relator's favor, it appears beyond doubt that relator can prove no set of facts entitling her to the requested relief. *State ex rel. Bell v. Pfeiffer*, 131 Ohio St.3d 114, 2012-Ohio-54. Relator fails to satisfy the requirements for the original actions listed and none of relator's requested relief is appropriately addressed by way of Habeas, a Writ of Prohibition or a Writ in Mandamus.

Habeas is not applicable

Habeas corpus relief is available to when an individual has been "unlawfully restrained of his liberty..." R.C. 2725.01. This is precisely what this Court has held, "habeas corpus will lie in extraordinary circumstances where there is an unlawful restraint of a person's liberty,...." *State ex rel. Jackson v. McFaul*, 73 Ohio St.3d 185, 1995-Ohio-228. Relator makes no allegation and provides no proof that any individual has been unlawfully restrained. Additionally, actions seeking habeas relief must comply with R.C. 2725.04, which requires the party seeking the relief to specify:

> (A) That the person in whose behalf the application is made is imprisoned, or restrained of his liberty;
>
> (B) The officer, or name of the person by whom the person is so confined or restrained; or, if both are unknown or uncertain, such officer or person may be described by an assumed appellation and the person who is served with the writ is deemed the person intended;
>
> (C) The place where the prisoner is so imprisoned or restrained, if known;
>
> (D) A copy of the commitment or cause of detention of such person shall be exhibited, if it can be procured without impairing the efficiency of the remedy; or if the imprisonment or detention is without legal authority, such fact must appear.

As this court held in *State ex rel. Jackson*, a petitioner seeking habeas corpus relief must comply with the requirements of R.C. 2725. Relator completely fails to either allege the most basic fact for habeas relief or satisfy any of the statutory requirements. Accordingly, the petition for habeas must be dismissed.

Writ of Prohibition is Not Applicable

Traditionally, a writ of prohibition is an extraordinary judicial writ issued by a court of superior jurisdiction directing or ordering an inferior court to cease abusing or usurping judicial functions. "[T]he purpose of a writ of prohibition is to restrain inferior courts and tribunals from exceeding their jurisdiction." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 1998-Ohio-275.

And as this Court has further held, in order for a writ of prohibition to issue, the relator must establish that:

> (1) The lower court is about to exercise judicial authority;
>
> (2) The exercise of authority is not authorized by law; and,
>
> (3) The relator possesses no other adequate remedy in the ordinary course of law if the writ of prohibition is denied.
>
> *State ex rel. Jones*, at 74. *State ex rel. Corn v. Russo*, 133 Ohio App.3d 57, 726 N.E.2d 1052(1999).

Since a court of common pleas is a court of general jurisdiction, such a court possesses the authority to initially determine its own jurisdiction. The only exceptions are the limited situations where there appears to be a total lack of jurisdiction for the lower court to act. *State ex rel. Jones*, at 74.

Here, relator fails to even allege that respondent is about to exercise judicial power that is unauthorized by law. Relator's claims are focused on actions that have already been taken by the respondent and relator now claims those completed actions were unauthorized. Respondent is the duly elected Common Pleas Judge in Adams County presiding over the General, Probate and Juvenile divisions. The actions that relator complains about involved respondents

normal exercise of his judicial powers as the Common Pleas Judge in Adams County. Despite some of relator's accusations, relator is complaining about respondent's decisions and not the exercise of his judicial powers. Finally, none of the relief sought is aimed at prohibiting respondent from exercising his judicial decision making powers in the future, much less a claim that any such action would be an exercise of unauthorized power.

A writ of prohibition is not a substitute for an appeal. *State ex rel. Crebs v. Court of Common Pleas of Wayne County, Probate Division*, 38 Ohio St.2d 51, 309 N.E.2d 926 (1974). As this court stated in State ex rel. Jones, at 74, "absent a patent and unambiguous lack of jurisdiction, relator's remedy in the ordinary course of law by postjudgment appeal precludes prohibition." Here, relator has availed herself of her right to appeal.[1]

Relator has failed to provide any evidence as to even one of the three prongs required for obtaining a writ of prohibition.

Writ of Mandamus is not applicable

Generally, mandamus is the proper remedy to compel the performance of any act that an inferior court has jurisdiction to perform and no jurisdiction nor discretion to refuse.[2] This Court presumes the regularity of trial court proceedings and will not issue a writ of mandamus to compel the observance of the laws in general or to control the exercise of a court's discretion. *State ex rel. Kuczak v. Saffold*, 67 Ohio St.3d 123, 616 N.E.2d230 (1993). Even if the discretion is alleged to have been abused. *State ex rel. Fontanella v. Kontos*, 117 Ohio St.3d 514, 2008-Ohio-1431.

To obtain a writ of mandamus, relator must establish each prong of the following three prong test: (1) relator must possess a clear legal right to the relief

---

[1] None of the issues raised on appeal by relator's counsel question respondent's jurisdiction to exercise his judicial authority.

[2] Relator seems to have ignored the incongruity of seeking a writ of prohibition (ordering a lower court to refrain from making an unauthorized act) and simultaneously seeking a writ of mandamus (ordering a court to do what it is required to do).

requested; (2) the respondent possesses a clear legal duty to perform the requested act; and

(3) the relator possesses no plain and adequate remedy in the ordinary course of the law. *State ex rel. Corn, supra,* at 64.

Whenever there is a clear remedy at law, the petition for a writ of mandamus will not be granted. *State ex rel. Corn*, at 64. *State ex rel. Carter v. Wilkinson*, 70 Ohio St.3d 65, 637 N.E.2d 1 (1994).

Here, relator has failed to establish that she has a "clear legal right" to the relief she requests. Nor has relator established that respondent has a "clear legal duty" to perform the requested actions. In fact, most of the relief sought is in the form of actions and orders from this Court. And of the remaining relief sought, none are actions that respondent has a clear legal duty to perform.[3] Finally, relator has made no showing whatsoever that she possesses no plain and adequate remedy in the ordinary course of the law. Relator's presently pending appeal demonstrates she does have an adequate remedy at law.

Conclusion

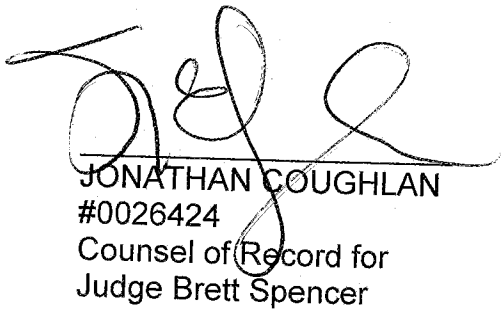
Respondent moves this Honorable Court to dismiss relator's complaint under Civ. R. 12(B)(6).

JONATHAN COUGHLAN
Adams Co. Asst. Prosecutor
#0026424
Counsel of Record for
Judge Brett Spencer
110 W. Main St. #112
West Union, Ohio 45693
(614) 462-5400
jcoughlan@keglerbrown.com

[3] For example, respondent has no clear legal duty to allow the submission, after the close of the evidence, of a recording from a completely different legal proceeding.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy was mailed by regular U.S. mail on the 25th day of February, 2015 to Amanda Wilson Iler, 121 E. Sixth Street, Seaman, OH 45679 and Michael Farahay, 1200 Mineral Springs Road, Peebles, Ohio 45660.



JONATHAN COUGHLAN
#0026424
Counsel of Record for
Judge Brett Spencer

Appendix

1. Dismissal of Complaint for Writ of Prohibition, Amanda Wilson v. Michael Farahay, No. CA 994, Court of Appeals, Fourth District

2. Dismissal of Motion for Reconsideration, Amanda Wilson v. Michael Farahay, No. CA 994, Court of Appeals, Fourth District

3. Amanda Wilson v. Michael Farahay, No. CA 994
Docket, Court of Appeals, Fourth District

4. Appellant's brief, Amanda Wilson v. Michael Farahay, No. CA 994
Court of Appeals, Fourth District

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY, OHIO

Amanda Wilson Nka Iler PLAINTIFF-RELATOR VS Brett M Spencer, Judge DEFENDANT-RESPONDENT	:	Case No: 14 CA 999 NOTICE OF ENTRY

Pursuant to Appellate Rule 30-A, you are hereby notified that an Entry, copy hereto attached, was filed for journalization in this Court on 12/18/14 .

LARRY HELLER, CLERK
COURT OF APPEALS
ADAMS COUNTY, OHIO

Donna Parker
Deputy

COURT OF APPEALS
FILED
ADAMS COUNTY
CLERK OF COURTS
2014 DEC 18 AM 9:23
Larry Heller
CLERK

2014 DEC 19 AM 11:10

12/19/14
- copy to Judge
- faxed to Nikki

COURT OF APPEALS

FILED
ADAMS COUNTY
CLERK OF COURTS

2014 DEC 18 AM 9: 16

CLERK

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

Amanda Wilson (nka:Iler),	:	
Relator,	:	Case No. 14CA999
v.	:	
Judge Brett M. Spencer,	:	
Respondent.	:	DECISION AND JUDGMENT ENTRY

APPEARANCES:

Amanda Wilson (nka:Iler), Seaman, Ohio, pro se Relator.

David Kelley, Adams County Prosecutor, West Union, Ohio, for Respondent.

HOOVER, Administrative Judge,

Relator Amanda Wilson, now known as Iler, filed a complaint for a writ of prohibition seeking an order requiring video surveillance in the magistrate's courtroom of Adams County Court of Common Pleas, Juvenile Division, reimbursement of her court costs, to allow M.F. "to have an independent voice and be heard," for the reversal of the trial court's judgment concerning a recent custody decision, and sanctions against Judge Brett M. Spencer, the juvenile court judge in Adams County. Respondent filed a motion to dismiss the complaint under Civ. R. 12(B)(6). Wilson has filed her response to the motion to dismiss.

A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 605 N.E.2d 378 (1992). When a party files a motion to dismiss

for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the non-moving party. However, while the factual allegations of the complaint are taken as true, the same cannot be said about unsupported conclusions. Unsupported conclusions of a complaint are not considered admitted, and are not sufficient to withstand a motion to dismiss. *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639 (1989).

In order for a court to grant a motion to dismiss for failure to state a claim, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753, 755 (1975).

Here, Wilson alleges that the trial court erred in adopting the magistrate's findings concerning a recent child custody dispute because there was insufficient evidence to warrant a change in custody. She seeks to have the installation of video surveillance in the courtroom, reimbursement of her court costs, to allow M.F. to testify, and for a reversal of the trial court's judgment. She also seeks sanctions.

To warrant a writ of prohibition, the relator must establish the existence of three prerequisites: (1) the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power, (2) the exercise of that power is clearly unauthorized by law, and (3) denial of the writ will cause injury for which there is no adequate remedy in the ordinary course of law. *McAuley v. Smith*, 82 Ohio St.3d 393, 395, 696 N.E.2d 572 (1998).

After reviewing the Respondent's motion to dismiss and the Relator's complaint, we find that the Respondent's motion to dismiss should be granted. Wilson concedes in her complaint

that the Respondent is the duly elected judge for the Adams County Court of Common Pleas, Juvenile Division. She does not make any allegations that the trial court is about to exercise judicial or quasi-judicial power that is clearly outside the trial court's jurisdiction or otherwise unauthorized by law. Additionally, even if all of her factual allegations are taken as true, Wilson has an adequate remedy through a direct appeal of the trial court's judgment and is actively pursuing this remedy by a direct appeal of the trial court's custody order. Thus, we find that Relator's complaint fails to establish the existence of any of the three prerequisites necessary to state a claim for a writ of prohibition and we hereby **GRANT** Respondent's motion to dismiss.

Relators' petition for writ of prohibition is hereby **DISMISSED**.

The clerk shall serve a copy of this order on all counsel of record and unrepresented parties at their last known addresses by ordinary mail.

PETITION DISMISSED. COSTS TO RELATOR. IT IS SO ORDERED.

Abele, P.J. & Harsha, J.: Concur.

FOR THE COURT

Marie Hoover
Administrative Judge

to NiRKi 1/16/15
copy to Judge 1/16

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY, OHIO

Amanda Wilson Nka Iler PLAINTIFF-RELATOR VS Brett M Spencer, Judge DEFENDANT-RESPONDENT	:	Case No: 14 CA 999 NOTICE OF ENTRY

Pursuant to Appellate Rule 30-A, you are hereby notified that an Entry, copy hereto attached, was filed for journalization in this Court on Jan 14, 2015 .

LARRY HELLER, CLERK
COURT OF APPEALS
ADAMS COUNTY, OHIO

Donna Parker
Deputy

2015 JAN 16 AM 9:56

COURT OF APPEALS
FILED
ADAMS COUNTY
CLERK OF COURTS
2015 JAN 14 PM 1:42
Larry Heller
CLERK

COURT OF APPEALS
FILED
ADAMS COUNTY
CLERK OF COURTS
2015 JAN 14 AM 9:31
CLERK

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

Amanda Wilson (nka: Iler),	:	
Relator,	:	Case No. 14CA999
v.	:	
Judge Brett M. Spencer,	:	
Respondent.	:	ENTRY

Hoover, Presiding Judge,

Relator Amanda Wilson, now known as Iler, filed a complaint for a writ of prohibition seeking an order requiring video surveillance in the magistrate's courtroom of Adams County Court of Common Pleas, Juvenile Division, reimbursement of her court costs, to allow M.F. "to have an independent voice and be heard," for the reversal of the trial court's judgment concerning a recent custody decision, and sanctions against Judge Brett M. Spencer, the juvenile court judge in Adams County. Respondent filed a motion to dismiss the complaint under Civ. R. 12(B)(6), which we granted. Wilson has filed an application for reconsideration under App.R. 26(A)(1). For the reasons that follow, we **DENY** the application.

App. R. 26(A) does not provide specific guidelines for appellate courts to use when determining whether a prior decision should be reconsidered. *State v. Wong*, 97 Ohio App.3d 244,246 (4th Dist. 1994). "The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews,* 5 Ohio App.3d 140, 143 (10th Dist. 1981).

Wilson argues that the trial court failed to follow the proper rules of procedure when

ruling on the most recent custody dispute and that the guardian ad litem engaged in misconduct. She attaches a number of exhibits to her motion for reconsideration that she argues supports her claims of procedural errors. As we held in our original decision and judgment entry, even if all of her factual allegations are taken as true, Wilson has an adequate remedy through a direct appeal of the trial court's judgment and is actively pursuing this remedy by a direct appeal of the trial court's custody order.

Wilson has not called to this court's attention an error in our judgment. An application for reconsideration is not designed for use in instances where a party disagrees with a judgment of an appellate court. Instead, it is intended to provide a party with an opportunity to prevent a miscarriage of justice where an appellate court makes an obvious error or renders a decision that is unsupported by the law. As we previously indicated, Wilson is not entitled to a writ of prohibition. We properly granted Respondent's motion to dismiss pursuant to Civ. R. 12(B)(6).

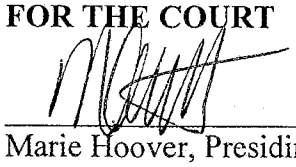
This court has fully considered the issues raised by Wilson and, because she has not called to our attention an error in our judgment or a conflict in our decisions, we **DENY** the application for reconsideration.

The clerk shall serve a copy of this order on all counsel of record at their last known addresses. The clerk shall serve relator by certified mail, return receipt requested. If returned unserved, the clerk shall serve appellant by ordinary mail.

IT IS SO ORDERED.

Harsha, J. & Abele, J.: Concur.

FOR THE COURT



Marie Hoover, Presiding Judge

Case Number : CA 994
Plaintant(s): Wilson, Amanda
Defendant(s): Farahay, Michael

Case CA 994

07/09/2014

CASE FILED

148.00 DEPOSIT - RECEIPT NO. 2141881 IN THE AMOUNT OF $ 148.00
HAPNER & HAPNER

NOTICE OF APPEAL WITH JUDGMENT ENTRY FILED ON 6/26/2014 RECIEVED FROM CLERK, JUVENILE COURT, ADAMS COUNTY, OHIO AND FILED. (CASE NO. 20035123)

CIVIL DOCKET STATEMENT FILED.

REQUEST FOR TRANSCRIPT OF IN CAMERA CONFERENCE FILED.

ORDER TO COURT REPORTER FILED.

ADULT CASE DOCKET RECEIVED AND FILED.

07/10/2014

FOUR COPIES OF NOTICE OF APPEAL WITH JUDGMENT ENTRY FILED ON 6/26/14, FOUR COPIES OF CIVIL DOCKET STATEMENT, FOUR COPIES OF REQUEST FOR TRANSCRIPT OF IN CAMERA CONFERENCE, FOUR COPIES OF ORDER TO COURT REPORTER, FOUR COPIES OF ADULT CASE DOCKET WITH REPORT FORM C ATTACHED MAILED TO THE FOURTH DISTRICT COURT OF APPEALS BY REGULAR U.S. MAIL.

07/23/2014

AMENDED ADULT CASE DOCKET FILED.

FOUR COPIES OF AMENDED ADULT CASE DOCKET MAILED TO THE FOURTH DISTRICT COURT OF APPEALS BY REGULAR U.S. MAIL

08/15/2014

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES, NUMBER LISTING OF DOCUMENTS IN RECORD, CERTIFICATE OF TRANSMITTAL, TRANSCRIPT OF HEARING 11/5/13, TRANSCRIPT OF HEARING HELD 12/3/13, TRANSCRIPT OF HEARING HEL 7/12/11, ALL ORIGINAL PAPERS RECEIVED FROM CLERK, ADAMS COUNTY JUVENILE COURT, ADAMS COUNTY, OHIO AND FILED.

NOTICE OF TRANSMISSION OF RECORD AND COPIES FILED.

FOUR COPIES OF NOTICE OF TRANSMISSION OF RECORD MAILED TO THE FOURTH DISTRICT COURT OF APPEALS BY REGULAR U.S. MAIL.

COPY OF NOTICE OF TRANSMISSION OF RECORD MAILED TO THE FOLLOWING BY REGULAR U.S. MAIL: JON HAPNER, TANYA DRINNON, JOHN CALDWELL, AND TYLER CANTRELL

20.00 ISSUING WRITS, ORDERS, NOTICES, EXCEPT SUBPEONA

1.92 POSTAGE CHARGED

09/05/2014

BRIEF OF APPELLANT AND COPIES FILED. (FILED BY JON C. HAPNER, ATTORNEY FOR APPELLANT.)

APPENDIX OF APPELLANT BRIEF AND COPIES FILED.

FOUR COPIES OF BRIEF OF APPELLANT, FOUR COPIES OF APPELLANT BRIEF MAILED TO FOURTH DISTRICT COURT OF APPEALS, 14 S. PAINT ST., #38, CHILLICOTHE, OH 45601 BY PRIORITY MAIL.

09/15/2014

REQUEST FOR ORAL ARGUMENT AND CERTIFICATE OF SERVICE FILED. (FILED BY JON C HAPNER, ATTY FOR APPELLANT)

FOUR COPIES OF REQUEST FOR ORAL ARGUMENT MAILED TO FOURTH DISTRICT COURT OF APPEALS BY REGULAR US MAIL.

.69 POSTAGE CHARGED

09/18/2014

MAGISTRATE'S ORDER FILED. (THE COURT DENIES THE REQUEST AT THIS TIME FOR ORAL ARGUMENTS AS IT DOES NOT COMPLY WITH THIS COURT'S LOC.R. 12.)

NOTICE OF ENTRY AND COPIES FILED.

COPY OF NOTICE OF ENTRY AND COPY OF MAGISTRATE'S ORDER MAILED TO JON C HAPNER AND TANYA DRINNON BY REGULAR US MAIL.

2.00 ENTERING JOURNAL - EACH PAGE

1.32 POSTAGE CHARGED

09/26/2014

APPELLEE'S MOTION REQUESTING AN EXTENSION OF TIME TO FILE BRIEF AND CERTIFICATE OF SERVICE FILED. (FILED BY DAVID E GRIMES, ATTY FOR DEF)

FOUR COPIES OF APPELLEE'S MOTION REQUESTING AN EXTENSION OF TIME TO FILE BRIEF MAILED TO FOURTH DISTRICT COURT OF APPEALS BY REGULAR US MAIL.

.48 POSTAGE CHARGED

10/02/2014

MAGISTRATE'S ORDER FILED. (MICHAEL FARAHAY MOTION FOR EXTENSION OF TIME TO FILE BRIEF GRANTED. SHALL BE FILED ON OR BEFORE 12/1/14.)

NOTICE OF ENTRY AND COPIES FILED.

COPY OF MAGISTRATE'S ORDER, COPY OF NOTICE OF ENTRY MAILED TO JON C. HAPNER, TANYA DRINNON, DAVID E. GRIMES, TYLER E. CANTRELL, JOHN B. CALDWELL BY REGULAR U.S. MAIL.

2.40 POSTAGE CHARGED

2.00 ENTERING JOURNAL - EACH PAGE

12.00 ISSUING WRITS, ORDERS, NOTICES, EXCEPT SUBPEONA

10/06/2014

MOTION TO DENY EXTENSION OF TIME AND CERTIFICATE FILED.
(FILED BY JON C HAPNER, ATTY FOR APELLANT)

FOUR COPIES OF MOTION TO DENY EXTENSION OF TIME MAILED TO
FOURTH DISTRICT COURT OF APPEALS BY REGULAR US MAI.

.69 POSTAGE CHARGED

10/09/2014

MAGISTRATE'S ORDER FILED.
BECAUSE APPELLANT DID NOT COMPLY WITH THIS COURTS PREVIOUS
ORDER AND BECAUSE THE ISSUE IS MOOT, THE COURT DENIES THE
MOTION TO DENY EXTENSION OF TIME.
NOTICE OF ENTRY AND COPIES FILED.

COPY OF MAGISTRATE'S ORDER, COPY OF NOTICE OF ENTRY MAILED
TO THE FOLLOWING BY REGULAR U.S. MAIL: JON HAPNER AND TANYA
DRINNON

FOUR COPIES OF MAGISTRATE'S ORDER MAILED TO THE FOURTH
DISTRICT COURT OF APPEALS

2.00 ENTERING JOURNAL - EACH PAGE

6.00 ISSUING WRITS, ORDERS, NOTICES, EXCEPT SUBPEONA

1.92 POSTAGE CHARGED

IN THE COURT OF APPEALS
ADAMS COUNTY, OHIO
FOURTH APPELLATE DISTRICT

Amanda Wilson (nka Ilcr),	:	Case No. CA 994
Plaintiff-Appellant	:	
-vs-	:	
Michael Farahay,	:	
Defendant-Appellee	:	

APPEAL FROM THE JUVENILE COURT OF ADAMS COUNTY, OHIO

BRIEF OF APPELLANT

Jon C. Hapner 0003017
127 North High Street
Hillsboro, Ohio 45133
Phone 937-393-3487
Fax 937-393-5388

Attorney for Appellant

Tanya M. Drinnon
307 N. Market Street
West Union, Ohio 45693
Phone 937-544-2581
Fax 937-544-1802

Attorney for Appellee

COURT OF APPEALS
FILED
ADAMS COUNTY
CLERK OF COURTS
2014 SEP -5 PM 2:03
CLERK

RECEIVED
SEP 08 2014

TABLE OF AUTHORITIES AND CASES

	Page No.
Bawidamann vs Bawidamann, 63 Ohio App 3d 691	17
Beaver vs Beaver, 143 Ohio App 3d 1	21
Davis vs Flickinger, 77 Ohio St 3d 415	11
Doley vs Doley, unreported (appendix)	13
Eastly vs Volkman, 132 Ohio St 3d 328	12
In Re Braydon James, 113 Ohio St. 3d 420	10
In Re: Williams, 101 Ohio St 3d 397	17
Grdina vs Moyer, 61 Ohio St 3d 479	13
Glimcher vs Glimcher, 29 Ohio App 2d 55	11
Kraus vs Kraus, 10 App 3d 63	14
Nolan vs Nolan, 2012 Ohio 3736	16
Whaley vs Whaley, 61 Ohio App 2d 111	14
Wyss vs Wyss, 3 Ohio App 3d 416, 3 OBR 483	11
Rules of Superintendence 48	15
RC 3109.04 OE) (1) (a)	17
RC 2151.352	17

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NUMBER ONE

The decision of the Court is against the manifest weight of the evidence.

Page 10

ASSIGNMENT OF ERROR NUMBER TWO

The Trial Court erred in considering the deficient report of the GAL.

Page 15

ASSIGNMENT OF ERROR NUMBER THREE

The Trial Court erred in not permitting the plaintiff to suggest questions for the in camera interview.

Page 19

ISSUES PRESENTED FOR REVIEW

ASSIGNMENT OF ERROR NUMBER ONE

The decision of the Court is against the manifest weight of the evidence.

Issue to be Decided: Is there sufficient evidence in this record to justify a finding of a change of circumstances?

B. What determines a change of circumstances even though credence may not be given to one party in the proceedings?

Page 10

ASSIGNMENT OF ERROR NUMBER TWO

The Trial Court erred in considering the deficient report of the GAL.

Issue to be Decided: Should the Trial Court consider a GAL report that is clearly, from all of the evidence, deficient in its content.

Page 15

Issue Number Two: Did the Trial Court err in not granting the child counsel, when the GAL takes a position contrary to the child's desires?

Page 19

STATEMENT OF THE CASE

This is a post decree action for modification of custody in the Juvenile Court of Adams County.

Defendant Father filed a motion to modify custody on April 11, 2013, alleging a change of circumstances.

A partial hearing was held on November 5, 2013. It was continued until December 3, 2013.

The Magistrate filed a decision on March 18, 2014. After plaintiff's objections, the Trial Court affirmed the Magistrate's Decision by judgment entry on June 26, 2014.

STATEMENT OF FACTS

On April 11, 2013, Michael Farahay, the father, filed a motion to modify parenting and change custody. He alleged three grounds:

(A) Mother is no longer able to provide a stable environment for minor child.

(B) Mother's behavior does not provide a good example for minor child.

(C)Minor child's school progress has rapidly declined.

The Mother, of course, denied these allegations.

Hearings were held on the matter on November 5, 2013 and December 3, 2013. At the November 5, 2013 hearing, Michael Farahay admitted that his relationship with his daughter is strained (11/5, Page 7,8). He claimed that Mackenzie was failing in school (11/5, Page 8), that Mackenzie told him that there were fights going on in her house (11/5, Page 10) (objected to as hearsay).

He claimed that Mackenzie was failing (11/5, Page 13,14) in school. Mr. Farahay admitted that he owed medical bills, but had never been given one. He further admitted that a shared parenting plan would not work with the Mother (11/5, Page 21,22).

On cross examination, (11/5, Page 25 to 32) Farahay danced around the payment of medical bills.

Lindsey Farahay testified backing up her husband.

Chase Gleason, a friend of Matt Iler's testified. She claimed to have received a text message from the Mother indicating she had been beaten (11/5, Page 61). The testimony was received over objection. On cross examination, Gleason admitted that Amanda's number was on any of the messages (11/5, Page 65). She also admitted that she personally never saw any

bruises being inflicted on Amanda .

Matt Iler then testified. He admitted to several conversations with Farahay, and claimed a threatening message from Amanda if he did testify. They were former husband and wife.

Tyler Cantrell testified as GAL. He felt both homes were suitable and adequate. He felt Mackenzie's relationship with the Father was not cozy or cuddly, but better (11/5, Page 103). Mackenzie has a very strong relationship with her Mother (11/5, Page 104). Cantrell felt that the parties are not capable of getting along together (11/5, Page 105). He hemmed and hauled and then in passing felt that if you placed Mackenzie in her Father's home, her mental and emotional health would be greatly altered (11/5, Page 107, Line 17). He then reflected on the possibility of arguments going on in the Mother's home, and her overall reaction to some of the testimony, he decided it would probably be better if Mackenzie was placed with her Father (11/5, Page 109).

On cross Cantrell admitted that his recommendation at the hearing was different than the report, and that he changed his mind. He believes there is some violence or arguments around Mackenzie (11/5, Page 110). He feel the child's grades should improve, but they are the same as they have been for years (11/5, Page 111). He did not find any physical abuse of Amanda Iler (11/5, Page 113) or the child. He saw no drug problem with the Mother, and found no material change of circumstances (11/5, Pages 116, 117). Cantrell was concerned with the child's school grades (11/5, Pages 117, 118).

At the December 3rd hearing, Amanda presented her case.

Nikki Chandler, Mackenzie's social study teacher, said Mackenzie had to work harder, she struggled, but earned mostly B's.

Lisa Taylor, Mackenzie's reading intervention teacher, testified that Mackenzie performed at level, or a little below, but she worked hard, and was very conscientious. Mackenzie was not failing (12/3, Page 11).

Beatrice Ball, Mackenzie's reading teacher, testified that she had Mackenzie as a student. She also tutored her (12/11, Page 15). She cannot remember meeting Todd Farahay.

Monica Crawford, Mackenzie's sixth grade teacher, testified. She taught math and language arts. She testified that Mackenzie did well, made safety patrol. She had contact with both parents over Mackenzie's school work. Monica also said she wrote the letter (Pl Ex 6) and that the statements made in it are true and correct (12/3, Page 26).

Constance Burchestee testified that she has baby sat for Amanda and Mackenzie was a happy, well balanced, good girl. She did say she notices a bitter attitude by Mackenzie towards her Father (12/3, Page 32). Mackenzie shows a down attitude after visitations with her Father (12/3, Page 32,33).

Deborah Spratt testified that she was a friend of Amanda, and has observed the interaction between Amanda and Mackenzie. Amanda encourages the child self esteem, and that Amanda was a very good Mom.

Anthony Tambash testified that he was Mackenzie's grandfather. He said Amanda and Mackenzie enjoy each other's company, and that Mackenzie was well cared for.

Virginia Tambash, Mackenzie's grandmother, testified. She says Mackenzie seems subdued after a visit with her Father (12/3, Page 53).

David Hughes testified. He is the live in companion of Amanda, since September, 2011. He has never beat Amanda or physically abused her (12/3, Page 56) and he has never been charged with assault on any one (12/3, Page 56). He then went on to describe his association

with Amanda's children and their daily routines.

Amanda was the last to testify on her behalf. She went through the medical bills matter, described how to counterfeit text messages (12/3, Page 94) and she specifically denies sending the messages to Chase (12/3, Page 95,96). On cross, she specifically denied violence in [illegible] (12/3, Page 94-95) (12/3, Page 101). She also critiqued the GAL report and its

with Amanda's children and their daily routines.

Amanda was the last to testify on her behalf. She went through the medical bills matter, described how to counterfeit text messages (12/3, Page 94) and she specifically denies sending the messages to Chase (12/3, Page 95,96). On cross, she specifically denied violence in the home (12/3, Page 94,95) (12/3, Page 101). She also critiqued the GAL report and its shortcomings (12/3, Page 108 to 112).

At the end of the testimony, Amanda proffered some questions to be asked of Mackenzie in the in camera session. Farahay objected and the Court denied them (12/3, Page 157,159).

ASSIGNMENT OF ERROR NUMBER ONE

The decision of the Court is against the manifest weight of the evidence.

Issues to be Decided.

A. Is there sufficient evidence in this record to justify a finding of change of circumstances?

B. What determines a change of circumstances, even though credence may not be given to one party in the proceedings?

Argument.

A. First of all, the authorities are quite clear that the Trial Court in custody cases has a wide discretion. The Trial Court is entitled to determine the credibility of the witnesses, since it has the opportunity to observe and hear the testimony.

A Trial Court is precluded from modifying a prior decree affecting parenting rights unless it finds, based on facts that have arisen since the time of the decree or were unknown to it at the time, not only that a change has occurred in the circumstances of the child, the child's residential parent, or either parent subject to a shared parenting decree, but also that the modification of the prior custody decree is necessary to serve the best interests of the child.

Such changes may be, for example, a new marriage that creates hostility by the residential parent and spouse toward the non-residential parent, frustrating attempts toward visitation, the advancement of the child from infancy to adolescence, unruly behavior of the residential parent involving the police, and fights between the residential parent and a new spouse that required police intervention, along with the fact that the residential parent moved six times in two years. In Re: Braydon James, 113 Ohio St 3d 420.

"Clearly there must be a change of circumstances to warrant a change of custody,

and the change must be a change of substance, not a slight or inconsequential change. The nomenclature is not the key issue. As the Wyss Court aptly stated: "The clear intent of that statute is to spare children from a constant tug of war between their parents who would file a motion for change of custody though he or she could provide the children a "better" environment. The statute is an attempt to provide some stability to the custodial status of the children, even though the parent out of custody may be able to prove that he or she or she can provide a better environment." Wyss 3 Ohio App 3d at 416, 3 OBR at483. Davis vs Flickinger, 77 Ohio St 3d 415."

Coming now to the Court's decision in this case, it seems to center on the idea that domestic violence occurred in the Mother's home. It found that the Mother was the victim, and apparently that the child witnessed it.

First of all, since the Court was finding this to be so, if believed, there was one incident, with no direct testimony on the incident. Both principals, (Mother and significant other) denied it happening. The finding is based on an alleged anonymous phone call (11/3T, Page 9) hearsay statements (T11/3, Page 10). The alleged admissions by the Mother to the ex-husband's girlfriend (T 11/5, Pages 61 and 65) and the ex-husband testimony that he saw bruises on the Mother (T 11/5, Page 71). Evidence of an out of court admission is not such credible evidence. Glimcher vs Glimcher, 29 Ohio App 2d 55.

With this, we note that (a) no police record; (b) no admissions or concessions; © no direct eye witnesses; (d) no medical records or pictures.

Further, there is no direct evidence that Mackenzie saw any such violence, or how it would affect her, if any.

In essence, there is a supposition, rebutted by what the Magistrate felt was non credible evidence.

Further, the GAL testimony, as flawed as it was, noted that the relationship

between the Mother and Daughter was véry strong, even though no material changes in circumstances, and he was uncertain if the Father gaining custody would be in the best interest of the child (T 11/5, Pages 107,108).

This is the basis of the Trial Court's findings.

Is this sufficient?

Sufficiency of the evidence is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury, or whether the evidence is legally sufficient to support the judgment as a matter of law.

**** in essence, sufficient is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Eastly, Admr. Vs Volkman, 132 Ohio St 3d 328 (2012).

Weight of the evidence is a distinct concept.

Weight of the evidence concerns the "inclination of the greater amount of the credible evidence offered in a trial to support one side of the issue rather than the other. It indicated clearly to the jury that the party having burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics but depends on its effect in inducing belief." Eastly, supra.

Par. 19 in Eastly:

> "Because 'manifest weight" of the evidence refers to a greater amount of credible evidence and relates to persuasion, it does not matter that the burden of proof differs in criminal and civil cases. In a civil case in which the burden of persuasion is only by a preponderance of the evidence, rather than beyond a reasonable doubt, evidence must still exist on each element (sufficiency) and the evidence on each element must satisfy the burden of persuasion (weight)."

With all of this in mind, we note the case of Grdina vs Moyer, 61 Ohio St 3d 479, relating the seeking of a modification of custody. A party seeking a modification of custody must show that some action by the custodial parent presently endangers the children, with a reasonable degree of certainty, will manifest itself and endanger the child in the future if the child is not removed from her parents' environment immediately.

Taking the Father's case at its best, it would show one incident of a knockdown, drag out fight between the adults. There was no police intervention, no medical treatment, and no proof that the child actually saw the incident.

We submit that this is neither sufficient nor proof by preponderance of a change of circumstances of the custodian Mother and child.

We submit that the Trial Court's reliance on Kelly Doley vs Doley Lake County, is misplaced. First of all the comment cited was dicta in the Doley opinion. Secondly, it is an unreported case, and not authority. In the Doley case, the Father conceded that he held a gun to the Mother's head, pushed her into a snow bank, called her vile names, and made various other threats to her. But the request in that case was for a shared parenting decree, and the Court found that it would be devastating for the child to be placed in the middle of such violent and hostile interaction between the parents. In the case at bar the child has lived with the Mother all of her life, and to change homes and school districts would be an upheaval of significant impact, which the GAL admitted would be of little help to the child (T 11/5, Page 107).

We submit therefore, that even though the Trial Court has wide discretion, it is limited by the facts in the case. As to the Mother's supposed lack of credibility, we can point out that this is the Father's fourth attempt at custody, (per the trial review of documentation, July 14,

2008; February 2, 2011; March 18, 2010; and April 11, 2013) and the Magistrate found no lack of credibility before.

We submit, instead, that the Magistrate clearly had a bias against the Mother in this cause. We offer as a reason, that she clearly did not like the way that the law was being administered in her case, particularly with the GAL performance.

The Magistrate takes great exception to her denial of domestic violence. He did not seem, nor did the Trial Court, to find her testimony lacking credibility in other respects. Further, the Magistrate Report reflected a "concern" of domestic violence in the home, and not that there was a finding of actual finding on such in the home.

Further, as a matter of logic, the idea that the Father is more credible, or his home more stable, is not a change of circumstances. Such matters are outside child's circumstances.

We point out that there is no evidence in this record as to the matter of harm to the child if she remains with her Mother.

Section 3109.04 creates a presumption which favors the retention of the current custodian. Kraus vs Kraus, 10 App 3d 63. It is especially strong when the child is twelve years of age or older and chooses to remain with the custodial parent. The modification of a prior custody order is likely to harm a child. Whaley vs Whaley, 61 Ohio App 2d 111.

This presumption seems to have been ignored by the Trial Court. The evidence failed to disclose any incident where the child saw any domestic violence. It is lacking in any psychological determination that the Mother's home life has been harmful or detrimental to the child. After all, it is required to establish such a decision as the one at bar.

ASSIGNMENT OF ERROR NUMBER TWO

The Trial Court erred in considering the deficient report of the GAL.

Issue to be Determined: Should the Trial Court consider a GAL report that is clearly, from all of the evidence, deficient in its content?

2nd Issue: Did the Trial Court err in not granting the child counsel, when the GAL takes a position contrary to the child's desires:

The GAL requirements are set out in Superintendence Rule 48. We have attached a copy as an appendix to the brief. We point Sup. Rule 48 (D) that upon determining that a conflict exists between his position and the child's desires, that the GAL shall at the earliest practical time request in writing that the Court promptly resolve the conflict by entering appropriate orders. (We suggest that this would mean a new GAL).

Under Sup. Rule 48 (F) the report was due seven days before the hearing. Under Sup. Rule 48 (D) (3) the GAL is to perform certain duties, which were clearly deficient in this case.

Mr. Cantrell admitted that (1) he changed his opinion on the stand, (2) his opinion was contrary to the child's desires; and he changed his opinion due to the actions of the Mother in court (T11/5, Page 109).

We point out that at no time in either hearing was the Mother called down for her actions in court. Further, counsel was seated left of the Mother, and the GAL was to the left and in front of counsel. What observations he claimed to influence him were never made a matter of record.

His performance as a GAL was clearly deficient: (1) his report was late. (2) He

clearly did not discuss the child's school activity with the school personnel, since the teacher's testimony was clearly at variance with his findings. He did not discuss the situation with Mrs. Farahay or with Mr. Newman, nor did he the other adults in this matter.

All are suggested in Sup. Rule 48 (D) 13.

Further he express concerns about a change of circumstances doing more harm than good.

His betrayal of the child, and it is just that, is mind boggling. The Mother took great exception to his testimony and findings, since she is also trained in the GAL requirements.

It is even more startling, in view of his finding that there is a strong bond between Mother and Daughter; and that his recommendation is contrary to the presumptions set forth in RC 3109.04 (E) (1) (a). He admitted that the relationship between the Daughter and Father was strained, and that going to his home may cause her to become delinquent (T 11/5, 107, 108).

Further, as to the change in circumstances, we point out the following on the record (T 11/5, 116/117).

"2 Q: Well its not a material change of circumstances?

A. I wouldn't say it's a super big change, no."

We submit that Mr. Cantrell was affected by some bias in this matter, as clearly shown by his remarks on Mackenzie's school progress. We submit that his performance was biased, insufficient, and inaccurate.

The Court has already discussed the problem of ineffectiveness GAL performance in the case of Nolan vs Nolan, 2012-Ohio 3736. We concede that the Court has held that Sup. Rule does not have the force of law. However, when the GAL falls below the minimum standard of the rules, the testimony or report cannot be considered competent evidence and should be

striken.

The second issue in the assignment is the position of the child when the GAL abandons her.

Juvenile Rule 4 © states in part:

"(1) When the GAL is an attorney admitted to practice in this state, the guardian may also serve as counsel to the ward providing no conflict between the roles exist.

(2) If a person is serving as a GAL and as attorney for the ward and either that person or the Court finds a conflict between the responsibilities of the role as attorney and that of GAL, the Court shall appoint another person as guardian of the ward."

RC 2151.352 states in part:

"A child, the child's parents or custodian or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this Chapter or Chapter 2152 of the Revised Code."

Clearly, in this case, Mackenzie need protection from the GAL.

Under Juvenile Rule 2 (V) legal custody is involved in this mater, and Juvenile Rule (Y) defines party to include the child.

While most cases involve termination of parental rights, in this case the GAL was acting contrary to the Child's desires (conflict) and we submit contrary to the Statutes 3109.04.

The Ohio Supreme Court, in In Re Williams, 101 Ohio St 3d 397, have held that a child is entitled to counsel if there is a conflict between the GAL and the child. Clearly, in the situation at bar, the child was left up the creek without a paddle.

The situation at bar was considered in the case of Bawidamann vs Bawidamann, 63 Ohio App 3d 691, wherein the GAL determined that the childrens election to live with their father was not in their best. That Court held that allowing the GAL to act as the children's

attorney in a change of custody proceedings denied the children proper representation of counsel in protection of their wishes, and required a remand for a new trial.

We submit that the same would apply in this case.

SUMMARY

This case should be reversed.

(1) The Magistrate's Decision clearly indicates the bias against the Plaintiff Mother. In finding her lack of credibility, he ignores the defendant's claim of school failure, and the GAL concerns, all of which were not confirmed by the actual teachers. Just the opposite.

(2) The testimony in which the Court seems to find domestic violence is suspect, as to being established by an ex-husband, his girlfriend, and an anonymous phone call. While it is controverted, there is no direct evidence of such occurrence, no hospital records, no police calls, and no evidence that the Child saw such an event.

(3) The Court failed to consider the harm caused by such a change of residence, including the damage done by a change of schools, the effect of ignoring a child's choice, when the child is of such an age to reason, and certainly old enough to make a rational choice.

(4) The performance of the GAL is deficient on its face. He failed to consult the teachers, failed to interview other adults in the matter, and then betrayed the child. In doing so, the GAL failed to notify the Court of the conflict between his position and the Child, putting the girl in need of counsel.

(5) The matter of the in camera conference should be reviewed. Based on the prior interview two years before, the Magistrate clearly impressed the Child with his favoritism for the Father. The present interview was brief, barely 5 minutes, and since the Trial Judge put such weight upon it, the Mother should have had a chance to assess it, particularly for bias by the Magistrate.

We realize that the Trial Courts have very wide discretion in child custody cases, and the recent decisions affirm that. However, that discretion is not completely unbounded.

In this case the trier of fact ignored the inconsistencies on the school issues, failed to honor the child's selection, and based its decision on the questionable finding of domestic violence. It also found the Mother to have a lack of credibility. The Trial Court affirmed that without seeing or hearing the evidence. We point out that at no time was the Mother ever called down for her behavior during the hearing.

We also point out that if domestic violence was the issue, then the Mother was the victim, not the perpetrator of the same. There was not any evidence of how it would affect the child. In the case of Beaver vs Beaver, the Court considered the matter of how change would affect the child, and required proof of it. Beaver vs Beaver, 143 Ohio App 3d 1.

This case lacks that proof. It should be reversed.

Respectfully submitted,

Hapner & Hapner

By _____

Jon C. Hapner 0003017
127 North High Street
Hillsboro, Ohio 45133
Phone 937-393-3487
Fax 937-393-5388
Attorney for Plaintiff/Appellant

CERTIFICATE

This is to certify that a copy of this brief and appendix was delivered to the office of Tanya D. Drinnon, Attorney for Defendant/Appellee, this 5th day of September, 2014.

_____
Jon C. Hapner