[Cite as *Smarrella v. Smarrella*, 2015-Ohio-837.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

MATTHEW SMARRELLA	)	CASE NO. 14 JE 18
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
JENNA SMARRELLA	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 13 DR 247

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Francesca T. Carinci
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For Defendant-Appellant: Atty. Dawn King
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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 2, 2015

[Cite as *Smarrella v. Smarrella*, 2015-Ohio-837.]
ROBB, J.

{¶1} Defendant-appellant Jenna Smarrella ("Jenna") appeals the decision of the Jefferson County Common Pleas Court designating plaintiff-appellee Matthew Smarrella ("Matthew") custodial and residential parent of their minor children. Three issues are presented in this appeal. The first issue is whether the trial court's designation of Matthew as the custodial parent is against the manifest weight of the evidence. The second issue is whether the trial court considered the factors in R.C. 3109.04(F) when it designated Matthew the custodial parent. The third issue is whether it was plain error for the trial court to proceed with the trial that was in progress upon learning of a conflict of interest between the Magistrate hearing the case and Matthew Smarrella.

{¶2} For the reasons expressed below, the issues raised are meritless and thus, the trial court's decision is hereby affirmed.

Statement of the Case

{¶3} Jenna and Matthew were married on November 10, 2001. Two minor children were born of this marriage.

{¶4} On August 22, 2013, Matthew filed for divorce and sought to be named the residential and legal custodian of the children, who at the time were 11 and 12 years old. Jenna answered and counterclaimed also seeking a divorce and to be named residential and legal custodian of the children. 08/27/13 Answer. The parties agreed that they are incompatible and that the marriage was irreconcilable.

{¶5} Following motions, Matthew was named temporary residential and legal custodian of both minor children. The matter proceeded to a final hearing on custody and division of property, which lasted two days - February 28, 2014 and March 21, 2014.

{¶6} Thereafter, the trial court granted the divorce on the grounds of incompatibility, divided the property nearly equally and named Matthew the residential parent. Jenna was granted reasonable visitation rights. 04/10/14 Final Order of Divorce; 04/30/14 Child Support Order; 08/06/14 Pension Division Order.

{¶7} Jenna has filed a timely appeal. Her appeal solely addresses the trial court's decision to designate Matthew the custodial and residential parent of the minor children.

First Assignment of Error

"The trial court erred as a matter of law and its ruling is against the manifest weight of the evidence where substantial testimony and evidence introduced did not establish that it was in the best interests of the children to award custody to father."

{¶8} Jenna argues that the trial court's designation of Matthew as the residential parent is against the manifest weight of the evidence.

{¶9} The Ohio Supreme Court has explained:

> Divorce and ancillary custody actions are purely matters of statute. R.C. 3109.04 governs the domestic relations court's allocation of parental rights and responsibilities and sets forth the procedures and standards courts are to use in proceedings pertaining to such matters.

(Citations omitted.) *In re A.G.*, 139 Ohio St.3d 572, 579, 2014-Ohio-2957, 13 N.E.3d 1146, ¶ 41. Section B of R.C. 3109.04 requires a trial court to take into account the best interests of the children when allocating parental rights and responsibilities for the care of the children in an original proceeding. R.C. 3109.04(B)(1). Section F of that statute sets forth what must be considered in determining the best interest of a child; "the court shall consider all relevant factors, including, but not limited to" the ten factors that are enumerated in subsection (a) through (j). R.C. 3109.04(F)(1).

{¶10} In granting custody of the minor children to Matthew, the trial court did not cite R.C. 3109.04 (this will be discussed in the second assignment of error). However, the trial court did review the testimony from numerous witnesses and concluded that "the interest of the children are best served in the custody of their Father." 04/10/14 J.E. It is a nine page judgment entry and six pages are devoted to the custody determination.

{¶11} We review a court's determination of the best interest of a child for an abuse of discretion. *Brown v. Brown,* 2d Dist. Champaign No.2012–CA–40, 2013–Ohio–3456, ¶ 12. Generally, an abuse of discretion constitutes more than an error of law or judgment; rather, it implies the court's attitude was unreasonable, arbitrary or

unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). An appellate court may not find an abuse of discretion simply by substituting its judgment for that of the trial court. *In re Jane Doe 1,* 57 Ohio St.3d 135, 137–138, 566 N.E.2d 1181 (1991).

{¶12} In reviewing custody determinations, we recognize that, "[c]ustody determinations are some of the most difficult and agonizing decisions a trial judge must make, and, therefore, appellate courts must grant wide latitude to a trial court's consideration of the evidence." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). Deferring to the trial court on matters of credibility is "crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well." *Id*. at 419.

{¶13} In arguing that the trial court's custody determination is against the weight of the evidence Jenna claims that while the trial court did reference testimony from numerous witnesses in the custody award and did list several reasons why Matthew should be designated residential parent of the minor children, those reasons are not supported by the record. She contends that when all the evidence is considered it establishes that it was in the children's best interest for her to be named residential parent. Each of Jenna's claims will be addressed in turn.

{¶14} Jenna's first argument centers on the trial court's determination that Jenna exhibited poor judgment when she let two people she barely knew go to the marital house while no one was home and move her personal belongings from the home. 04/10/14 J.E. The trial court provided the following analysis:

> On December 18, 2013, Officer William Calandros was patrolling the Longvue Avenue area and noticed a pick up truck and two men at the home of the parties. Calandros knows the couple and knew that neither was living at the residence at the time. He stopped to investigate. The two men were the ones Wife had previously been seen with. One was Sterling Hughey, who identified himself as Keven Williams. While he was speaking with the men the phone in Hughey's pocket rang. It was Wife who then explained to the officer that these two men were removing her belongings from the home at her request while she was

> elsewhere. Wife barely knows either of these guys, one of whom has a felony record and gave the police a false name. Her judgment was very poor.

04/10/14 J.E.

{¶15} Jenna contends that the allegation that Hughey is a felon is unsubstantiated speculation. Furthermore, she asserts that there is no evidence other than Officer Calandros testimony that Williams is Hughey. Jenna claims that it was Williams, not Hughey who helped her move.

{¶16} Jenna's allegations concern credibility questions. The record indicates that Officer Calandros thought the man who gave him the name Kevin Williams was actually Sterling Hughey. He confirmed that when he looked at Sterling Hughey's criminal record. 03/21/14 Tr. 157. Officer Calandros also provided a description of this man. He testified that there was criminal history concerning a stolen gun and possibly a felony record. 03/21/14 Tr. 157. However, Jenna told Officer Calandros on the phone that both men were supposed to be there moving her things out of the house. Therefore, Officer Calandros did not take any further action, such as asking for identification, but instead left the house.

{¶17} Jenna, however, testified that Hughey did not help her move, but rather Kevin Williams did. Her testimony indicates that she does not know Kevin Williams, but rather he is a friend of her friend's boyfriend. 03/21/14 Tr. 107.

{¶18} The trial court was in the best position to determine which witness to believe. From the judgment entry it can be deduced that as to the matter of whether Kevin Williams is actually Sterling Hughey, the trial court believed Officer Calandros. We will not second guess credibility determinations. Thus, there is no merit with Jenna's first argument.

{¶19} Regardless, the trial court's conclusion that Jenna exhibited poor judgment is supported by the record. Even if we do not consider whether one of the people she used to help her move was Hughey, a person with a criminal record, her actions would still constitute poor judgment. She permitted two people she barely knew to move her belongings from the marital residence when she was not there; these people were alone in the house without supervision.

{¶20} Her next assertion is that the trial court used her alleged attempted suicide as a reason to grant custody to Matthew. She contends that there is no evidence to support the allegation of an attempted suicide.

{¶21} During the custody trial, there was testimony that Matthew received a text from Jenna that made him worry she was going to harm herself. 03/21/14 Tr. 253-254. Matthew called Jenna's father to have him go check on her. Jenna's father called the police. The police went to the marital residence and found Jenna asleep/passed out. Jenna claimed she took three legally prescribed Zoloft and she was not trying to harm herself. 03/21/14 Tr. 297-298. She testified if she was trying to harm herself she would have taken Tylenol. 03/21/14 Tr. 297. Her father and step-mother arrived after the police and her father testified that Jenna was a little groggy, but coherent. 03/21/14 Tr. 255. Her father was not alarmed and does not think she attempted to harm herself. 03/21/14 Tr. 257.

{¶22} However, Jenna's mother and sister testified Jenna admitted to them that she was trying to harm herself. 03/21/14 Tr. 21. Her sister elaborated and explained Jenna told her that she did not care what happened to her, and she took at least eight pills and was drinking alcohol. 03/21/14 Tr. 44. Her sister stated Jenna told her their father and stepmother were there that night and they knew everything. They covered for her with the police. 03/21/14 Tr. 45.

{¶23} In addition to referencing the above testimony, the trial court also aptly noted, "[c]uriously neither party called Deputy Pfouts to testify." 04/10/14 J.E. Deputy Pfouts responded to the call of the alleged attempted suicide. Had he been called, this officer could have testified about this incident.

{¶24} In reviewing all this testimony, the trial court does not state it believes Jenna attempted suicide or it does not believe the allegation. Regardless, as with the above allegation this is a he said-she said situation and the trial court is in the best position to determine witness credibility. As stated above, we will not second guess a credibility determination.

{¶25} Next, Jenna claims the trial court listed several incidents it found were inappropriate for Jenna to engage in with the children. One of them concerns video recordings of Jenna and the minor daughter singing songs. Jenna recorded her

minor daughter singing Mockingbird and posted the video on social media. Minor daughter recorded Jenna singing Surfboard/Drunk in Love. Matthew discovered the videos and asserted that the lyrics for both are inappropriate. The trial court agreed and stated, "[w]hile both are on the radio they seem inappropriate for a mother and an 11 year old daughter to be entertaining each other with." 04/10/14 J.E.

{¶26} Testimony at trial indicated at the end of Mockingbird there is one cuss word. The song deals with a mother who uses drugs and a dad who is not around. Testimony also indicated that the lyrics to Surfboard are sexually explicit. However, testimony established there are clean versions of each song.

{¶27} The videos were not played for the trial court, but they were accepted into evidence. Having reviewed the recordings, the trial court's determination that these songs are not appropriate for the children is supported. This is especially the case concerning the song Surfboard, which even the clean version is sexually explicit. While it is true that the minor daughter was not recorded singing Surfboard, testimony established that it was the daughter who was doing the recording. Thus, Jenna was singing the song in front of her daughter and it was being used for entertainment purposes.

{¶28} The trial court also noted that Jenna takes minor daughter to get her hair and nails done, and eyebrows waxed. 04/10/14 J.E. The trial court's judgment did not specifically indicate that this was inappropriate behavior. Without a specific indication from the trial court that it is inappropriate behavior, the most that can be deduced from the trial court's statement is Jenna does spend time with minor daughter doing those activities.

{¶29} Next, Jenna argues Matthew does not understand the concerns of minor daughter as it relates to puberty. She contends he made a big deal about eleven year old minor daughter using panty liners and having a padded bra. It is noted that the trial court does not mention these issues in the judgment entry. That said, while it may be true a mother would better understand what a girl goes through during puberty that does not mean the decision is against the manifest weight of the evidence.

{¶30} Jenna's last argument concerns R.C. 3109.04(F)(1)(f). This division states that in allocating parental rights the trial court shall consider, if relevant, the parent that is more likely to honor or facilitate court approved parenting time. Jenna claims the record is full of testimony regarding Matthew refusing to allow the children contact with Jenna. In all of the testimony there is no indication Matthew kept Jenna from seeing the children on her designated visitation days. It appears that Jenna's argument is based on the allegation that Matthew did not honor the temporary custody order which allowed her visitation time whenever Matthew was working. She testified that sometimes when he was working he had his mother watch the children instead of contacting her so that she could have visitation. Jenna cites this court to *Ensell* where we stated that the parent more likely to honor and facilitate court-approved parenting time is favored to support her position. *Ensell v. Ensell*, 7th Dist. No. 09JE14, 2010-Ohio-5942, ¶ 34.

{¶31} Jenna's recitation of *Ensell* is correct, however, it must be considered in context. Our decision in *Ensell* was based partially on the fact that the father let the child decide whether or not he wanted to visit his mother on the scheduled visitation. *Id*. at ¶ 34. Here there is no claim Matthew lets the children decide whether they want to visit Jenna. Likewise, as stated above, there is no claim Matthew kept Jenna from the children on her designated days.

{¶32} The temporary custody order does state the parent having the children should try to utilize the other parent for any childcare that is needed. Jenna claims Matthew violated this term and has not utilized Jenna for childcare when he is working. Her claim, however, is not supported by the evidence. Matthew testified he does try to utilize Jenna. 03/21/14 Tr. 231. Furthermore, Jenna testified about two occasions where Matthew tried to utilize her for childcare before using his mother. 03/21/14 Tr. 322; 334.

{¶33} The trial court's judgment entry does not discuss this factor or this evidence. However, that is because, as the above analysis shows, factor (f) of R.C. 3109.04(F)(1) is irrelevant. There is no indication in the record that either party has failed to abide by the terms of the temporary custody order. Therefore, since

pursuant to R.C. 3109.04(F) the trial court is not required to consider irrelevant factors, it did not err in failing to mention this evidence.

{¶34} Consequently, all of Jenna's specific arguments as to why the trial court's decision is against the manifest weight of the evidence fail. However, the analysis does not end here. In the interest of thoroughness, the decision as a whole is reviewed because Jenna also claims that when the evidence in its entirety is reviewed, the designation of Matthew as the residential parent is against the manifest weight of the evidence.

{¶35} During the custody trial, numerous individuals testified. The testimony covered Jenna's parenting, Matthew's parenting, the children's school and extracurricular activities, and other various aspects of Jenna and Matthew's lives.

{¶36} As to Jenna's parenting, there were two differing opinions on this topic. Jenna's mother, Jenna's sister, and Matthew's mother all testified that up until about a year ago Jenna was a good mother and that the children were her priority. However, they avowed at that time Jenna changed and became an absent mom. 03/21/14 Tr. 30-31, 52-53, 63-64, 73. Jenna's mother and sister further explained Jenna has basically ended her relationship with them. It is Matthew who fosters their relationship with the children. 03/21/14 Tr. 18, 46.

{¶37} Matthew also testified about Jenna's parenting. His testimony elaborated on the statements made by his mother, Jenna's mother, and her sister. 03/21/14 Tr. 187. He explained that within the past year Jenna went on three one-week mission trips to Haiti and started going out to concerts and bars. 03/21/14 Tr. 187, 189. He avowed that the summer before the divorce Jenna was never around him and the children. 03/21/14 Tr. 187.

{¶38} However, other witnesses had a different opinion on whether Jenna is currently a good mother. Jenna's father, Jenna's friend, and Jenna's aunt testified that Jenna is a good, attentive mother. 03/21/14 Tr. 94, 258, 281. Jenna's father avowed that one of the children told him that they hate Matthew and want to live with Jenna. 03/21/14 Tr. 260. However, that testimony is inconsistent with the statements the children made during the in camera interview. 03/24/14 In camera Tr. 15-16, 29.

{¶39} Jenna also testified she and Matthew are good parents. However, she stated she should be residential parent because Matthew does not understand what a girl goes through during puberty. Jenna did admit to going on the three one-week mission trips, to going to four concerts in a year, and to going out to a bar four or five times in the past year. 03/21/14 Tr. 317-318. However, she claimed Matthew supported the trips and bought her the concert tickets. 03/21/14 Tr. 319.

{¶40} Specific instances of parenting the minor daughter were brought up at trial. Jenna testified that minor daughter throws tantrums. Jenna's response when she cannot control her daughter is to call Matthew. In one instance she texted Matthew, "I'm done, come get her." 03/21/14 Tr. 113. She further explained Matthew is the more authoritative one, while she is the softer one. When the children are not listening to her she often has to say, "I'm going to tell your dad." They will then listen. 03/21/14 Tr. 311-312. She admitted minor daughter knows she can get away with a little bit more with her and will "push her buttons." 03/31/14 Tr. 312.

{¶41} Matthew's testimony confirmed that Jenna texted him to come and get the daughter. He also testified that a week prior to the trial, Jenna called him saying minor daughter would not get out of bed to go to school and that Jenna wanted him to do something about it. 03/21/14 Tr. 228. He avowed Jenna wants him to punish the children for what they do at her place. 03/21/14 Tr. 228. Matthew explained that while minor daughter sometimes talks back to him, she does not throw tantrums when she is with him. 03/21/14 Tr. 228.

{¶42} Evidence was also presented at trial regarding the children's progress in school and about their extracurricular activities. Matthew and his mother testified he is the parent who does school work with the children. 03/21/14 Tr. 66, 174, 176-177. Jenna testified she has asked Matthew to keep their school work in their school folders so that she can see their progress. She claims to have even asked Matthew to send the homework with the children so she can help them with it. 03/21/14 Tr. 326. He testified he did send homework on at least one occasion, but the homework was not done. 03/21/14 Tr. 230.

{¶43} Testimony established that the children are academically thriving under their father's care. Minor son, who has always gotten an "A" average, has

maintained that under the father's care. 03/21/14 Tr. 247. As to the minor daughter, testimony established that prior to the divorce she got A's, B's and an occasional C, but has now improved to an "A" average. 03/21/14 Tr. 247. Matthew testified he purposely schedules doctor's appointments after school because daughter has a hard time with her grades and does not need to be missing school. 03/21/14 Tr. 235.

{¶44} Evidence was also presented regarding school and extracurricular events. Matthew testified he is the parent who attends almost every school and extracurricular event, whether it is practice, games, concert, etc. 03/21/14 Tr. 174, 176-177, 201. He is a police officer and works the night shift so he can have time with his children. 03/21/14 Tr. 76, 228, 244. He explained he typically works his second job, security, when he does not have the children. 03/21/14 Tr. 244. Jenna, a registered nurse, testified she attends the children's school and extracurricular events when her work schedule permits. However, she is starting a new shift that will let her have more time with the children. 03/21/14 Tr. 99.

{¶45} Jenna also testified Matthew has tried to keep her from being listed as an emergency contact for school purposes. That testimony, however, was refuted by Matthew producing the August 2013 school form, which indicated Jenna is an emergency contact. 03/21/14 Tr. 337.

{¶46} As to other aspects of Jenna and Matthew's life, there was testimony each were dating other people during the divorce proceedings. Matthew claims Jenna was dating Sterling Hughey who has a misdemeanor theft conviction. Matthew elicited testimony that there were 191 phone calls between the two in July of 2013. 03/21/14 Tr. 104. Jenna denied having a relationship with this man. However, she admitted to knowing him, that she bailed him out of jail, that he does have a misdemeanor criminal conviction, and that he was around the children on at least one occasion. 03/21/14 Tr. 104-106, 109. Jenna testified that Matthew is in a relationship with a married woman. 03/21/14 Tr. 323-324. She indicated she did not care about the relationship as long as the woman was nice to the children. 03/21/14 Tr. 325. Matthew denied the relationship. 03/21/14 Tr. 202-203.

{¶47} There was also testimony introduced that Jenna attempted suicide. Both Jenna's mother and sister avowed Jenna told them she attempted to harm

herself; Jenna's sister testified that Jenna told her she took pills and drank alcohol. That testimony was refuted by Jenna and her father. Jenna stated that she did not try to harm herself. Her father who saw her that night said Jenna was groggy but coherent and he does not believe she attempted suicide.

{¶48} As aforementioned, "A custody award supported by some competent, credible evidence will not be reversed * * * as being against the manifest weight of the evidence." *Bates v. Bates*, 11th Dist. No. 2000–A–0058, 2001 WL 1560915, citing *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 23, 550 N.E.2d 178 (1990). In reading the judgment entry in its entirety, two major reasons for the trial court's custody determination can be deduced. One is based on the interaction between the children and each parent. The other basis is that Jenna is not as stable as Matthew. In the entry the court explained:

> It is the impression of the Court that Husband has his feet more firmly planted on the ground. Most everything he does seems to be related to work or his children and there is no question that the children are thriving under his care with [minor son] maintaining his "A" average and [minor daughter] improving to an "A" average. Husband also seems to have better control of the children.
>
> Wife seems to be more of a friend to [minor daughter] than a parent. It is all about what [minor daughter] wants, which is okay to a point but [minor daughter] seems to be running the show when she is with her mother. The temper tantrums that [minor daughter] throws with her Mother do not seem to occur when she is with her Father. That would seem to suggest that temper tantrums meet with some success in dealing with her Mother but not with her Father.
>
> Wife seems to be a dedicated parent at times, helping with homework and attending games but off on her own mission other times. Three one-week missions to Haiti in one year seem like a very nice thing for someone to do. However, she has small children at home and

> they should come first. There will be plenty of time for Haiti when the children are raised.

04/10/14 J.E.

{¶49} Considering all of the testimony and evidence, there is competent credible evidence to support the trial court's decision. While there may be evidence that would support the conclusion that it is in the children's best interest for Jenna to be named the custodial parent, there is competent credible evidence to support the trial court's decision. As explained above, in custody determinations great deference is given to the trial court's decision. *Davis,* 77 Ohio St.3d at 419. Therefore, this court holds that the trial court's decision is supported by competent credible evidence and that this assignment of error is meritless.

Second Assignment of Error

"The trial court erred as a matter of law when it failed to mention R.C. 3109.04 or make any related factual findings."

{¶50} This assignment of error solely focuses on the trial court's failure to cite to R.C. 3109.04 and addresses the factors enumerated in division (F) of that section. Jenna claims this failure is reversible error and thus, the custody determination must be reversed and the matter remanded for further proceedings. She cites two cases in support of her position – *Phillips v. Phillips*, 5th Dist. No. 2005CA00072, 2006-Ohio-2098 and *Barrett v. LeForge*, 9th Dist. No. 26381, 2012-Ohio-5865.

{¶51} In *Phillips*, the Fifth Appellate District indicated the case had to be reversed and remanded because the Decree of Divorce not only failed to mention R.C. 3109.04 or make any related factual findings, but it also failed to indicate the trial court considered the children's best interests in designating the residential parent. *Phillips* at ¶ 23.

{¶52} In *Barrett*, the appellate court vacated the custody determination and remanded the matter for further consideration because there was no indication in the trial court's decision that it considered the minor child's wishes when it allocated parental rights. *Barrett*, 2012-Ohio-5865 at ¶ 10. Consideration of the minor's wishes is a specific factor listed in R.C. 3109.04(F)(1)(b).

{¶53} As stated above, the judgment entry is devoid of any citation to R.C. 3109.04 or the factors enumerated in division (F). However, R.C. 3109.04(F)(1) does not require the trial court to explicitly state its findings were made pursuant to R.C. 3109.04(F)(1). *Phillips v. Phillips*, 9th Dist. No. 13CA010358, 2014-Ohio-248, ¶ 9; *Goodman v. Goodman,* 3d Dist. No. 9–04–37, 2005–Ohio–1091, ¶ 18. The trial court is only required to determine what is in the best interest of the children and to "consider all relevant factors." *Krill v. Krill*, 3d Dist. No. 4-13-15, 2014-Ohio-2577, ¶ 33. If the record supports the conclusion that the trial court considered all the relevant factors, then the trial court complied with R.C. 3109.04(F)(1). *Phillips* at ¶ 9; *Brammer v. Meachem*, 3d Dist. No. 9-10-43, 2011-Ohio-519, ¶ 32-33.

{¶54} Furthermore, it has been explained, "[a]lthough the court is instructed by R.C. 3109.04(F)(1) to 'consider' the factors enumerated therein, the court's alleged failure to give the required consideration will not be found by an appellate court to be against the manifest weight of the evidence so long as the court's judgment is supported by some competent, credible evidence." *Feldmiller v. Feldmiller,* 2d Dist. Montgomery No. 24989, 2012–Ohio–4621, ¶ 32, citing *Bunten v. Bunten,* 126 Ohio App.3d 443, 710 N.E.2d 757 (3d Dist.1998). "[I]t is not necessary for the court to set forth its analysis as to each factor in its judgment entry, so long as the judgment entry is supported by some competent, credible evidence." *Bunten* at 447, citing *Masitto v. Masitto,* 22 Ohio St.3d 63, 66, 488 N.E.2d 857 (1986).

{¶55} Here, the trial court's judgment entry demonstrates it used the best interest test. It stated, "it is the opinion of the Court that the interest of the children are best served in the custody of their Father at the present time." 04/10/14 J.E.

{¶56} Furthermore, statements in the judgment entry indicate the trial court considered all relevant factors under R.C. 3109.04(F)(1).

{¶57} Division (a) is the wishes of the parents regarding the children's care. This was an obvious consideration given that both parties wanted to be named residential parent.

{¶58} Division (b) concerns the in camera interview with the children and the children's wishes concerning the allocation of parental rights. In its judgment entry the trial court noted that it had conducted an in camera interview with the children

and indicated "one child had a mild preference to live with one parent and the other child had no preference at all." 04/10/14 J.E. Thus, there is evidence the trial court did consider this factor.

{¶59} Division (c) is the children's interaction with their parents and other persons who may significantly affect their best interest. In the judgment entry the trial court discussed Jenna's interaction with the children. It indicated that she attends school events and extracurricular activities when her employment schedule allows and she helps with homework sometimes. Specifically, as to the minor daughter, the trial court noted that Jenna takes her to get her hair and nails done and to get her eyebrows waxed. It also discussed the behavioral problems Jenna has with the minor daughter and concluded that Jenna seems to be more of a friend to minor daughter than a parent. 04/10/14 J.E.

{¶60} As to Matthew's interaction with the children, the court stated everything he does is either work related or for his children. The court also found that the behavioral problems Jenna has with the daughter do not occur with Matthew.

{¶61} The court also noted Matthew fosters a relationship between the maternal grandmother and the maternal aunt with the children. 04/10/14 J.E.

{¶62} Division (d) is the children's adjustment to home, school and community. The trial court found that the children were adjusting well with minor son maintaining his "A" average and minor daughter improving her average to an "A." 04/10/14 J.E. The trial court did note that Jenna claimed Matthew has kept her from being an emergency contact on the school forms. However, this claim was refuted by Matthew producing the emergency contact school form. 04/10/14 J.E.

{¶63} Division (e) is the mental and physical health of all persons involved in the situation. There was no testimony about any physical health issues. Likewise, while there was testimony that Jenna may have attempted suicide, the trial court did not indicate it believed she attempted suicide or she has mental health problems. Thus, the trial court deemed this factor irrelevant.

{¶64} Division (f) concerns the parent who is more likely to honor or facilitate court approved parenting time or visitation. The trial court does not discuss this factor in the judgment entry and does not reference any testimony concerning

whether or not Matthew honored the visitation schedule. As discussed above, there is an allegation that Matthew did not honor the temporary custody order which allowed Jenna visitation time whenever Matthew was working. However, as discussed above, testimony at trial indicated Matthew did abide by the order. Thus, this factor is irrelevant.

{¶65} Divisions (g), (h), (i), and (j) are also all irrelevant. Division (g) concerns whether either parent has failed to make child support payments. Neither party was ordered to pay temporary child support, thus, that factor is inapplicable. Division (h) concerns criminal offenses and is inapplicable since there was no testimony that either had previously committed any criminal offenses, let alone one enumerated in that section. Division (i) is "whether the residential parent has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court." There was no allegation of this and it was not discussed at trial. Division (j) is also inapplicable because there was no evidence that either parent has established or is planning on establishing a residence outside the state. Therefore, these factors were all irrelevant and the trial court was not required to consider them.

{¶66} As the above analysis shows, the judgment entry demonstrates the trial court did consider all relevant factors under R.C. 3109.04(F) and those factors formed the foundation for the trial court's decision. As the Ninth District so aptly concluded, "Although it is the best practice for the trial court to specifically reference the factors set forth in R.C. 3109.04(F)(1), we cannot conclude that the trial court's analysis was deficient in this case." *Phillips*, 2014-Ohio-248 at ¶ 9.

{¶67} Accordingly, this assignment of error is meritless.

Third Assignment of Error

"It was plain error for the trial court to proceed with the trial that was in progress upon learning of a conflict of interest between the magistrate hearing the case and Matthew Smarrella."

{¶68} Magistrate Michelle Garcia Miller (now Judge Miller) presided over the temporary orders and even heard the testimony and evidence that was submitted on February 28, 2014. The testimony and evidence presented on February 28, 2014

concerned division of the property. The matter was continued for a separate hearing on custody.

{¶69} However, prior to that hearing, it was brought to the Magistrate's attention that she was friends with Matthew on social media. In order to avoid the appearance of impropriety, the Magistrate recused herself and referred the matter to Judge Bruzzese for further proceedings. In doing so, the Magistrate noted that "no interactive communications have occurred" between herself and Matthew. 03/06/14 Magistrate Order.

{¶70} The trial court held a hearing on March 21, 2014. On that date, the testimony and evidence that was offered at the February 28, 2014 division of property hearing was not reheard. Instead, the trial court proceeded to hear evidence that was primarily related to custody.

{¶71} Jenna admits that she did not object to the trial proceeding in that manner. However, she claims that it was plain error for the trial court "to proceed as it did." This presents us with two plausible arguments. The first is that Jenna's argument is a claim it was plain error to not restart the trial over from the beginning, meaning that the trial court was required to rehear the matters regarding division of property which were heard on February 28, 2014. This, however, may not be her argument since she references the temporary custody hearing and claims that the trial court should have heard that evidence also. Therefore, the second option is that Jenna feels the whole case should have been restarted from the beginning.

{¶72} Given her statements, it is not clear what her argument is under this assignment of error. Thus, both arguments set forth above will be explored below. However, for the reasons expressed below, both fail.

{¶73} If her argument is the trial court should have reheard the division of property evidence, it fails because the error was invited. Under the invited-error doctrine, a party is not permitted to take advantage of an error which she invited or induced the trial court to make. *State ex rel. Smith v. O'Connor*, 71 Ohio St. 3d 660, 663, 646 N.E.2d 1115 (1995). Even plain error is waived where error is invited. *State v. Rohrbaugh,* 126 Ohio St.3d 421, 2010–Ohio–3286, 934 N.E.2d 920, ¶ 10.

{¶74} In this instance, the trial court was prepared to start the trial over from the beginning. It specifically stated, "I was aware that part of this was tried before the Magistrate before she figured out she had a conflict but we have to start over because I didn't hear any of it." 03/21/14 Tr. 7. Counsel for Matthew then stated that the testimony and evidence from the February division of property hearing dealt solely with finances and asked if the Court could use a transcript of that testimony to decide the financial aspect of the case instead of rehearing that evidence. 03/21/14 Tr. 12. The trial court indicated there were two options: 1) the parties could split the cost of the transcript and it could read the previous testimony to decide the issue or 2) it could all be redone. 03/21/14 Tr. 12. Matthew requested the parties split the cost of the transcript. 03/21/14 Tr. 13. The trial court asked Jenna and her counsel if that was acceptable. 03/21/14 Tr. 13. They responded, "That's fine with us because it is what it is." 03/21/14 Tr. 13.

{¶75} Thus, the error was invited. While it is true that Jenna did not propose that course of action in lieu of starting the trial over from the beginning, she agreed to it. The Ohio Supreme Court has found that the invited error doctrine is applicable where a party has asked the court to take some action later claimed to be erroneous, *or affirmatively consented to a procedure the trial judge proposed*. *State v. Campbell*, 90 Ohio St.3d 320, 324, 738 N.E.2d 1178 (2000). Likewise, we have previously explained:

> The notion of invited error acknowledges that every litigant has a duty to contemporaneously challenge a perceived error and first bring it to the attention of the trial court. In so doing, the litigant provides the court with an opportunity to correct or otherwise remedy the error. Accordingly, "a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible." *State v. Kollar* (1915), 93 Ohio St. 89, 91, 112 N.E. 196.

Schmidt v. Koval, 7th Dist. No. 00-C.A.-239, 2002-Ohio-1558, ¶ 22.

{¶76} Therefore, since Jenna was actively responsible for the trial not starting over from the beginning, she cannot claim the failure to start the trial over from the beginning amounted to error, let alone plain error.

{¶77} If her argument is that the whole case should have been restarted from the beginning, that argument also fails based on the invited error doctrine. Jenna agreed to the trial court proceeding in the manner it did, i.e. picking up the case where the magistrate left off.

{¶78} However, even if we do not invoke the invited error doctrine, her argument still fails. The doctrine of plain error "is sharply limited to the *extremely rare* case involving *exceptional* circumstances where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122, 679 N.E.2d 1099 (1997). In the appellate brief and the reply she contends that at the March 21, 2014 hearing references were made to prior hearings, but were not fully explored. The citations to the record Jenna directs this court to all concern testimony that occurred at the temporary child custody hearing, which the magistrate presided over. The record before us does not contain the transcript of that hearing. App.R. 9(B)(1) states it is an appellant's obligation to ensure the proceeding she considers necessary for the inclusion in the record are transcribed. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower's court proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384. Thus, without the transcript of the temporary custody hearing, we cannot conclude that any error, including plain error, occurred.

{¶79} Furthermore, in reviewing the March 21, 2014 trial transcript it does not appear that anything regarding the temporary custody hearing needed to be more fully explored. At the March 21, 2014 hearing, references were made to Jenna's mother and sister's testimony at the temporary custody hearing. 03/21/14 Tr. 22, 34, 41-42. Both witnesses testified that their testimony at the trial was consistent with their prior testimony. 03/21/14 Tr. 22, 34, 41-42.

{¶80} Likewise, there were multiple witnesses that testified at trial regarding custody. If matters from the temporary custody hearing needed to be more fully explored for purposes of explaining the trial testimony, nothing prevented Jenna from calling the same witnesses that testified on her behalf at the temporary custody hearing to testify at trial. Also, nothing prevented her from offering more testimony or exploration as to why she should be named residential parent.

{¶81} Consequently, if Jenna's argument is that the trial court should have started this case over from the beginning either she invited the error and/or the alleged error does not amount to plain error.

{¶82} For the above stated reasons this assignment of error is meritless.

Conclusion

{¶83} For the reasons expressed above, all three assignments of error are deemed meritless and the trial court's custody determination is hereby affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.