

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

IN RE: : **OPINION**
S.B. AND S.B. :
 : **CASE NO. 2010-A-0019**
 :

Civil Appeal from the Ashtabula County Court of Common Pleas, Juvenile Division, Case No. 07 JH 38.

Judgment: Affirmed.

Luke P. Gallagher, 326-A West Main Road, Conneaut, OH 44030 (For Appellant-Tiffani Brink).

Malcolm Stewart Douglas, 525 Lake Avenue, Ashtabula, OH 44004 (For Appellee-Shawn Brink).

Jodi M. Blankenship, 302 South Broadway, Geneva, OH 44041 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Tiffani Brink nka Lindstrom, appeals the Judgment Entry of the Ashtabula County Court of Common Pleas, Juvenile Division, denying her Motion to Modify Custody and granting defendant-appellee, Shawn Brink’s, Motion for Modification of Visitation, with respect to their minor children. For the following reasons, we affirm the decision of the court below.

{¶2} On July 11, 1992, Shawn and Tiffani were married in Conneaut, Ohio, and are the parents of Shae Brink (dob 07/06/96), and Sierra Brink (dob 02/16/99).

{¶3} On July 22, 2003, the Ashtabula County Court of Common Pleas issued a Judgment Entry Final Decree of Divorce, terminating the parties' marriage and granting custody of the children to Tiffani. Shawn was awarded visitation with the children, pursuant to the court's "Standard Visitation Order."

{¶4} On October 23, 2003, Tiffani filed a Motion for Court Order Approving Relocation of Plaintiff and Children.

{¶5} On November 10, 2003, Shawn filed a Motion to Modify Allocation of Parental Rights.

{¶6} In March 2004, Tiffani moved to the Orlando area in Florida, leaving the children in Shawn's care.

{¶7} On April 6, 2004, the trial court approved the parties' Agreed Judgment Entry, including a Shared Parenting Plan. The Entry provided that the July 22, 2003 Final Decree of Divorce was "temporarily modified" according to the terms of the parties' Shared Parenting Plan. The Plan provided that "[e]ach of the parents shall be deemed the residential parent and legal custodian when the Children are in their respective possession." Shawn was to have possession of the children "during all times," except for the following designated times during which Tiffani would have possession: the children's summer vacation excepting the first and last week; the first weekend in October of each year; the children's Thanksgiving vacation in even-numbered years; the weekend following Thanksgiving vacation in odd-numbered years; the children's first week of Christmas vacation in even-numbered years; the children's second week of Christmas vacation in odd-numbered years; Presidents' Day weekend of each year; and the children's spring break of each year.

{¶8} According to the Plan, Tiffani would be “solely responsible for all air travel expenses” for the children, and would have “the sole decision of scheduling the day and time of the Children’s air travel so long as it does not conflict with the Children’s school attendance.”

{¶9} The parties also agreed that they would have “daily unlimited telephone, E-Mail and Web-Cam contact with the Children while they are in the other parent’s possession.”

{¶10} On October 16, 2004, Shawn married Stacie Ann Brink.

{¶11} On October 20, 2005, the trial court entered a Judgment Entry, designating Shawn as the residential and legal custodian of the children. The court’s Judgment was substantially similar to the temporary Parenting Plan drafted by the parties, with the following additions. When Tiffani visited Ohio, Shawn was to “make every effort to accommodate additional companionship time with the children.” The parties would have telephone, e-mail, and web-cam communication with the children “at least every other day,” when they were in the other parent’s possession. While scheduling the day and time of the children’s air travel remained Tiffani’s “sole decision,” she was to “attempt to schedule so that father does not have to miss work.”

{¶12} At Halloween of 2005, there was a dispute between the parties regarding Tiffani’s companionship time in Ohio, the resolution of which involved the trial court.

{¶13} In January 2006, Tiffani requested companionship time in Ohio during May, but Shawn refused, claiming the children were “busy” on the weekend in question.

{¶14} In spring 2006, there was a dispute between the parties over whether spring break began on the last Friday of school or on the following Monday, which dispute was resolved by the trial court.

{¶15} In April 2006 (spring break visitation), Tiffani claimed she noticed discoloration in Sierra's elbow and neck and that she notified Shawn about this, without response from him.

{¶16} At the close of the 2006 school year (early June), the Brinks took the children on vacation to Myrtle Beach.

{¶17} Before sending the children to Florida for summer visitation, Shawn had the children undergo physicals. Shawn testified that Sierra had a spot on her elbow, about the size of a dime. Shawn was told to continue observing the spot and, if it grew or spread, to contact a dermatologist. At this time, Shae was having a tonsillectomy and Tiffani had come to Ohio for the operation. Shawn advised Tiffani of Sierra's condition. On June 14, 2006, Sierra flew to Florida by herself while Shae recovered from the tonsillectomy. Tiffani complained that she lost companionship with Shae on account of the tonsillectomy being scheduled during her parenting time, but after Shawn had taken the children on vacation to Myrtle Beach.

{¶18} On June 19, 2006, Tiffani took Sierra to a family practice because of the discoloration of her arm and was referred to a dermatologist. On June 22, 2006, Dr. Michael Knight performed a biopsy on Sierra and referred her to a rheumatologist, Dr. Caryn Hasselbring, who examined Sierra in July. After performing blood work, Dr. Hasselbring diagnosed Sierra with linear scleroderma, an auto-immune disorder characterized by a thickening of the skin in the affected areas. Dr. Hasselbring did not treat Sierra, as she would be returning to Ohio at the end of summer.

{¶19} Shawn went to Florida during the summer of 2006 and testified that he could not obtain information about Sierra's condition from Dr. Hasselbring, because

Tiffani instructed her not to communicate with him. Shawn was able to obtain information from Dr. Knight.

{¶20} In September 2006, Dr. Hashkes of the Cleveland Clinic saw Sierra and prescribed a course of treatment including taking folic acid daily, weekly injections of methotrexate, and a series of nine steroid treatments to strengthen her immune system. Sierra's condition is controlled but requires monitoring in the event it becomes active.

{¶21} In August 2006, Tiffani asked Shawn to complete the necessary paperwork for the children to obtain passports. Tiffani anticipated taking the children on a cruise or to Sweden. Shawn did not complete the paperwork. Again, in December 2006, Tiffani requested Shawn to complete the paperwork. Shawn refused to do so and advised Tiffani that he would refer the matter to his attorney.

{¶22} Thereafter, Tiffani completed passport applications for the children wherein she intentionally provided false information regarding the children's permanent residence and her ability to get in contact with Shawn. Ultimately, in March 2007, Tiffani obtained a Magistrate's Order requiring Shawn to apply for expedited passports for the children.

{¶23} In February 2007, Tiffani requested that the children's spring break visitation be extended three days, so that the children could attend her wedding in April 2007. Shawn objected that the children would miss school. Ultimately, a Magistrate's Order was issued extending the spring break visitation by three days, but reducing Tiffani's summer companionship by three days.

{¶24} On April 17, 2007, Tiffani married Fredrik Lindstrom, a Swedish national residing in the United States.

{¶25} On April 25, 2007, Shawn filed a Motion to Modify Visitation and Hearing Request, alleging "a change in circumstances has occurred with regards to the minor

children.” In an affidavit, attached to a Motion to Show Cause filed the same day, Shawn claimed that Tiffani “has refused to attempt to schedule the transportation of the minor children so that Affiant does not miss work.”

{¶26} On May 7, 2007, Tiffani filed a Motion for Custody, alleging a “substantial change in circumstances has occurred since this Court’s last parenting order.” In an attached affidavit, Tiffani claimed that Shawn “has substantially interfered with my parenting rights with Shae and Sierra by failing to cooperate and allow court ordered parenting time, failure to allow communications between Shae and Sierra and me when they are in his possession and by failing to encourage Shae and Sierra to have a loving, caring relationship with me.” Further, Tiffani claimed that Shawn “has been neglectful in his duties as a father to Shae and Sierra, subjecting them to neglect of their medical needs, and even basic care such as hygiene.”

{¶27} On May 10, 2007, on Tiffani’s motion, the trial court entered an Order that the parties and the children undergo a forensic custody evaluation, performed by Dr. Farshid Afsarifard.

{¶28} On June 14, 2007, a Magistrate’s Order was issued, appointing a Guardian ad Litem (“GAL”) for the children. This Order further required Shawn to board the children on a previously scheduled 7:15 a.m. flight to Florida, and Tiffani to schedule all future flights between 7 and 8 p.m.

{¶29} In June 2007, the parties, their spouses, and Sierra met with Dr. Hashkes. Shawn claimed that Tiffani and Fredrik were confrontational, questioning Dr. Hashkes’ credentials and challenging his treatment of Sierra. Following the meeting, Dr. Hashkes requested that Shawn designate a contact person, through whom the parties could obtain medical information regarding Sierra. Shawn designated the GAL as that person, but

admitted he could still obtain information directly from Dr. Hashkes' office. Tiffani denied being hostile toward Dr. Hashkes and testified that she never obtained medical information about Sierra through the GAL.

{¶30} When Sierra arrived in Florida, about week after the meeting with Dr. Hashkes, Tiffani testified that she was pale and lifeless. Tiffani took Sierra to a doctor who diagnosed her with c-diff (clostridium difficile). The c-diff might have been caused by an antibiotic, prescribed earlier for Sierra for bronchitis, due to her suppressed immune system.

{¶31} In June 2007, Shawn learned that Tiffani intended to have some of Sierra's baby teeth removed, contrary to his wishes and the advice of Sierra's orthodontist in Ohio. On June 22, 2007, Shawn obtained a Restraining Order against Tiffani, prohibiting her from authorizing the extraction of teeth from Sierra.

{¶32} During a visit to Florida in July 2007, Shawn noticed that Sierra's scleroderma was spreading and filed an Emergency Motion to Transport Child for Medical Treatment. On July 24, 2007, a Magistrate's Order was issued, ordering Sierra to be returned to Ohio for treatment by Dr. Hashkes, and returned to Florida by July 27. Dr. Hashkes prescribed an intravenous steroid drip for Sierra, which could be administered in Florida. Tiffani testified that when she brought Sierra to Dr. Hasselbring for treatment, she refused to administer it, according to Tiffani, because she is not a pediatric rheumatologist and did not want to involve herself in a custody dispute.

{¶33} Upon learning of Dr. Hasselbring's refusal, Shawn filed an Emergency Motion to Transport Child for Medical Treatment. On August 1, 2007, a Magistrate's Order was issued, ordering Sierra to be returned to Ohio for treatment by Dr. Hashkes. Thereafter, Sierra returned to Florida.

{¶34} Also on August 1, 2007, the GAL filed a Motion to Request Certification to Juvenile Court, based on her “concerns about the minor children’s medical and emotional needs, which can be better addressed by the juvenile court.”

{¶35} On August 6, 2007, the trial court entered an Order, granting the GAL’s request for Certification.

{¶36} On August 15, 2007, Shawn obtained an Order, requiring Tiffani to return the children to Ohio on August 18, upon learning that Tiffani intended to extend the summer visitation to compensate for lost companionship time.

{¶37} Tiffani and Fredrik reported that the children were becoming more defiant and confrontational, particularly after visiting or communicating with the Brinks. During the summer, there was a confrontation in which Tiffani slapped Sierra, as she and Fredrik were taking away some of the children’s possessions as a means of disciplining them. Thereafter, Fredrik surreptitiously recorded conversations with the children, as he believed the GAL was not being responsive to their concerns about the children’s behavior.

{¶38} On October 4, 2007, Dr. Asfarifard filed his Psychological Report with the juvenile court. Dr. Afsarifard opined, “based on reasonable psychological certainty, that it is in the children’s best interest to have their father as the residential parent and continue a visitation arrangement with their mother.”

{¶39} During the 2007 Thanksgiving visitation, Tiffani and Fredrik claimed that Shawn had local police perform several welfare checks on the children while in their possession.

{¶40} On March 4, 2008, the juvenile court entered a Judgment Entry ordering Shawn to retain a child psychologist for Shae. Thereafter, both children began

counseling with Dr. Patricia Gillette. Also in March, Tiffani contacted Dr. Deborah Day, a psychologist in Florida, for counseling for herself and Shae.

{¶41} On March 13, 2008, Shawn obtained an Order from the juvenile court, restraining Tiffani from taking the children to physicians other than their regular physicians in Ohio, “except for situations which require and rise to the level of a valid medical emergency.”

{¶42} During the children’s March visitation in Florida, Shawn filed an Emergency Motion for Early Termination of Visitation; Motion for Supervised Visitation, based, in part, on his inability to communicate with the children because Tiffani had taken away their cell phones. Tiffani testified that she did this on the advice of Dr. Day.

{¶43} In May 2008, Shawn filed a Motion for Restraining Order, to prevent Tiffani from taking the children to visit Sweden during the summer of 2008. In support of the Motion, Shawn informed the juvenile court that Dr. Gillette had advised the GAL that international travel was not in the children’s best interest. On May 29, 2008, the court issued an Order granting Shawn’s Motion for Restraining Order.

{¶44} On May 27, 2008, Tiffani filed a Motion for Order Enforcing Parenting Time, based on her belief that Shawn did not intend to board the children on a flight she had scheduled for June 11, 2008.

{¶45} On June 10, 2008, Shawn filed a Motion to Modify Visitation, seeking the children’s summer visitation with Tiffani to begin on July 10, 2008.

{¶46} On June 11, 2008, a Magistrate Order was issued, denying Shawn’s Motion to Modify Visitation and ordering the children boarded on the flight scheduled by Tiffani. Shawn testified that he did not board the children because the flight had been scheduled during his work hours, contrary to the Magistrate’s Order of June 2007. A second

Magistrate Order was issued that day, threatening Shawn with arrest if the children were not boarded on a flight to Florida. On June 12, 2008, Shawn boarded the children on a flight to Florida.

{¶47} On June 26, 2008, the GAL filed a Motion to Restrain Mother, in response to Tiffani's refusal to allow the GAL to communicate with the children unless the conversations were recorded. On June 28, 2008, a Magistrate Order was issued restraining Tiffani from recording conversations between the GAL and the children.

{¶48} On July 23, 2008, Shawn filed a Motion for Restraining Order, seeking an order enjoining Tiffani from taking the children to counseling with Dr. Day. In support of the Motion, Shawn attached an affidavit of the GAL, stating that Dr. Day has terminated contact with Dr. Gillette and that her continued involvement does not "further the goals of the treatment objectives" and is not in the children's best interest.

{¶49} On July 23, 2008, the juvenile court issued a Restraining Order, prohibiting Tiffani from taking the children to see any counselor or psychologist while in her care.

{¶50} On August 14, 2008, Tiffani filed a Motion for Order Removing Guardian ad Litem, based on the GAL's assistance to Shawn in obtaining an Order to discontinue therapy with Dr. Day.

{¶51} In September 2008, Dr. Gillette terminated counseling with the children upon her retirement.

{¶52} Shawn testified that, during the summer of 2008, the e-mail account through which he communicated with the children was hacked into and the password altered. As a result, he closed the e-mail account and ceased communicating with Tiffani by e-mail.

{¶53} On November 13, 2008, the GAL filed her Guardian ad Litem Report in which she recommended that Shawn retain custody of the children.

{¶54} On November 19, 2008, the juvenile court issued a Judgment Entry, denying Tiffani's Motion for Order Removing Guardian ad Litem.

{¶55} During the Christmas 2008 visitation in Florida, an altercation occurred involving Tiffani, Fredrik, and the children, to which the police responded. It was reported that Fredrik broke Shae's cell phone and grabbed Sierra with enough force to leave bruises. Tiffani and Fredrik testified that the phone was broken when Shae threw it at Tiffani. Fredrik denied ever becoming physical with the children.

{¶56} On February 3, 2009, the GAL filed a Motion to Modify Visitation, based on her concerns about escalating physical confrontations during visitation. The GAL requested that Tiffani's visitation take place in Ohio until she "obtain[s] counseling to deal with issues regarding her relationship with her children," and Fredrik "complete[s] parenting classes to learn how to deal with the girls and discipline them in an effective[] and appropriate manner."

{¶57} On February 6, 2009, the juvenile court issued a Judgment Entry, granting the GAL's Motion to restrict visitation to within the court's jurisdiction.

{¶58} On April 17, 2009, Shawn filed a Motion for Summary Judgment; Motion for Sanctions, on the grounds that no genuine issue of material fact exists as to whether a change in circumstances has occurred and/or whether it is in the children's best interest that he retain custody. Shawn further sought an award of attorney fees for Tiffani's allegedly frivolous conduct in this matter.

{¶59} On June 19, 2009, the juvenile court entered a Judgment Entry, granting Tiffani visitation with the children in Florida, from July 12, 2009, through August 1, 2009.

{¶60} During this visitation period, Tiffani sought medical treatment on Sierra's behalf for an ear infection. Tiffani testified that she did not inform Shawn that she was doing so. Shawn obtained two juvenile court Orders, on July 24 and 31, 2009, requiring Tiffani to disclose the details of the medical treatment, to provide Dr. Hashkes with the names of all treating physicians, and to execute any necessary releases of medical information.

{¶61} On August 18, 2009, the juvenile court issued a Judgment Entry denying Shawn's Motion for Summary Judgment; Motion for Sanctions.

{¶62} Hearings were held with respect to the Motion to Modify Visitation and Motion for Custody on the following days: April 30, May 1, and August 17 through 20, 2009. At the hearings, the juvenile court heard testimony from the following persons: Shawn and Stacie Brink, Tiffani and Fredrik Lindstrom, the GAL, Dr. Deborah Day (the psychologist who worked with Tiffani and Shae in 2008), Candace Clough (Tiffani's sister), Lester Brink (Shawn's father), and David Hawn (Stacie's stepfather). The substance of the testimony presented is as follows.

{¶63} Tiffani testified that she believed Shawn and Stacie have interfered with her relationship with the children by encouraging their misbehavior, discouraging them from communicating with her, and allowing Stacie to play the role of their mother. She testified that she purchased and sent the children a web cam which Shawn refused to accept. She also sent Shae flowers which she did not receive, although Shawn had signed for them.

{¶64} Shawn testified that, for the first year after he obtained custody, there were relatively few disputes regarding visitation, and that the majority of flights were scheduled outside of his working hours. Since September 2005, Shawn lost a total of twenty-five

hours of work as a result of Tiffani's scheduling of the flights on seven different occasions. Three of these occasions were in 2005, two were in 2006, and two were in 2007.

{¶65} Shawn testified that he was frustrated about the difficulties in communicating with Tiffani. Shawn claimed telephone communication was ineffective and argumentative and that e-mail communications would be misconstrued and manipulated to provide grounds for accusations about the children's care. Shawn also complained about Tiffani's interference with the children's ability to communicate with him during the Florida visitations.

{¶66} On March 25, 2010, the juvenile court issued its Judgment Entry, addressing Shawn's April 2007 Motion to Modify Visitation and Tiffani's May 2007 Motion to Modify Custody. The court found no change of circumstances with respect to Shawn as the custodial parent or with the children, but, rather, "that the only change of circumstances has been the creation of turmoil and discord in the lives of these children by the legal maneuverings and constant manipulations by Mrs. Lindstrom." As an initial matter, the court noted that Tiffani "displayed a distinct lack of credibility," citing in particular the false information sworn to on the children's passport applications.

{¶67} With respect to Tiffani's claim that the medical needs of the children constitute a change of circumstances, the juvenile court acknowledged that Sierra requires "extensive treatment" for the chronic condition of scleroderma, but also that this condition has been controlled and, therefore, does not constitute an adverse effect upon the child. The court found that Shawn adequately addresses the children's medical needs. The court was disturbed by Tiffani's conduct with respect to the children's medical needs while in her care, noting that she disregarded the professional advice of

the treating physicians, and undermined treatment plans by seeking the intervention of additional medical providers.

{¶68} With respect to Tiffani's claim that the children's increasing alienation from her constitutes a change of circumstances, the juvenile court rejected her claim that Shawn is "the source of any and all discord between the Mother and the parties' children." The court noted that the children displayed no behavior problems at the Brink residence, at school, or in their community. The court found it "apparent" that the children continue to "struggle with understanding Mrs. Lindstrom's relocation to Florida, and their perception of a lack of interest or understanding by their Mother in the daily lives and interests of the children in their community."

{¶69} With respect to Tiffani's claim that the children's education, social, and personal needs constitute a change in circumstances, the juvenile court found that these issues failed to rise to the statutorily required level.

{¶70} Despite finding no change in circumstances meriting reconsideration of the children's custody, the juvenile court conducted a best interest analysis, pursuant to R.C. 3109.04(E)(1)(a) and (F)(1). With respect to these factors, the court made the following findings. "Each parent has expressed their wish of serving as the custodial parent of the children." R.C. 3109.04(F)(1)(a). "The children have expressed the consistent and strongly held desire to remain in the custody of Mr. Brink." R.C. 3109.04(F)(1)(b).

{¶71} "The children describe, and the Guardian ad litem has observed and reported, a positive, supportive, and loving relationship between the children and Mr. Brink. Additionally, those observations have included beneficial interactions and interrelationships with their stepmother and their stepbrother with whom they also reside as well as extended family of Mr. Brink who provide additional stability in the lives of the

children. Although a loving bond exists between the Mother and the children, the Court questions whether the relationship between Mrs. Lindstrom and the children has suffered and required repair. The relationship between Mr. Lindstrom and the children raises concerns to the Court regarding his understanding of the children's development and the appropriateness of his parenting skills as highlighted by his tape recording of the children. The responses of both Mrs. and Mr. Lindstrom during companionship periods have been inconsistent with the needs and the best interest of the children." R.C. 3109.04(F)(1)(c).

{¶72} "The children continue to reside in the Conneaut, Ohio area and attend the Conneaut school system, which has been the only home the children have known since birth. The minor children exhibit a comfortable and secure connection with their home, their school, and their community. Both children are actively involved in school and community activities and sports and have achieved success in their education and in their interests. The children have established close friendships and appropriate social relationships with their peers." R.C. 3109.04(F)(1)(d).

{¶73} "Although Sierra suffers from a chronic medical condition, *** the medical treatment and care provided for the child's scleroderma appropriately addresses her needs. Further, this Court finds that Mrs. Lindstrom's actions and manipulations in regard to the minor child Sierra's medical treatment is not in the best interest of the minor children." R.C. 3109.04(F)(1)(e).

{¶74} "Both parents have exhibited inflexibility and reluctance in their constant and continuing disagreements regarding the scheduling of court ordered visitation, which has been further complicated by the communication difficulties between the parents." R.C. 3109.04(F)(1)(f). "Despite the disagreements between the parents and their mutual

difficulties with regard to companionship time, Mr. Brink has not continuously or willfully denied Mrs. Lindstrom's right to parenting time." R.C. 3109.04(F)(1)(i).

{¶75} The juvenile court concluded that the best interests of the children were served by Shawn remaining the custodial parent.

{¶76} The juvenile court next considered the Motion to Modify Visitation, applying the best interest of the child standard mandated by R.C. 3109.051. The court concluded that it was in the children's best interests to modify the visitation order, "[u]ntil such time as Mrs. Lindstrom makes the necessary efforts to improve her relationship with the children." The court noted that the children's "interests and healthy development will increasingly require their commitment and participation in school and extracurricular activities." As a result of Tiffani's "refusal to embrace and become involved in the interests of the children ***, without intervention, there will be a continued deterioration of the relationship." Accordingly, Tiffani "should be permitted and encouraged to begin repairing her relationship with the children by becoming involved in their interests and activities during visitation within Ashtabula County, Ohio."

{¶77} The juvenile court granted Tiffani companionship time during the school year on the second weekend of each month, from Friday at 6 p.m., until Sunday at 6 p.m. During each of the summer months of June, July, and August, Tiffani was granted companionship time for one week (seven days), beginning on the second Friday of the month at 6 p.m. Tiffani was not granted any other visitation beyond this, except by the mutual agreement of the parties and the consent of the guardian ad litem.

{¶78} Finally, the juvenile court ordered Tiffani, pursuant to Juv.R. 4(G) and R.C. 3105.73(A), to pay all GAL fees and all fees for the forensic evaluation conducted by Dr. Afsarifard. The court found it equitable to assess these fees against Tiffani on the

grounds that her “conduct in bringing her Motion to Modify Custody was frivolous and without basis.”

{¶79} On April 6, 2010, Tiffani filed her Notice of Appeal. On appeal, Tiffani raises the following assignments of error:

{¶80} “[1.] The Trial Court abused its discretion when it denied the Appellant’s motion for change of custody, and therefore committed prejudicial error.”

{¶81} “[2.] The Trial Court committed prejudicial error by allowing evidence which is prohibited by the rules of evidence to the prejudice of the Appell[ant].”

{¶82} “[3.] The Trial Court’s failure to grant Appellant’s motion to remove the Guardian ad Litem resulted in prejudice to the Appellant at the hearing conducted in this matter.”

{¶83} “[4.] The Trial Court’s finding that Appellant engaged in vexatious litigation and caused protracted litigation is unfounded, and the order that she pay the court costs, including all of the Guardian ad Litem fees and cost of the forensic custody evaluation is an abuse of discretion.”

{¶84} In her first assignment of error, Tiffani challenges the juvenile court’s determination that no change in circumstances occurred warranting a modification of custody, that it was in the children’s best interests to remain in Shawn’s custody, and that it was in the children’s best interest to modify the visitation order. We will first address the argument regarding a change in circumstances.

{¶85} “The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child’s residential

parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and *** [t]he harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.” R.C. 3109.04(E)(1)(a)(iii); *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, at paragraph one of the syllabus; *In re B.J.*, 11th Dist. No. 2009-G-2933, 2010-Ohio-2284, at ¶33 (citations omitted). The change in circumstances necessary to justify a modification of custody “must be a change of substance, not a slight or inconsequential change.” *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶86} “In determining whether a change in circumstances has occurred so as to warrant a change in custody, a trial judge, as the trier of fact, must be given wide latitude to consider all issues which support such a change.” *Davis*, 77 Ohio St.3d 415, at paragraph two of the syllabus. The determination that a change in circumstances has occurred for the purposes of R.C. 3109.04 “should not be disturbed, absent an abuse of discretion.” *Id.* at paragraph one of the syllabus. “Abuse of discretion connotes something more than merely being against the manifest weight of the evidence.” *Baxter v. Baxter* (1971), 27 Ohio St.2d 168, 173. Rather, the decision rendered must be found arbitrary or unreasonable. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 73-74 (citation omitted). Nor may the court of appeals substitute its own judgment for that of the lower court. *Trickey v. Trickey* (1952), 158 Ohio St. 9, at paragraph two of the syllabus.

{¶87} Tiffani contends that the issues with the children’s health, Shawn’s refusal to foster a relationship between the children and her, his denial of court-ordered

parenting time, and the cessation of communication between the parties constitute a change of circumstances sufficient to warrant a change in custody. We disagree.

{¶88} With respect to medical needs, Shae's health is not an issue in the present case. Sierra's scleroderma is a serious condition that requires monitoring, but it has been controlled for the majority of the time during which these proceedings have been litigated. The most serious consequence of Sierra's condition has been on the parties' inability to work together for the benefit of the children. While Sierra's condition may have exacerbated the tensions between Shawn and Tiffani, it certainly did not cause them.

{¶89} The breakdown in communication between Shawn and Tiffani was as much a change of circumstances with respect to Tiffani, as it was with Shawn. Tiffani admitted that Shawn has tried to call her and left voice messages, but that she blocks the calls and does not return the messages. While the children were in Florida for visitation during the summer of 2009, Tiffani did not try to maintain any form of contact with Shawn. Likewise, the deterioration of the relationship between Tiffani and the children, which the juvenile court ascribed to Tiffani's conduct and attitude, does not necessarily constitute a sufficient change in circumstances. A juvenile court does not abuse its discretion in failing to find a change in circumstances where the moving party has helped to create or is responsible for the allegedly changed circumstances on which the motion to change custody is based.

{¶90} Tiffani's claim that Shawn has refused to foster a relationship between the children and her is not supported by the record, which indicates that the children have free access to their phones while in Shawn's custody, but choose not to call Tiffani.

{¶91} This court has held that “a custodial parent’s interference with visitation by a noncustodial parent may be considered as part of a ‘change of circumstances’ which would allow for modification of custody.” *Headley v. Headley*, 11th Dist. No. 99-A-0049, 2000 Ohio App. LEXIS 4556, at *12 (citation omitted). In the present case, there is evidence that Shawn has interfered with Tiffani’s visitation, in one instance refusing to board the children on a flight, and has sought to strictly limit their visitation to what is mandated by the juvenile court’s orders. This interference does not rise to the level of a change in circumstances. Tiffani regularly exercised her visitation rights with only sporadic interference from Shawn.

{¶92} It is not this court’s role to construe the facts de novo and render an independent judgment. We must defer to the juvenile court’s conclusions where, as here, they are fairly based on the evidence and record before the court. Cf. *Hinton v. Hinton*, 4th Dist. No. 02CA54, 2003-Ohio-2785, at ¶¶14-29 (the trial court properly found no change in circumstances where the mother sought to regain custody after moving to Florida, despite ongoing issues between the parties regarding visitation, communication, and the children’s health).

{¶93} Tiffani also argues under this assignment of error that the juvenile court abused its discretion in finding it in the children’s best interest to remain in Shawn’s custody. In support of this argument, Tiffani challenges many of the juvenile court’s factual findings.

{¶94} In determining “whether the trial court’s determination that the best interests of the children would be served by a modification of custody was against the manifest weight of the evidence,” a reviewing court “does not undertake to weigh the evidence and pass upon its sufficiency but will ascertain from the record whether there is some

competent evidence to sustain the findings of the trial court.” *Ross v. Ross* (1980), 64 Ohio St.2d 203, 204.

{¶95} Tiffani faults the juvenile court for not ascribing the deterioration of her relationship with the children to “the machinations of [Shawn] and his wife.” She notes that the relationship did not begin to suffer until after the Motion to Modify Visitation and Motion to Change Custody had been filed. This statement, if true¹, does not compel the conclusion that Shawn or Stacie is responsible for the change. Tiffani cites to several instances in the record where Stacie has referred to herself, or the children have referred to her, as mom. Again, it is not obvious that these instances are the cause of the strained relationship. It is equally plausible that the strain on the children’s relationship with Tiffani is the result, as the juvenile court indicated, of the parties living at a considerable distance from each other in different states. Moreover, the children are becoming more involved in activities outside of their home and school, the scheduling of which activities conflicts with the extended periods of visitation in Florida.

{¶96} Tiffani claims there is no evidence to support the juvenile court’s statement that she has been manipulative with respect to the children’s medical needs. However, there was evidence of Tiffani and Fredrik being hostile to Dr. Hashkes, of Tiffani taking Sierra to a third rheumatologist in Tampa, Florida, for another opinion regarding the scleroderma, of Sierra having to be flown back to Ohio on two occasions for treatment of the scleroderma, of Tiffani providing false and/or incorrect information to Dr. Hasselbring regarding Sierra’s methotrexate injections, and of Tiffani attempting to have unauthorized

1. The claim that the relationship between Tiffani and the children did not begin to deteriorate until after the Motions were filed is contradicted by Tiffani’s Motion for Custody which was based, in part, on the allegation that Shawn “fail[ed] to encourage Shae and Sierra to have a loving, caring relationship with me.”

dental work performed on Sierra. This evidence is competent to support the court's censure of Tiffani's conduct.

{¶97} Tiffani claims there was no evidence to support the juvenile court's finding that she exhibited inflexibility in the continuing disagreements regarding visitation. However, there was evidence that Tiffani repeatedly scheduled flights during Shawn's working hours, which action typically precipitated interference by Shawn and, inevitably, the parties having recourse to the court for resolution of the dispute.

{¶98} Tiffani strongly criticizes the GAL's report, noting that it omitted anything that was prejudicial to Shawn, was unfairly critical to her, and contained many inaccurate statements. Assuming, arguendo, that Tiffani's characterization of the report is accurate, this fact does not compromise the juvenile court's determination regarding the children's best interest. As an initial matter, the primary purpose of the guardian ad litem is "to protect the interests of [the] child." Juv.R.4(B); Civ.R. 75(B)(2) ("[w]hen it is essential to protect the interests of a child, the court may *** appoint a guardian ad litem *** for the child and tax the costs"). There is no requirement that a guardian ad litem must maintain strict neutrality; they are to advocate on behalf of the children. In the present case, the GAL determined that it was in the children's best interest that Shawn retain custody and she wrote her report accordingly. The GAL was extensively cross-examined regarding her report by Tiffani's trial counsel and several factual inaccuracies were brought to the attention of the court. Our review of the court's judgment rests, ultimately, on the findings made by the court, not the contents of the GAL's report. If the court's findings are supported by competent evidence in the record, then we must affirm.

{¶99} In sum, Tiffani's arguments with respect to the children's best interest focus on the juvenile court's negative findings regarding her conduct. In order to affirm the

court's decision, however, it is only necessary that there be positive evidence supporting the conclusion that Shawn retain custody. In the present case, there is abundant evidence that the children are well-adjusted in the Brink home, are doing well in school and socially, and are having their physical and emotional needs met. We find no reason to disturb the court's judgment.

{¶100} Finally, Tiffani argues the trial court abused its discretion by its modification of the visitation schedule.

{¶101} Modification of visitation rights is governed by R.C. 3109.051, which provides that "the court *** shall make a just and reasonable order or decree permitting each parent who is not the residential parent to have parenting time with the child at the time and under the conditions that the court directs." *Braatz v. Braatz*, 85 Ohio St.3d 40, 1999-Ohio-203, at paragraph one of the syllabus. "The party requesting a change in visitation rights need make no showing that there has been a change in circumstances in order for the court to modify those rights. Pursuant to R.C. 3109.051(D), the trial court shall consider the fifteen factors enumerated therein, and in its sound discretion shall determine visitation that is in the best interest of the child." *Id.* at paragraph two of the syllabus.

{¶102} Tiffani maintains the modified visitation schedule is unjust and unreasonable in light of the evidence that Shawn never allowed Tiffani companionship time beyond what was expressly ordered and resisted accommodating Tiffani for missed visitation. R.C. 3109.051(D)(10). Further, the juvenile court ignored the fact that, as an accountant, Tiffani is unable to have vacation time during tax season, from January to April. We find neither of these arguments persuasive. Shawn's reluctance to grant Tiffani additional visitation is only one factor for the court to consider and, in light of the

other factors in the present case, such as concerns for the children's health (R.C. 3109.051(D)(7)), the geographical distance between Ohio and Florida (R.C. 3109.051(D)(2) and (14)), and the children's involvement in Ohio activities (R.C. 3109.051(D)(5)), is not determinative.

{¶103} Finally, Tiffani complains that the juvenile court failed to address the communication issues that exist between the parties and her ability to obtain access to the children's school and medical records. With respect to these issues, neither party sought a ruling from the court. The only matters properly raised before the court were custody and visitation. Accordingly, communications between the parties remain governed by the court's prior October 2005 Judgment Entry.

{¶104} The first assignment of error is without merit.

{¶105} In her second assignment of error, Tiffani claims the juvenile court admitted prejudicial hearsay testimony during the course of the hearings.

{¶106} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C).

{¶107} Tiffany cites to three instances of hearsay. In the first, the GAL testified, over objection, that Dr. Hashkes told her that he did not believe Shawn was neglectful in obtaining treatment for Sierra's scleroderma and that the condition was not in an active or flare state. The admission of this hearsay testimony was harmless. The GAL had already testified that she found that the medical needs of both children were being met

while in Shawn's custody. Shawn testified as to the measures taken to treat and control the scleroderma. There was no testimony that the condition was not being controlled, although Tiffani testified that she personally disagreed with the prescribed treatment. The only disagreement in the testimony was that Tiffani claimed there was noticeable discoloration in Sierra's skin as early as April 2006, while Shawn denied that there were visible indications until June 2006. We find no convincing evidence that Shawn has failed to address Sierra's medical needs regardless of the hearsay statement attributed to Dr. Hashkes.

{¶108} Tiffani cites to testimony proffered by Shawn as to statements made by Shae and Sierra. These statements describe an incident where Tiffani allegedly left Shae alone at the apartment while she went shopping with Sierra and another incident describing a fight between Fredrik and the children. We find no reversible error. The juvenile court initially sustained an objection to the testimony, based on Shawn's lack of foundation. Following a discussion among the attorneys, the court overruled the objection to the testimony "subject to corroboration from the in-camera interview," which was scheduled with the children. As the in camera interview was never held, we conclude that the court disregarded the testimony, in accord with its ruling. *State v. Dennis*, 79 Ohio St.3d 421, 433, 1997-Ohio-372 (a reviewing court "will presume that the judge considered only the relevant, material, and competent evidence in arriving at a judgment, unless the contrary affirmatively appears from the record"). The court mentions neither incident in its Judgment Entry.

{¶109} Lastly, Tiffani objects to testimony proffered by Shawn that a nurse practitioner advised him in June 2006 to monitor the spot on Sierra's elbow. Again, we find no error. In this case, Shawn had already presented this same testimony on cross-

examination, and without objection, elicited by Tiffani's trial counsel. *Lester v. Leuck* (1943), 142 Ohio St. 91, at paragraph one of the syllabus ("[a] party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make").

{¶110} The second assignment of error is without merit.

{¶111} In the third assignment of error, Tiffani claims the trial court erred by not removing the GAL, in light of her biased and unprofessional conduct toward her.

{¶112} The juvenile court's decision whether to remove a GAL is reviewed under an abuse of discretion standard. *Meyers v. Hendrich*, 11th Dist. No. 2009-P-0032, 2010-Ohio-4433, at ¶21, citing *Gabriel v. Gabriel*, 6th Dist. No. L-08-1303, 2009-Ohio-1814, at ¶15. As noted above, "[t]he role of guardian ad litem is to investigate the ward's situation and then to ask the court to do what the guardian feels is in the ward's best interest." *In re Baxter* (1985), 17 Ohio St.3d 229, 232; also Juv.R.4(B); Civ.R. 75(B)(2).

{¶113} Tiffani claims the GAL's report accuses her of initiating the present litigation and for continuing it for four years and that this erroneous information is the basis for the juvenile court's finding that she is a "vexatious litigator." We disagree.

{¶114} Initially, we note that the GAL does not accuse Tiffani of initiating the present litigation. Her report states that "[i]n the spring of 2007, Mrs. Lindstrom filed a motion for change for custody," while omitting to mention Shawn's Motion to Modify Visitation. The report provides no explanation or excuse for the protracted length of the litigation. It does not expressly label Tiffani a "vexatious litigator," or blame her for the protracted litigation.

{¶115} The majority of the report is concerned with responding to allegations that Tiffani raised against Shawn: "Mrs. Lindstrom reports that the girls are being medically neglected by Mr. Brink"; "Mrs. Lindstrom reports that Mr. Brink has neglected the

children's dental needs"; "Mrs. Lindstrom reports that another concern is that Shae is especially disrespectful and hateful towards her"; "Mrs. Lindstrom reports that Mr. Brink has alienated the children from her"; "Mrs. Lindstrom reports that Mr. and Mrs. Brink have not supported a relationship between herself and the girls"; "Mrs. Lindstrom reports that the girls are not being taught good table manners"; "Mrs. Lindstrom reports that the girls clothes are dirty and do not fit properly"; "Mrs. Lindstrom reports that there is a concern that Mr. Brink is using illegal drugs"; and "Mrs. Lindstrom reports Shae is struggling academically and that Mr. Brink has failed to obtain appropriate help." That Tiffani has raised and litigated these concerns is substantiated by the juvenile court's docket, e.g. where she obtained a Judgment Entry ordering the parties to undergo immediate drug testing, and by the hearings on the Motions, e.g. where she submitted as evidence a picture of Sierra's "unkempt" toe nails. We find nothing inherently unfair in the GAL's description of the proceedings or the issues raised therein.

{¶116} Tiffani complains that the juvenile court dismissed her Motion without hearing. The GAL responded to the substance of Tiffani's Motion in her report, explaining why she sought an order removing Dr. Day as Shae's counselor. There was no error in the court ruling on Tiffani's motion based on the record before it. The Ohio Civil Rules provide that, "[t]o expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition." Civ.R. 7(B)(2). This expedited procedure has been applied to motions seeking the removal of a GAL. *Weisgarber v. Weisgarber*, 5th Dist. No. 2008CA0067, 2009-Ohio-20, at ¶52.

{¶117} The third assignment of error is without merit.

{¶118} In her fourth and final assignment of error, Tiffani claims the juvenile court abused its discretion by requiring her to pay the GAL fees and fees for the forensic evaluation.

{¶119} The juvenile court is authorized to assess the costs of the GAL and other litigation expenses against a party by Juv.R. 4(G) (“[t]he court may fix compensation for the services of appointed counsel and guardians ad litem, tax the same as part of the costs”) and R.C. 3105.73(A) (“[i]n an action for divorce ***, a court may award all or part of reasonable attorney’s fees and litigation expenses to either party if the court finds the award equitable”). An appellate court reviews a juvenile court’s award of GAL fees and other litigation expenses under an abuse of discretion standard. *Holeski v. Holeski*, 11th Dist. No. 2009-P-0007, 2009-Ohio-6036, at ¶28 (citation omitted).

{¶120} Tiffani claims that the award of fees for the GAL and forensic evaluation in the present case are inequitable in light of the fact that she neither commenced the present litigation nor perpetuated it. Tiffani asserts that Shawn initiated the present litigation by seeking to modify the visitation schedule. Moreover, by Tiffani’s reckoning, Shawn was responsible for the filing of thirty-eight substantive motions (motions for continuances and motions in limine excluded) since he filed the Motion to Modify in May 2007, while she is only responsible for twenty-seven substantive motions in the same period.

{¶121} We find the juvenile court’s conclusion, that it is equitable to assess the GAL and forensic evaluation fees against Tiffani in light of her prosecution of a Motion to Modify Custody that was frivolous and without basis, to be a valid exercise of its discretion. The number of and scope of issues raised by Tiffani’s Motion to Modify Custody far exceeds those raised by Shawn’s Motion to Modify Visitation. As

demonstrated above, Tiffani raised a considerable number of concerns which she claimed justified a change of custody. Several of the claims were trivial in nature; several of the claims had been raised and litigated previously; and all of the claims lacked substance. The degree of disparity in the resources expended in litigating the two Motions may be gauged by the fact that four and a half of the six days of hearings were devoted to presenting Tiffani's case for modifying custody, while Shawn's case for modifying visitation (and rebutting Tiffani's witnesses) was presented in a day and a half. The forensic evaluation, moreover, was conducted on Tiffani's motion. We note that Tiffani was not required to pay Shawn's attorney fees, but only the fees of those persons who services are typically required to resolve custody, as opposed to visitation, issues. But for Tiffani's ongoing efforts to obtain custody of the children irrespective of the existence of a sufficient factual basis for altering the custodial arrangement, these costs would not have been incurred. They have been properly assessed against Tiffani.

{¶122} The fourth assignment of error is without merit.

{¶123} For the foregoing reasons, the Judgment of the Ashtabula County Court of Common Pleas, Juvenile Division, denying Tiffani's Motion to Modify Custody and granting Shawn's Motion for Modification of Visitation, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.