[Cite as *In re A.M.*, 2016-Ohio-8433.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN THE MATTER OF:	:	**O P I N I O N**
A.M., MINOR CHILD.	:	**CASE NO. 2016-T-0051**
	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Juvenile Division, Case No. 2010 JS 00704.

Judgment: Affirmed.

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DIANE V. GRENDELL, J.

{¶1} Appellant, Brenda Johnson, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, Juvenile Division, adopting the Magistrate's Decision, which granted appellee, Willie McElroy, legal custody of their child, A.M. For the following reasons, we affirm the decision of the trial court.

{¶2} On October 26, 2010, an Administrative Order was approved, finding McElroy to be the father of A.M., born on May 19, 2010. Johnson is A.M.'s mother. Subsequent to A.M.'s birth, McElroy moved out of state.

{¶3} On February 28, 2013, McElroy filed a Motion for Visitation and was granted "Standard Guidelines Long Distance Visitation." On May 10, 2013, McElroy filed a Motion to Establish Child Support Amount and a Judgment Order awarding support was subsequently filed.

{¶4} McElroy filed a Motion for Reallocation of Parental Rights and Responsibilities on April 7, 2015. He argued that A.M. had been living with his grandmother, who was arrested for Domestic Violence, and Johnson had refused McElroy visitation and a relationship with A.M. While that matter was pending, McElroy sought temporary custody, which was denied following a July 29, 2015 hearing.

{¶5} A trial was held before the magistrate on November 2, 2015, and January 5, 2016. The following testimony and evidence were presented.

{¶6} Willie McElroy is an Industrial Hygiene Technician for the Air Force. He is currently stationed in Tampa, Florida, where he moved approximately three months before the date of trial. He earns around $28,000 in addition to a cost of living stipend, a base housing allowance, and a food allowance.

{¶7} McElroy requested custody because "of bad choices made by" Johnson, who would not let him see A.M., blocked him on Facebook, and changed her phone number. He expressed concern with her smoking marijuana and the people she "associated herself with." When he has visitation, he encourages A.M. to communicate with his mother on the phone. He described activities he did with his son, planned a schedule for him, and noted the need for consistency.

{¶8} Alexandria McElroy, McElroy's wife, testified that she had a strong relationship with her husband. She was present during A.M.'s visitation each summer for the past three years and wants him to live with her and her husband so that he can

have a good education, a positive environment, and "the best chance he can." Alexandria described positive interactions between her husband and A.M., as well as with her own family. The McElroys' apartment complex was described as including various facilities, such as an exercise room and a pool. Pictures of a bedroom prepared for A.M. were also presented. She described that the school A.M. would be attending is "highly-rated." She agreed that her husband's family, as well as her own, do not live in Florida and that McElroy's parents live in Warren, Ohio.

{¶9} Brenda Johnson, A.M.'s mother, lives in Warren with her three children and has worked at Burger King for approximately four months. A.M. has lived with her since he was born and has a close relationship with her and his siblings.

{¶10} Johnson testified that she sought a voucher to enroll A.M. in Holy Trinity for school due to her limited income. She believes it is a good school and values A.M.'s education. A.M. has a stutter and she spoke with the school about getting him therapy for this. A.M. missed a few days of school for illness and a death in the family and was tardy a few times because her car broke down. Although she does not have a valid driver's license, she sometimes drives A.M. to school.

{¶11} Johnson has family members and friends to help her with her children when needed. She wants A.M. to have a relationship with his father, although A.M. has previously not wanted to visit his father in the summers and McElroy rarely calls to speak to A.M. She believes it would have a negative impact for him to move to Florida, since he is close with his siblings and would miss being around her and his family.

{¶12} Johnson admitted that she had posted on social media about smoking marijuana but stopped smoking when she received the custody motion and has no intention of continuing. She had a positive drug screen test for marijuana when the

custody proceedings were initiated, although a subsequent screen was negative. She also testified that her other children's fathers had been arrested and/or imprisoned for offenses of violence (Domestic Violence and Murder), although she did not have them around A.M. She admitted to being involved in physical altercations with other females.

{¶13} Brenda Bell, A.M.'s grandmother, lives in Warren. Johnson and A.M. spend a lot of time at her home. According to her, she was arrested in 2011 when one of her daughters was stabbed, but was not convicted. She testified that Johnson loves her son, plays with him, and helps him with his homework.

{¶14} Jabreea Scates, a friend of Johnson's, frequently interacts with A.M., playing with him and driving him to school. She observed a strong relationship between A.M. and his mother. She described that he becomes upset when he goes to visit with his father.

{¶15} The guardian ad litem, Terry Grenga, testified that A.M. was comfortable with both parents and that they loved him. She expressed several concerns with A.M.'s current situation which arose from her investigation. She noted he had missed many days of preschool and was "bothered" that he missed the first day of kindergarten and had at least six absences and four tardies during the beginning of the school year until November, although he did not miss any days after that. She noted that Johnson did not seem to express concern over this.

{¶16} Grenga observed A.M. falling asleep in school and he told her he stayed up until midnight. A.M. also said that he spent much of his time at his grandmother's. Based on her investigation, she questioned whether he had "a lot of interaction at the home." She also became aware that Johnson was driving A.M. to school, although she has no license. Grenga reviewed A.M.'s school records and noted that A.M. had an

"academic deficiency" and is "behind." Regarding the speech problem, Grenga learned in her investigation that the school was not providing therapy given his age and possibility that A.M. may grow out of the problem.

{¶17} Grenga believed, based on her investigation and past daycare records, that McElroy would "provide a steady school schedule." She agreed that she did not observe the McElroys' housing situation, since it is in Florida.

{¶18} On January 7, 2016, a Magistrate's Decision was issued, finding that legal custody should be granted to McElroy. This was based on the weighing of best interest factors, including findings that A.M. would miss his siblings if he moved to Florida, has adjusted well to living with his father during visitation periods, and that McElroy had been denied opportunities to visit and speak with A.M. The Decision also found that A.M. had been late in getting his vaccinations and was "struggling in school."

{¶19} On January 7, 2016, the court approved the Magistrate's Decision and issued an Order on Custody.[1] Johnson filed Objection[s] to Magistrate's Decision on January 11, 2016, to which McElroy replied.

{¶20} On April 20, 2016, the trial court filed an Order, overruling Johnson's objections and approving the Magistrate's Decision. It noted that no hearsay evidence had been considered to reach a decision and that the decision was made in the best interest of the child, considering the totality of the evidence. Legal custody was granted to McElroy, his support obligation was terminated, and parenting time for Johnson was ordered during summer, spring, and fall school breaks, and "long weekends."

{¶21} Johnson timely appeals and raises the following assignment of error:

1. The Magistrate's Decision is missing page five. The Order on Custody, which appears to restate the findings of the magistrate, also explains that considerations for custody include the mother's lack of a driver's license but continued transportation of A.M., as well as "her choice of male friends with criminal records" that may put A.M. at risk.

{¶22} "The trial court erred in granting a change in custody from the Mother, Brenda Johnson, to the Father, William McElroy."

{¶23} Appellate courts only review legal custody determinations for abuse of discretion, which is "particularly appropriate in child custody cases, since the trial judge is in the best position to determine the credibility of the witnesses and there 'may be much that is evident in the parties' demeanor and attitude that does not translate well to the record.'" (Citations omitted.) *Cireddu v. Clough*, 11th Dist. Lake No. 2010-L-008, 2010-Ohio-5401, ¶ 19. Appellate courts also review a trial court's adoption of a magistrate's decision for an abuse of discretion. *Fortney v. Willhoite*, 11th Dist. Lake No. 2011-L-120, 2012-Ohio-3024, ¶ 33. The best interest of the child is the "overriding concern in any child custody case." *Miller v. Miller*, 37 Ohio St.3d 71, 75, 523 N.E.2d 846 (1988).

{¶24} In her first issue, Johnson argues that the guardian ad litem did not complete a "proper investigation" under the Rules of Superintendence Rule 48, including that she did not visit or investigate the father's residence or school district in Florida or any friends/family there, based on the fact that Florida was too far to travel.

{¶25} "The role of the guardian ad litem is to investigate the child's situation and then ask the court to do what is in the child's best interest." *In re Williams*, 11th Dist. Geauga Nos. 2002-G-2454 and 2002-G-2459, 2002-Ohio-6588, ¶ 19. Sup.R. 48(D)(13) requires a guardian ad litem to "make reasonable efforts to become informed about the facts of the case" and lists investigatory tasks that shall be performed "unless impracticable or inadvisable * * *." These include conducting interviews, investigation of certain records, and visiting the child at his residence.

{¶26} Initially, it must be emphasized that the Rules of Superintendence "are not the equivalent of rules of procedure and have no force equivalent to a statute. They are purely internal housekeeping rules which are of concern to the judges of the several courts but create no rights in individual defendants." (Citation omitted.) *Allen v. Allen*, 11th Dist. Trumbull No. 2009-T-0070, 2010-Ohio-475, ¶ 31. Thus, it has been held that the courts can determine the weight to be given to the guardian ad litem's recommendation when certain items in Sup.R. 48(D) are not addressed. *In re Ma. P.*, 9th Dist. Medina No. 14CA0110-M, 2015-Ohio-2088, ¶ 26.

{¶27} Further, Sup.R. 48(D)(13) requires "reasonable efforts" be made in the investigation. Grenga provided a great deal of information and performed a thorough investigation which constituted reasonable efforts, especially when considering that visiting Florida is a task that may be considered "impracticable" under Sup.R. 48(D)(13). While it is accurate that Grenga did not visit the McElroys' home in Florida, this was for the obvious reasons of difficulty and expense. In addition, there does not appear to be a question that the McElroys' home would be safe. Pictures provided of the apartment complex in general and pictures of A.M.'s actual room were made available and school district information was provided. Regardless, the court was fully aware of this issue when it weighed all of the evidence together, including the GAL's recommendation that McElroy be granted legal custody.

{¶28} Johnson also points to other items that were not investigated, such as why A.M. was absent and whether he attended school regularly during the second quarter.

{¶29} Again, as discussed above, Grenga performed a thorough investigation but it is impossible for her to find out every single fact about A.M.'s life. She noted that the school was unaware of the grounds for all of A.M.'s absences, which prevented her

from fully knowing the reasons. Her thorough, if not entirely exhaustive, investigation justified the court's decision to rely on her recommendation. *See In re J.A.W.*, 11th Dist. Trumbull No. 2013-T-0009, 2013-Ohio-2614, ¶ 48.

{¶30} Johnson next contends that the court incorrectly determined A.M.'s education was "at risk." Johnson argues, in multiple issues raised under the sole assignment of error, that school records presented as exhibits, primarily a document containing A.M.'s grades and "allegedly showing poor performance at school," contained hearsay and were not properly authenticated.

{¶31} "[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.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). 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). Evid.R. 901(A) requires authentication by evidence "sufficient to support a finding that the matter in question is what its proponent claims."

{¶32} It is accurate that evidence must be properly authenticated and cannot contain hearsay to be admissible. However, it is unnecessary to determine whether the questioned school records were properly admitted since there is no evidence that the court relied on these or even considered them in reaching its decision or making a determination that A.M. is "struggling in school."

{¶33} The magistrate did not comment about the foregoing document in the extensive factual findings. In fact, the magistrate described only the GAL's testimony about A.M.'s struggles in school and that school performance was an important factor in

her recommendation, rather than relying on the purportedly inadmissible document. The GAL indicated she received her impressions of A.M.'s issues at school partially from reviewing their records, not based on exhibits presented by McElroy. Thus, any possible error would be harmless since the same type of information about difficulty in school was presented through proper testimony, and the court's conclusion appears to be based on the fact that schooling influenced the GAL's recommendation. *See Wells Fargo Bank, N.A. v. Watson*, 11th Dist. Ashtabula No. 2014-A-0062, 2015-Ohio-2599, ¶ 65 (any error admitting an improper affidavit was "harmless since appellant presented the same information via [a witness'] deposition").

{¶34} Johnson also points to the evidence that she emphasized education, including obtaining a scholarship/voucher for private school and reading with A.M. at home.

{¶35} While there may be evidence of this, it was within the trier of fact's province to decide that education was a concern. As noted above, the GAL's investigation determined that A.M. was struggling in school, that there were issues with A.M. attending school regularly at some point, and that he was tired at school. In addition, the trial court considered many factors in determining custody, not just education. The court may have considered that Johnson cared about A.M.'s education but still found it necessary to grant McElroy custody for the many reasons discussed in its judgments.

{¶36} In her next issue, Johnson argues that the damage done by taking A.M. away from his siblings is "not outweighed by the nice house and nice school district of the father."

{¶37} This takes a narrow view of the scope of the proceedings. There is nothing to indicate that the court weighed only these two issues against each other. The court recognized various concerns related to Johnson retaining custody, including her choice to drive A.M. to school while she had no license, to associate with individuals with criminal records, the foregoing concerns with A.M.'s education, and Johnson's failure to allow McElroy to communicate with the child, blocking him from social media and preventing phone contact. The court recognized and considered the close relationship with A.M.'s family in Warren but weighed all of these best interest concerns together, as required by R.C. 3109.04(F)(1).

{¶38} Regarding Johnson's argument about the lack of speech therapy for the stuttering, there was conflicting testimony as to whether this was actually occurring. Regardless of the stutter, there was sufficient justification for the court's decision.

{¶39} Johnson next argues that the "wealth" of McElroy was a factor in the court's decision and that "poor mothers throughout the nation are at risk of having their children taken away from them because they are poor."

{¶40} As Johnson concedes, the lower court's judgment did not state it considered this in reaching its decision. There is nothing in the court's decision that would lead to the conclusion that it found or believed Johnson could not parent A.M. because of her financial status. Rather, the court's judgment indicates that its decision was based on the reasons discussed extensively above.

{¶41} Finally, Johnson argues that evidence of the criminal records of her mother and friends were not properly authenticated and were not relevant to determining custody.

{¶42} A review of the record shows that McElroy's counsel did, on several occasions, question the criminal records of various individuals, including Johnson's mother, Brenda Bell. Johnson did testify about some of these records. While the court did not permit the admission of documents purporting to show the convictions, it did allow Johnson to testify. We find no error in allowing this testimony. The court permitted the testimony from Johnson's personal knowledge of the circumstances surrounding any arrests and sustained objections when she was asked to testify based on documents relating to their crimes. It is difficult to conclude how it would be hearsay when Johnson testified about information of which she was personally aware.

{¶43} Johnson also argues that this testimony was not relevant and should not have been admitted since these individuals were not around A.M. However, who Johnson associates with, including the fathers of her other children, can certainly impact her son. The court was entitled to determine how much weight to give this information, since the "relative import" of the best interest factors "depends upon the facts of the case." *Janecek v. Marschall*, 11th Dist. Lake No. 2015-L-065, 2015-Ohio-5219, ¶ 16.

{¶44} The sole assignment of error is without merit.

{¶45} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, Juvenile Division, awarding legal custody of A.M. to McElroy, is affirmed. Costs to be taxed against appellant.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶46} Finding merit in Ms. Johnson's first issue under her assignment of error, I would reverse. The trial court abused its discretion in relying on the report and testimony of the guardian ad litem.

{¶47} Sup.R. 48(D)(13), governing the duties to be performed by guardians ad litem, provides, in pertinent part:

{¶48} "(13) A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. In order to provide the court with relevant information and an informed recommendation as to the child's best interest, a guardian ad litem shall, at a minimum, do the following, unless impracticable or inadvisable because of the age of the child or the specific circumstances of a particular case:

{¶49} "(a) Meet with and interview the child and observe the child with each parent, foster parent, guardian or physical custodian and conduct at least one interview with the child where none of these individuals is present;

{¶50} "(b) Visit the child at his or her residence in accordance with any standards established by the court in which the guardian ad litem is appointed;

{¶51} "* * *

{¶52} "(d) Meet with and interview the parties, foster parents and other significant individuals who may have relevant knowledge regarding the issues of the case;

{¶53} "* * *

{¶54} "* * *

{¶55} "(g) Interview school personnel, medical and mental health providers, child protective services workers and relevant court personnel and obtain copies of relevant records;

{¶56} "* * *

{¶57} "(i) Perform any other investigation necessary to make an informed recommendation regarding the best interest of the child."

{¶58} In this case, Mr. McElroy and his wife sought custody of A.M. The McElroys live in Florida. Due, evidently, to the time and expense involved in travelling to Florida, the guardian ad litem never inspected the McElroys' apartment, or apartment complex; the neighborhood in which it is located; and the school to which they intend to send A.M. The guardian ad litem never interviewed any people with whom the McElroys associate in Florida. The information in the record on these issues – all of which go to A.M.'s best interest, as they will affect his safety, education, and nurture – depends on self-reporting by the McElroys.

{¶59} *Nolan v. Nolan*, 4th Dist. Scioto No. 11CA3444, 2012-Ohio-3736, is instructive. In that case, mother wished to move to Oregon to live with her new boyfriend, and moved the trial court to terminate a shared parenting plan regarding her child, and designate her residential parent. *Id.* at ¶4-5. Father objected, but the trial court found in Mother's favor. *Id.* at ¶1. On appeal, one of Father's arguments was that the investigation of the guardian ad litem was insufficient, and that his report and testimony should have been stricken. *Id.* In relevant part, the Fourth District held:

{¶60} "Here, it is apparent that the guardian ad litem did not meet the minimum standards of Sup.R. 48(D)(13). For example, even though the Child would be living with [Mother] and her boyfriend, the guardian ad litem did not interview [the boyfried]. *See*

Sup.R. 48(D)(13)(d). The guardian ad litem also failed to investigate relevant details about [the boyfriend's] life. See Sup.R. 48(D)(13)(f) & (i). Furthermore, the guardian ad litem did not interview the Child's half-sister or visit the residences of either [Father] or [Mother]. See Sup.R. 48(D)(13)(b) & (d). And despite the Child having ADHD and behavioral issues that could affect his educational opportunities, the guardian ad litem did not interview the Child's school personnel or medical-health providers. See Sup.R. 48(D)(13)(g). * * * In short, the guardian ad litem fell far short of the minimum standards established by the Supreme Court of Ohio.

{¶61} "Therefore, the question is: How does Sup.R. 48(D)(13) affect the present case? In most circumstances, 'Ohio appellate courts have indicated that the Rules of Superintendence are general guidelines for the conduct of the courts and do not create substantive rights in individuals or procedural law.' *In re K.G.*, 2010 Ohio 4399, at ¶ 11. As a result, we have concluded that Sup.R. 48 does not have the force of law. *See In re E.W.*, Nos. 10CA18, 10CA19, & 10CA20, 2011-Ohio-2123, ¶ 15. We do not believe, however, that Sup.R. 48 should be ignored. And here, where the guardian ad litem fell so far below the minimum standards of Sup.R. 48(D)(13), we fail to see how his testimony or report can be considered competent, credible evidence of the Child's best interests. Accordingly, we agree that the trial court abused its discretion by considering the guardian ad litem's testimony and report." *Nolan* at ¶25-26.

{¶62} Similar reasoning applies to this case. The failure of the guardian ad litem to do any investigation of the circumstances under which A.M. would be living with the McElroys in Florida, falls far below the minimum standards required by Sup.R. 48(D)(13). Thus, the trial court abused its discretion on relying on her report and testimony.

{¶63} As the judgment of the trial court should be reversed, I must respectfully dissent.