**[Cite as *Hartman v. Eggar*, 2010-Ohio-6357.]**

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| | : | JUDGES: |
| C.J. HARTMAN | : | Julie A. Edwards, P.J. |
| | : | W. Scott Gwin, J. |
| Plaintiff-Appellee | : | Sheila G. Farmer, J. |
| | : | |
| -vs- | : | Case No. 09 CA 0055 |
| | : | |
| | : | |
| MARLA EGGAR, et al., | : | O P I N I O N |

Defendants-Appellants

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| CHARACTER OF PROCEEDING: | Civil Appeal from Fairfield County Court of Common Pleas, Family Court Division, Case No. 2008 DR 00079 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | December 16, 2010 |
| APPEARANCES: | |
| For Plaintiff-Appellee | For Defendant-Appellant |
| RANDY L. HAPPENNEY, ESQ.<br>Dagger, Johnston, Miller<br>Ogilvie & Hampson<br>144 E. Main Street<br>P.O. Box 667<br>Lancaster, Ohio 43130 | MARLA C. EGGAR<br>617 Crownpoint Lane<br>Arlington, Texas 76002<br><br>Guardian Ad Litem<br><br>JENNIFER J. STRUNK, ESQ.<br>124 W. Main Street, Suite 201<br>Lancaster, Ohio 43130 |

*Edwards, P.J.*

**{¶1}** Defendant-appellant, Marla Eggar, appeals from the August 12, 2009, Decision of the Fairfield County Court of Common Pleas, Domestic Relations Division.

STATEMENT OF THE FACTS AND CASE

**{¶2}** Appellant Marla Eggar and appellee C.J. Hartman are the biological parents of Gavin Hartman (DOB 5/21/01). The two were never married, but started dating in 1999 or 2000. At the time they started dating, both appellant and appellee were residing in West Virginia. Paternity for Gavin was established through the West Virginia Child Support Enforcement Agency and a child support order was established, effective November 27, 2002. The West Virginia court order indicated that, at the hearing before the court, appellee testified that he had physical custody of Gavin for at least 15 days each month and that the "shared custody formula was utilized" to determine child support.

**{¶3}** On February 13, 2008, appellee filed a complaint for change of custody, seeking custody of Gavin. Appellee, in his motion indicated that appellant was currently in the process of moving Gavin from the State of Ohio. On March 10, 2008, appellant filed a Motion to Dismiss for Insufficiency of Service of Process. Appellant, in her motion, alleged that she was served at her aunt and uncle's address and that she had never lived at the same. On March 13, 2008, appellee filed an Amended Complaint. Pursuant to an Entry filed on April 2, 2008, the trial court overruled appellant's Motion to Dismiss, finding that personal service was perfected on appellant on March 31, 2008.

**{¶4}** A pretrial was scheduled for May 12, 2008. On May 5, 2008, appellant filed a motion asking that her appearance at the pretrial be waived and that she be

allowed to be available by telephone. Appellant, in her motion, indicated that she was seven months pregnant and that her doctor indicated that it was unsafe for her and her unborn child for her to travel. The trial court granted such motion.

**{¶5}** Subsequently, a trial commenced on May 27, 2009. The following testimony was adduced at the trial:

**{¶6}** In December of 2004, appellant married Ryan Eggar. Testimony was adduced that the two had four children, including Gavin, and also had a baby due in August of 2009. From 2002 until she moved to Ohio in December 2004 appellant was always living within 20 miles or so of where appellee was living. Appellant testified that for a period of time when she was in West Virginia with Gavin, appellee was working in New Jersey and other locations and that he sometimes would come home on Thursday nights and exercise companionship with Gavin from Friday mornings until Sunday afternoons. She also testified that after she moved to Ohio, appellee sometimes drove to Ohio on Friday mornings to get Gavin out of his half-day Friday preschool and would keep Gavin until Sunday afternoon. According to appellant, while she was living in Lancaster, Ohio and appellee was still residing in West Virginia, either appellee or his father met her in Athens, Ohio approximately five times to pick up Gavin and met her in Belpre, Ohio several times. Appellant testified that the remainder of the time appellee occasionally came to Lancaster, Ohio to pick up Gavin.

**{¶7}** Appellee eventually moved to the Lancaster, Ohio area in August of 2006 and lived within a few miles of where appellant had relocated with Gavin. Appellant testified that appellee exercised companionship with Gavin every other weekend and that she never picked up or dropped Gavin off at appellee's home. Appellant testified

that prior to her move to Texas, she had never been to appellee's house and that she had never picked up or dropped off Gavin at appellee's house. The following is an excerpt from appellant's testimony at trial:

**{¶8}** "Q. BY MR. HAPPENEY: Mrs. Eggar, it's correct, is it not, that up to this Court's involvement, there was never a specific companionship order between you and C.J. [appellee]? Is that a fair statement?

**{¶9}** "A. Yes, that's true.

**{¶10}** "Q. So the arrangement that you and C.J. had while the two of you were living together in West Virginia, while you were living in West Virginia - - excuse me - - he was living in West Virginia and you were living in Ohio, and then subsequently when both of you were living in Ohio, that was all done by agreement?

**{¶11}** "A. You mean, as in like he would call ahead of time and that kind of a thing?

**{¶12}** "Q. Yeah.

**{¶13}** "A. Yes.

**{¶14}** "Q. And if I understand your testimony correctly, what you're indicating is that if C.J. [appellee] called and asked to have Gavin, generally, you would comply, I guess, unless you had something else going on?

**{¶15}** "A. Yes.

**{¶16}** "Q. Okay. And you would agree that that system worked pretty well up until January of 2008?

**{¶17}** "A. Yes." Transcript at 40-41.

**{¶18}** After appellant relocated to Texas in February of 2008, appellant had problems with appellee regarding visitation. At the time of the relocation, appellant was not working outside the home. Appellant had relocated to Texas after her husband took a job selling insurance at an agency owned by his uncle. Prior to the move, appellant's husband had sold insurance at his father's insurance business until the same was sold in September of 2007. He then worked for the man who had purchased the insurance business until November or December of 2007 when he started looking for a new job because sales were down. Appellant testified that Gavin's last day in school in Ohio was approximately January 27th or 28, 2008. Right after such time, appellant went with her children to West Virginia due to back problems related to her pregnancy. They remained there until they moved to Texas. During the period of time from January 27 or 28th, 2008, until February 28, 2008, Gavin, who was with appellee's family in West Virginia, was not enrolled in school. When asked why she did not leave Gavin with his father during such time so that he could attend school for that month, appellant testified that appellee had no way of getting Gavin there. Appellant disagreed with appellee's assertion that she did not notify him that she was moving to Texas until February 4, 2008, and testified that appellee was aware of her move before such date. She also denied telling appellee that the only reason that she and Gavin were in West Virginia was because she was having problems with her pregnancy.

**{¶19}** At trial, appellant testified that she was unable to appear for a deposition on February 9, 2009, because of her pregnancy. While she testified that her doctor had advised her not to travel the last 90 days of her pregnancy, she admitted that February

9, 2009, did not fall within such time period. Appellant denied using her pregnancy as an excuse to avoid things.

**{¶20}** Appellant testified that since she had relocated to Texas, appellee had visitation with Gavin twice. She testified that appellee had Gavin for six or seven weeks during the summer of 2008 and had him at Christmas. Appellant denied that, after receiving notice that appellee was not in agreement with the preliminary recommendation of the Guardian Ad Litem, she made it difficult for appellee to exercise companionship with Gavin over Christmas.

**{¶21}** Testimony was adduced at the trial that appellee's attorney contacted appellant's attorney via letter dated October 14, 2008 (Exhibit C) requesting that appellee have Gavin for the entire Christmas break from school. In response, pursuant to a letter dated November 3, 2008, (Exhibit D) appellant's counsel indicated that appellant agreed for appellee to have Gavin during his Christmas vacation. In response, appellee's counsel, in a letter to appellant's counsel dated December 10, 2008 (Exhibit E), stated as follows:

**{¶22}** "It is my understanding that your client [appellant] originally advised my client that she was coming to Ohio over the holidays to visit with family. There was discussion about C.J. [appellee] exercising companionship with Gavin during that stay. Your client is now indicating that she is not coming to Ohio and that furthermore my client will not be entitled to exercise any companionship with Gavin over the Christmas holiday. I would suggest to you, that if this is the case, that this would be clearly contrary to your client's indication to the Guardian that she intends to facilitate long

distance companionship with my client. Please contact me immediately to discuss holiday visitation. If I need to file a Motion I will do so."

**{¶23}** As memorialized in a letter dated December 10, 2008, (Exhibit F) appellant's attorney informed appellee's attorney that appellee could have visitation with Gavin from December 27, 2008, at 3:00 p.m. through January 3, 2009, at 3:00 p.m. and that appellee had to provide the transportation. Appellant's counsel, in such letter, indicated that appellant denied saying that she was traveling to Ohio for the holidays.

**{¶24}** After receipt of such letter, appellee, on December 17, 2008, filed a motion asking that the trial court grant him companionship with Gavin during Christmas break, from December 19, 2008, through January 2, 2009, and that the trial court order each party to pay half of the transportation costs.

**{¶25}** During a telephone conference, the trial court indicated that it would grant appellee's motion in part, allowing for companionship from December 27, 2008 through January 3, 2009.

**{¶26}** In a letter to appellant's counsel (Exhibit J) dated December 23, 2008, appellee's counsel indicated that appellee had purchased tickets and that appellee and Gavin would be departing the Dallas/Fort Worth Airport on December 27, 2008, at 5:40 a.m. Pursuant to a letter to appellee's counsel faxed on December 23, 2008, (Exhibit K) appellant's counsel stated that the time of the departure had to be changed because Gavin could not be available until afternoon on December 27, 2008. Appellant's counsel, in such letter, stated that "I originally notified you of my client's offer of 3:00 p.m. because Gavin will not get home until late on December 26th from holiday activities."

**{¶27}** Via an Entry filed on December 23, 2008, the trial court had granted appellee's request for companionship from December 27, 2008, through January 3, 2009, and ordered appellee to advance all transportation costs. The trial court stated that appellee could request reallocation of such costs at the final hearing or to have the costs credited to his child support obligation. The trial court, in such Entry, stated that appellee and Gavin would depart from the Dallas/Fort Worth Airport on December 27th at 5:40 a.m.

**{¶28}** In a letter to appellant's counsel dated December 23, 2008, (Exhibit L), appellee's counsel stated as follows: "Enclosed please find the Entry of the Court with regard to my client's holiday companionship. As you are aware, the Judge did not put any limit on the times for travel dates. Due to my client's limited choices in flights being offered and his financial constraints, I submitted the enclosed Entry to the Judge and he had approved the same. This is a Court Order and therefore we expect the child to be at the airport in ample time to meet with [appellee] for the flight back to Ohio."

**{¶29}** At the hearing, appellant testified that there had been no ongoing issues with Gavin's asthma and denied that Gavin's doctor indicted that Gavin should be seen every six months. Gavin had been diagnosed with asthma in September of 2006, and had been prescribed an inhaler, an oral steroid and daily Singular. Two weeks later, he was started on an inhaled steroid (Flovent). Gavin did not show up for a scheduled follow up appointment and influenza vaccine 4-6 weeks later. He was seen again by his doctor on December 1, 2006, and Singular was discontinued due to the expense. He was instructed to follow up in three months for an asthma check, but Gavin was not reevaluated until August 17, 2007. At such time, he was restarted on Singular. Gavin's

doctor, in a letter to appellee dated September 26, 2007, (Exhibit B), stated that Gavin should be seen every six months for an asthma recheck.

**{¶30}** Appellant testified that Gavin has not had an asthma attack since he had been in Texas and testified that she disagreed that Gavin had told appellee that he was having trouble breathing. Appellant testified that Gavin had told appellee that he was congested and was having a hard time catching his breath. Appellant did not take Gavin to the doctor and testified that she did not tell appellee that she did. Appellant, when asked, testified that the last time she took Gavin to see a dentist was on May 12, 2009, a few days before the Guardian Ad Litem came for her visit. Before such date, Gavin had not been to the dentist since 2007. Appellant testified that she did not take her children to the dentist every six months.

**{¶31}** Appellant testified that appellee had always paid his child support in a timely manner. While she denied that appellee told her that he could not afford to pay half of the approximately $3,400.00 a year kindergarten tuition for Gavin at Fairfield Christian Academy, she admitted that he said that he was not going to pay half of the tuition.[1] Prior to such time, appellee had paid for half of Gavin's preschool tuition which was $1,700.00 a year. During the nearly five month period of time when Gavin attended Fairfield Christian Academy during 2007-2008, he was tardy 32 times. Gavin's last day at school was on January 28, 2008.

[1] Testimony was adduced at the hearing that Gavin stopped attending Fairfield Christian Academy on January 28, 2008 and that the letter of withdrawal was signed on February 4, 2008. At the time of the hearing, there was a balance due on Gavin's account in the amount of $3, 213.00. Testimony also was adduced that a minor balance was due for another of appellant's children.

**{¶32}** According to appellant, in 2007, which was the last full year that she lived in Ohio, her husband's income was approximately $38,000.00 a year. She testified that she did not know her husband's income for 2008.

**{¶33}** Testimony was adduced at the trial that appellant had not returned to West Virginia since she moved to Texas. Testimony also was adduced that, after the move to Texas, appellant did not provide appellee with Gavin's report cards.

**{¶34}** Ryan Eggar, appellant's husband, testified that his salary was $35,000.00 a year while he was working for the agency owned by his father in Ohio. He testified that after the agency was sold, his salary, which was tied to policy renewals, decreased. According to Eggar, his last paycheck in Ohio was for $2,100.00. Eggars testified that he currently was employed as a sales manager and brought home $4,250.00 a month with a gross of $4,600.00 a month. When asked when he first spoke with his uncle in Texas about potentially working there, Eggar testified that it was during the summer of 2007. According to Eggar, in December of 2007, his uncle invited him to come to Texas. Eggar testified that at such time they notified appellee that there was a possibility that they were moving to Texas. Eggar testified that he spoke with appellee again in January of 2008 before he made his trip to Texas. Eggar did not look for employment in the central Ohio area before accepting a position with his uncle in Texas.

**{¶35}** Eggar also testified that he had nine or ten cousins in Texas, two grandparents, one aunt and one other uncle and that none of them had met Gavin before the move to Texas. Appellant also has family in Texas. Eggar denied that Gavin had an asthma attack in March of 2009, and claimed that Gavin's problems were caused by the high pollen count. When asked whether, by relocating to Texas, he

potentially interfered with Gavin's relationship with appellee, Eggar disagreed. He also testified that appellee could come see Gavin any time he wanted and that he offered to assist appellee financially with the transportation costs. Eggar admitted telling appellee that he was not to have any contact with appellant's family members in West Virginia because appellee tried to tattle on them to get appellant's family on his side. Eggar further testified that he felt that Gavin, who is biracial, benefited from the move to Texas because there was more cultural diversity. He claimed that appellee's family was racist.

**{¶36}** Eggar also testified that, prior to the relocation to Texas, visitation went smoothly as long as it was on appellee's terms. According to Eggar, any time appellee could not have Gavin when he wanted to, he threw "little temper tantrums." Transcript at 125. He further testified that visitation was "just not [appellee's] terms anymore." Transcript at 126.

**{¶37}** At the hearing, appellee testified that, when he first got out of high school, he worked in West Virginia for Nelson Tree Service maintaining utility lines. He testified that although he had had other employers, he was working for Nelson at the time of the hearing. Appellee testified that he met appellant in the spring of 2000 and that, when he was home on the weekends from working out of state, appellant stayed with him in West Virginia. After Gavin was born, appellee and appellant dated another six to eight months. During such time, appellee was unemployed, so he was with Gavin all of the time.

**{¶38}** Appellee testified that he went to court in West Virginia over child support and that appellant did not appear for the hearing. Appellee also testified that he and

appellant did not have any formal arrangement with respect to visitation up through and including the time that appellant moved to Ohio.

**{¶39}** Appellee testified that he worked four ten hour days and had Fridays off. He testified that when he worked for Davy Tree Service in New Jersey, he would come home to West Virginia Thursday nights. Appellee testified that he left for New Jersey on Sundays at 7:00 p.m. and would get back to West Virginia about 1:00 a.m. on Friday morning. He testified that he worked this schedule for about six months before appellant moved to Ohio. During this period, appellant also was working and appellee would go on Fridays to pick Gavin up from the babysitter and keep him until Sunday evening. He testified that he had Gavin just about every weekend.

**{¶40}** After appellant moved to Ohio, appellee drove to Ohio on Fridays after returning from work and picked Gavin up. He would return Gavin to Ohio on Sunday afternoon at round 5:00 p.m. Appellee testified that he continued doing so until he moved to Ohio in August of 2006 to be closer to Gavin and to be able to interact with him more. Appellee took an approximately $9.00 an hour pay cut when he moved. While he was making $24.59 an hour in New Jersey, appellee was making $15.63 an hour in Ohio and also lost his union benefits and had to pay for his insurance. The following is an excerpt from his testimony:

**{¶41}** "Q. Okay. You heard Marla [appellant] testify earlier about sharing transportation while you were in West Union and she was living in the Lancaster area. Was her testimony accurate?

**{¶42}** "A. No. She met me one time in Athens and that was on Columbus Street or Columbus Road, whatever that is down there. She met me one time and the only

reason they met me then is because I was unable to bring him back all the way because I was running short on time. That's the only reason they met me, because I wasn't going to make it if they didn't.

**{¶43}** "Q. So this is a Sunday afternoon return trip?

**{¶44}** "A. Yes.

**{¶45}** "Q. And if I understand your testimony correctly, what you're indicating is, you weren't going to make it back in time to catch the van at 7:00 p.m.?

**{¶46}** "A. Exactly. So I asked them to meet me - - you know, it wasn't halfway, but I asked them to meet me some place closer so it could cut down on my time, so I could make it back in time.

**{¶47}** "Q. So other than that occasion in Athens, were there any other occasions where you met Marla in Athens - - or any of her family members in Athens to exchange Gavin?

**{¶48}** "A. No. She doesn't - - most of her family members is in West Virginia.

**{¶49}** "Q. Were there any occasions that you can recall - - strike that.

**{¶50}** "Q. Were there any occasions where Marla met you in Belpre?

**{¶51}** "A. No.

**{¶52}** "Q. Were there any occasions where Marla brought Gavin all the way to West Union so that you could exercise companionship with him on a weekend?

**{¶53}** "A. If they would have done it, they was coming to West Virginia anyway to visit with her family.

**{¶54}** "Q. Okay.

**{¶55}** "And that would have been the only reason." Transcript at 158-160.

**{¶56}** Appellee testified that, after moving to Ohio, he would pick Gavin up on his way home from work Thursdays because he was still working four ten hour days, that he would take Gavin to and from school on Friday and that he would return Gavin to appellant's house on Monday morning. He testified that he had Gavin almost every weekend and that he provided the transportation most of the time. At the time, appellant and appellee were living 15 minutes apart.

**{¶57}** When asked, appellee testified that he first heard about appellant's relocation to Texas on February 4, 2008. He testified that he did not see Gavin during the month of February of 2008 before he went to Texas, although Gavin stayed with appellee's father and stepmother. Appellee did not see Gavin during such time because he was working during those two weeks. Appellee testified that during the one month period that Gavin was out of school, Gavin could have stayed with him and gone to school.

**{¶58}** At trial, appellee testified that he was married and had two stepchildren. During the trial, appellee was questioned about his request for visitation with Gavin over Christmas. He testified that he told appellant that he wanted the visit to start on or about December 19, 2008 so that he could get a break on airfare. Appellee testified that appellant said that she was not going to make it easy on him. The tickets for appellee and Gavin ended up costing appellee approximately $1,200.00. Appellee testified that, prior to January of 2008, he had no major problems with appellant or her husband. Appellee testified that he had no family in Texas and that he got along well with appellant's family. He also testified that, prior to January of 2008, he had no problems dealing with appellant regarding Gavin's school records or medical needs, but that prior

to the Guardian Ad Litem's report, he did not know where his son went to school. Appellee testified that he had medical insurance coverage on Gavin since Gavin was born. He testified that he could not afford to pay half of the more than $300.00 a month for Gavin to attend private school.

**{¶59}** Jennifer Strunk, the Guardian Ad Litem, testified that she made a preliminary recommendation on September 29, 2008. At that point, Strunk did not have Gavin's medical records, and had not met with appellee. She testified that Gavin was doing well and was well adjusted in Texas and that she did not think that it was in his best interest to move twice within a two year period. Strunk admitted that Gavin had missed too many days of school and that she did not believe that it would have been a problem for Gavin to have spent the month with his father and gone to school. She also testified that Gavin had not had medical treatment while in Texas but was scheduled for an annual wellness update on August 11, 2009. In her report, the Guardian Ad Litem recommended that it was in Gavin's best interest to remain with appellant in Texas.

**{¶60}** After the conclusion of the trial, the parties filed Findings of Fact and Conclusions of Law. Pursuant to a Decision filed on August 12, 2009, the trial court found that it was in Gavin's best interest to name appellee as legal custodian and residential parent of Gavin. The trial court specifically found that appellant was less likely to honor or facilitate court approved visitation. The trial court ordered counsel for appellee to prepare the final entry. The final Judgment Entry was filed on September 16, 2009.

**{¶61}** We note that the Notice of Appeal in the case *sub judice* was filed on September 11, 2009, which is before the final Entry was filed on September 16, 2009.

We find we have jurisdiction pursuant to App. 4(C). “A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the time period is treated as filed immediately after the entry.” App.R. 4(C). A premature Notice of Appeal under App.R. 4(C) does not divest the trial court of jurisdiction. *Bennington v. Robinson* (Feb. 7, 2000), Stark App. No. 1999CA00212, 2000 WL 222156, unreported.

**{¶62}** In this case, the trial court exercised its jurisdiction and proceeded to issue a final Judgment Entry on September 16, 2009. The trial court's Judgment Entry constituted a final, appealable order. The premature Notice of Appeal will be treated as if filed immediately after the entry.

I

**{¶63}** Appellant, in her brief, does not specifically set forth an assignment of error. Appellant, however, argues that the trial court erred in designating appellee residential parent and legal custodian of Gavin.

**{¶64}** As is stated by the trial court in its decision, the West Virginia entry of November 27, 2002, did not specifically address custody. The standard of review in initial custody cases is whether the trial court abused its discretion. *Davis v. Flickinger,* 77 Ohio St.3d 415, 416-17, 1997-Ohio-260, 674 N.E.2d 1159. See also *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. More than mere error of judgment, an abuse of discretion requires that the court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Given the nature and impact of custody disputes, the juvenile court's discretion will be accorded paramount deference because the trial court is best suited to

determine the credibility of testimony and integrity of evidence. *Gamble v. Gamble,* Butler App. No. CA2006-10-265, 2008-Ohio-1015, ¶ 28. Specifically, "the knowledge a trial court gains through observing witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846. Therefore, giving the trial court due deference, a reviewing court will not reverse the findings of a trial court when the award of custody is supported by a substantial amount of credible and competent evidence. *Davis,* supra at 418, 674 N.E.2d 1159.

**{¶65}** The juvenile court must exercise its jurisdiction in child custody matters in accordance with R.C. 3109.04. R.C. 3109.04(B)(1) governs initial custody awards, and provides: "When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children."

**{¶66}** Because this action involved an original determination of custody of a child of an unmarried mother, R.C. 3109.042 is applicable. R.C. 3109.042 confers a default status on the mother as the residential parent until an order is issued by the trial court designating the residential parent and legal guardian. Such default status is not, in and of itself, a decree allocating parental rights and responsibilities to the mother. The trial court, in determining custody, must balance the competing interests of the natural parents with the child's best interests to determine if either parent would be a suitable custodian for the child. R.C. 3109.042 requires the court to treat each parent as standing upon equal footing. In other words, when a trial court makes a custody

determination, pursuant to R.C. 3109.042, neither party is entitled to a strong presumption in his or her favor. Under these circumstances, the trial court's custody determination need only be based on the best interests of the child according to R.C. 3109.04(F)(1). See *In Re Cihon*, Guernsey App. No. 09 CA 00002, 2009-Ohio-5805 at paragraph 17.

**{¶67}** R.C. 3109.04(F)(1) states as follows: "(F)(1) In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

**{¶68}** "(a) The wishes of the child's parents regarding the child's care;

**{¶69}** "(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

**{¶70}** "(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

**{¶71}** "(d) The child's adjustment to the child's home, school, and community;

**{¶72}** "(e) The mental and physical health of all persons involved in the situation;

**{¶73}** "(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

**{¶74}** "(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

**{¶75}** "(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

**{¶76}** "(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

**{¶77}** "(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

**{¶78}** In the case sub judice, the trial court found that the factors set forth in R.C. 3109.04(F)(1)(b), (i) and (j) were not applicable. The trial court further found that both appellee and appellant wanted custody of Gavin, that the Guardian ad Litem reported that each had a safe and suitable home for him, and that Gavin had a strong bond with both and had a strong relationship with his half siblings, step brothers, stepmother and stepfather. The trial court also noted that Gavin had adjusted well to his home, school and community in Texas, that neither appellant nor appellee had any mental or physical health issues and that appellee had paid his child support in a timely fashion.

**{¶79}** The critical issue to the trial court was which parent was most likely to honor and facilitate court approved parenting time, rights or visitation and companionship rights. We find that the trial court did not abuse its discretion in finding that appellee was such parent because the trial court's decision was not arbitrary, unreasonable or unconscionable. The trial court, in its decision, found that appellant had put forth little effort, if any, to ensure that appellee had companionship with Gavin and noted that appellee provided the transportation involved even after appellant moved Gavin to Ohio. The trial court further noted that appellee, after working four ten hour days in New Jersey, drove hours to spend time with Gavin while appellant rarely provided transportation.

**{¶80}** The trial court, in its decision, clearly believed that appellant's husband had a hostile attitude toward appellee and was critical of him. The trial court also indicated that it found appellant not credible because, while appellant indicated that she

would not allow Gavin to travel to Ohio to visit appellee on December 19, 2009, because she did not want Gavin to miss a day of school, appellant had no qualms about Gavin missing one month the prior school year. As noted by the court, during that one month period prior to the move to Texas, appellant never asked appellee to keep Gavin. The following is an excerpt from the trial court's Decision:

**{¶81}** "Also, the Court finds that it is very unlikely that Defendant-Mother took the child to West Virginia in January 2008 due to complications with her pregnancy. The Defendant-Mother did not ask Plaintiff-Father to keep Gavin during that time period. Yet she said it was also a time for Gavin to visit with family prior to the move to Texas. Certainly the Plaintiff-Father is 'family.' The court suspects that the Defendant-Mother knew that Plaintiff-Father would be upset about her move to Texas and that she was trying to avoid telling him until it was too late for him to interfere with her move. Ryan Eggar's testimony is not credible when he said he told Plaintiff-Father in December of the planned move and that Plaintiff-Father said 'so you're finally going.' Given the efforts of Plaintiff-Father to maintain a relationship with his son, the Court doubts Plaintiff-Father would have been so passive."

**{¶82}** Throughout the trial court's decision, it is clear that the trial court did not believe that appellant was interested in maintaining the relationship between Gavin and his father and that appellant and her husband, while critical of appellee, did not assist him financially with transportation expenses. The trial court also noted that it took appellee "over two months and a last minute court order to arrange companionship with Gavin in December 2008."

**{¶83}** Upon our review of the record, we find that the trial court's findings are supported by the record and that the trial court's decision was not arbitrary, unconscionable or unreasonable. While appellant takes issue with a number of the trial court's findings, we note that there was contradictory testimony from the parites on many matters. In its decision, the trial court voiced concerns that appellant was less than honest. For example, the trial court noted that while appellant said that she could not attend a deposition in Fairfield County on February 2, 2009, due to pregnancy complications, appellant's physician indicated that appellant could not travel during the last three months of her August 20, 2009, due date. The trial court also noted that while appellant had filed a motion to dismiss the complaint alleging, in an affidavit, that she had never lived at the West Virginia address set forth in the complaint, "[t]hese statements contradict her testimony that she went to West Virginia January 29, 2008, and did not return to Ohio prior to moving to Texas." A relative of appellant's had signed for the certified mail in West Virginia on February 21, 2008. As the trier of fact, the trial court was in the best position to assess credibility and clearly found appellee more credible.

**{¶84}** Appellant's assignment of error is, therefore overruled.

**{¶85}** Accordingly, the judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Edwards, P.J.

Gwin, J. and

Farmer, J. concur

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JUDGES

JAE/d0827

**[Cite as *Hartman v. Eggar*, 2010-Ohio-6357.]**

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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|---|---|---|
| C.J. HARTMAN | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| MARLA EGGAR, et al., | : | |
| Defendant-Appellant | : | CASE NO. 09 CA 0055 |

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas, Family Court Division, is affirmed. Costs assessed to appellant.

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JUDGES