

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Julie R. Rowell, :
 :
 Petitioner-Appellee, :
 :
 v. : No. 12AP-802
 : (C.P.C. No. 08JU-10-13850)
 Julie A. Smith, : (REGULAR CALENDAR)
 :
 Respondent-Appellant. :

D E C I S I O N

Rendered on May 30, 2013

*Fey Law Offices, and Carol Ann Fey, Massucci & Kline, LLP,
and LeeAnn M. Massucci, for appellee.*

Einstein & Poling, LLC, and Dianne D. Einstein, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

SADLER, J.

{¶ 1} Respondent-appellant, Julie A. Smith, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, awarding shared custody of Smith's minor child to petitioner-appellee, Julie R. Rowell. For the reasons that follow, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} As a matter of contentious and ongoing litigation, this case has been before both this court and the Supreme Court of Ohio concerning a variety of issues pertaining to visitation and custody of Smith's minor child. Though most of the facts are vehemently disputed by the parties, we begin by presenting the underlying circumstances as

summarized by the Supreme Court of Ohio in *Rowell v. Smith*, 133 Ohio St.3d 288, 2012-Ohio-4313.¹

{¶ 3} On September 9, 2003, Smith gave birth to a daughter as the result of artificial insemination with sperm from an unknown donor. At the time, Smith was involved in a relationship with Rowell. Several years later, when Smith and Rowell's relationship ended, Rowell filed a petition in juvenile court, pursuant to R.C. 2151.23(A)(2), seeking an order for shared custody of the minor child and simultaneously requesting a temporary order granting her companionship time with the child.

{¶ 4} The trial court issued temporary orders designating Smith as the child's legal custodian and residential parent and granting Rowell visitation rights. Smith challenged the orders, arguing the trial court lacked jurisdiction to award visitation rights to Rowell. The court held that it had authority to issue temporary orders under Juv.R. 13(B)(1) and Loc.R. 5(D) of the Court of Common Pleas of Franklin County, Division of Domestic Relations, Juvenile Branch, allowing nonparent visitation and subsequently found Smith in contempt of court for violating the court's orders.

{¶ 5} The court of appeals reversed. *Rowell v. Smith*, 10th Dist. No. 10AP-675, 2011-Ohio-2809. In a split decision, this court held that, because the juvenile court lacked authority to order visitation in an R.C. 2151.23(A)(2) custody case, the underlying temporary orders were invalid and Smith could not be in contempt of an invalid order.

{¶ 6} On further appeal to the Supreme Court of Ohio, the judgment of the court of appeals was reversed, and the trial court's orders were reinstated. The *Smith* court held that, in exercising its jurisdiction under R.C. 2151.23(A)(2), a juvenile court may issue temporary visitation orders that are in the best interest of the minor child during the litigation.

{¶ 7} Trial on Rowell's petition for shared custody commenced before a magistrate on July 6, 2011. The trial included testimony from 18 witnesses and resulted in over 2,400 pages of transcript and nearly 60 exhibits. In a 41-page decision granting

¹ The case before the Supreme Court of Ohio concerned whether a juvenile court could issue temporary visitation orders in a pending case for custody under R.C. 2151.23(A)(2) between a parent and nonparent. Answering in the affirmative, the Supreme Court of Ohio held that, in exercising its jurisdiction under R.C. 2151.23(A)(2), a juvenile court may issue temporary visitation orders that are in the best interest of the minor child during the litigation. *Id.* at ¶ 1.

Rowell's petition for shared custody, the magistrate concluded Smith's conduct demonstrated a contractual relinquishment of sole custody and the grant of shared custody of the child to Rowell, and Rowell accepted and assumed the shared custodial responsibility for the child. (Magistrate's Decision, 27.) Having found parental unsuitability based on Smith's voluntary contractual relinquishment of sole custody, the magistrate proceeded to conclude shared custody was in the best interest of the child.

{¶ 8} According to the testimony presented at trial, Rowell is a 17-year employee for the City of Columbus, Department of Public Utilities, where she is employed as a chemist working in waste water and water analysis. Rowell testified she met Smith at a mutual friend's birthday party in November 2001, and the two quickly started a relationship and began living together "[p]retty much right away." (Tr. 64.)

{¶ 9} Rowell testified that Smith discussed wanting to have a child within a month of their relationship, but they decided to wait and "see where [the] relationship was going to go in the future." (Tr. 91.) According to Rowell, she met Smith's family a couple of months after the two began dating, and Rowell was introduced as Smith's friend.

{¶ 10} It was Rowell's testimony that, in September 2002, she and Smith decided to have a child and contacted an artificial insemination clinic. Rowell testified they selected a sperm donor based on characteristics that was "like a hybrid" between Rowell and Smith. (Tr. 101.) According to Rowell, it took two insemination attempts before Smith became pregnant, and Rowell assisted in the insemination process, including the insertion of the donor sperm from the syringe.

{¶ 11} Also according to Rowell, in preparation for the baby's arrival, the two prepared as a couple. Rowell attended all three baby showers that were held for Smith and Rowell and, as Smith's Lamaze coach, attended every Lamaze class taken by Smith. Rowell and Smith also took a parenting class together. Additionally, Rowell testified she drove Smith to the hospital when Smith went into labor.

{¶ 12} The child was born September 9, 2003. In the room during the birth were Rowell, Smith's mother, and Smith's sister. After the baby was born, the doctor handed Rowell the scissors, and Rowell cut the umbilical cord. Rowell also explained that wristbands are required in order to enter the nursery at the hospital and "only parents are

allowed to have these wristbands," and that only Rowell and Smith were given wristbands by the nursing staff. (Tr. 121.) According to Rowell, Smith chose the child's first name, and Rowell chose the child's middle name, Rose, which is Rowell's mother's name and Rowell's middle name.

{¶ 13} After returning to work, Smith had to go out of town, and Rowell took some days off of work to care for the child. While Smith was away, the child developed an ear infection, and Rowell took her to the doctor. Rowell had been previously introduced to the child's doctor as Smith's "partner" and "[the child's] other mom." (Tr. 139.) Rowell testified she attended all of the child's doctor appointments with Smith.

{¶ 14} Rowell also testified that both parties interviewed the daycare the child attended one day a week, and both Rowell and Smith were authorized to pick up and deliver the child to the daycare. Rowell's mother watched the child two days a week, and the child was watched by Smith's mother and Smith's sister on the other two days needed for care. As the child got older, Rowell decided on another daycare, the Goddard School, and again both parties interviewed the daycare together. The child attended Goddard two days a week, and Rowell's mother watched the child one day per week.

{¶ 15} Rowell asked Smith, who is a lawyer, about co-custodial agreements Rowell learned about from another couple. According to Rowell, Smith said she did some research and agreed it was something they needed to do. When asked why it did not happen, Rowell testified that "[l]ife just got in the way." (Tr. 158.)

{¶ 16} The child was baptized in a catholic church where Rowell and Smith took classes together with the priest to prepare them to raise the child in the Catholic faith. Smith's brother and sister were chosen as the child's godparents. Rowell testified that she held a candle normally given to fathers and assisted with pouring water on the child and wiping her forehead. Rowell's family did not attend the ceremony, but attended the party held after the baptism. Smith's family attended both the ceremony and the party. Rowell's name does not appear on the baptismal certificate.

{¶ 17} In August 2008, Rowell confronted Smith about Smith's long working hours. Smith told Rowell she wanted to end their relationship and, a few days later, told Rowell she had been dating a woman with whom she worked. In the months that followed, Rowell's access to the child was restricted prompting Rowell to file this action.

Rowell testified she believed the two agreed they would "co-parent in every way, emotionally, physically, monetarily, in every way." (Tr. 792.) Rowell explained, "There was never talk of my relationship with [the child] only being contingent on my relationship with Smith. We agreed to have this child together and no expiration date, I believed. And I also believed that Smith believed that I was going to be [the child's] parent." (Tr. 792-93.) Rowell believed "the agreement was forever, for [the child's] entire life. There was no restrictions. I had no restrictions. I had access to all day cares, all schools, all doctors appointments, I mean everything." (Tr. 793.) "[The child] never distinguished between me and Smith as, oh, you're my mom and you're not my mom. Never the case." (Tr. 794.)

{¶ 18} Two employees from the office where Smith underwent the artificial insemination procedure also testified at trial. Tammy Lawson testified about the artificial insemination procedure in general terms. According to Lawson, once the sperm-filled syringe is in place, it is common for the patient's partner or significant other to perform the act of "pushing the plunger" to inject the sperm into the uterus. (Tr. 257.) However, Lawson was unable to recall if Rowell performed this action or not. Melanie Biddle testified that, according to the office notes, Smith began inquiring about artificial insemination in March 2001 and had her first artificial insemination procedure in October 2002. However, the notes did not indicate if Smith was alone or with her partner during the first procedure. The December 2002 office notes indicated another artificial insemination procedure occurred and that Smith and her partner were present.

{¶ 19} Dr. Stacy Scudder, the child's pediatrician, testified Rowell was represented as Smith's partner and the child's co-parent, and that both parties attended the child's appointments until they separated. Norma Lucas, administrator of the Goddard School the child attended, testified that, on several school forms, Smith was listed as the child's parent, and Rowell was listed as a co-parent or parent. To Lucas's knowledge, the forms were completed by Smith. Lucas also testified she considered both Smith and Rowell to be the child's parents.

{¶ 20} Other than the timeframe and place in which they met, Smith's testimony is directly contrary in almost all respects to that of Rowell. Smith denied that the two became quickly involved in a relationship and further denied that they began living

together prior to the summer of 2003. Smith testified she became interested in having a child prior to ever meeting Rowell and that her first visit to the physician's office where she would undergo artificial insemination was in March 2001.

{¶ 21} Smith denied choosing a donor that would reflect both parties characteristics and, instead, testified that she chose a donor based on the characteristics of her family. According to Smith, Rowell did attend one of the two insemination procedures, but Rowell played no active role in the procedure other than to drive Smith to and from the appointment. Smith also testified that she moved into her new home in June 2002, but that Rowell did not move in until September 2003. With respect to the delivery of the child, Smith admitted that Rowell cut the umbilical cord, but testified that Rowell did so without Smith's consent. According to Smith, Rowell had no input in the child's name selection and that the child's middle name is that of Smith's grandmother.

{¶ 22} Smith also testified that Rowell was not included in any decision-making processes related to the child's conception, birth, care, custodial or financial responsibilities. Additionally, Smith denied being a life partner to Rowell and further denied that she created any contractual relinquishment of her custodial rights.

{¶ 23} Many of the remaining witnesses consisted of friends and family members of the parties. In most respects, the testimony of the remaining witnesses supported the version of events testified to by the party calling them.

{¶ 24} After the magistrate rendered a decision granting Rowell's petition for shared custody, Smith asserted six challenges in her objections to the magistrate's decision. Smith asserted the magistrate erred in determining her conduct constituted a contractual relinquishment of her custody rights and in finding shared custody was in the child's best interest. Smith also asserted the magistrate's factual findings were not supported by the evidence and that the magistrate erred in finding Rowell had standing to pursue this matter. Additionally, Smith challenged evidence Rowell introduced at trial, as well as the trial court's appointment and use of the guardian ad litem ("GAL").

{¶ 25} After review, the trial court concluded reliable, credible evidence supported the magistrate's findings. Therefore, the trial court overruled Smith's objections to the magistrate's decision and adopted the magistrate's decision in its entirety with the

addition that Smith be prohibited from permanently removing the child from the court's jurisdiction without prior court order or written agreement of the parties.

II. ASSIGNMENTS OF ERROR

{¶ 26} This appeal followed, and Smith brings the following eight assignments of error for our review:

I. The trial court erred by failing to apply a clear and convincing standard of review and conduct a *de novo* review of the Magistrate's decision.

II. The trial court violated the Mother's constitutional rights by failing to acknowledge her exclusive parental rights and ordering Forced Shared Custody of her daughter with an unrelated person.

III. The trial court erred when it failed to indulge every reasonable presumption *against* waiver of a fundamental right and decided that the Mother relinquished her exclusive parental rights to raise her daughter in direct conflict with all prior law.

IV. The trial court erred when it held that the Mother had contractually relinquished custody of her daughter to an unrelated person because there was no finding of the critical element of permanence.

V. The trial court erred in awarding forced shared custody to an unrelated person who lacked standing to bring this action.

VI. The trial court erred when it ruled that forced shared custody is in the best interest of the Mother's daughter.

VII. The trial court erred in granting an unrelated person standing to request an appointment of a *Guardian Ad Litem* for a fit Mother's child.

VIII. The trial court erred in allowing considerable evidence to be introduced by an unrelated person *at trial* in violation of the court's own discovery order.

(Emphasis sic.)

III. DISCUSSION

A. Applicable Law and Standard of Review

{¶ 27} It is without question that parents have a constitutionally protected due process right to make decisions concerning the care, custody, and control of their children, and the parents' right to custody of their children is paramount to any custodial interest in the children asserted by nonparents. *In re Mullen*, 129 Ohio St.3d 417, 2011-Ohio-3361, ¶ 11, citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *In re Murray*, 52 Ohio St.3d 155, 157 (1990); *Clark v. Bayer*, 32 Ohio St. 299, 310 (1877). Equally well-settled under Ohio law is the principle that a parent may voluntarily share with a nonparent the care, custody, and control of his or her child through a valid shared-custody agreement. *Mullen* at ¶ 11, citing *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, ¶ 50, and R.C. 2151.23(A)(2); *State ex rel. M.L.G. v. Montgomery*, 10th Dist. No. 12AP-13, 2012-Ohio-3591, ¶ 21. Ohio law also recognizes that a parent may enter into such an agreement through either words or conduct. *Mullen* at ¶ 14; *Masitto v. Masitto*, 22 Ohio St.3d 63, 66 (1986); *In re Lapiana*, 8th Dist. No. 93691, 2010-Ohio-3606, ¶ 33.

{¶ 28} The essence of a voluntary shared custody agreement between a parent and nonparent is the purposeful relinquishment of some portion of the parent's right to exclusive custody of the child. *Mullen* at ¶ 11. "A shared-custody agreement recognizes the general principle that a parent can grant custody rights to a nonparent and will be bound by the agreement." *Id.*, citing *Bonfield* at ¶ 48, citing *Masitto* at 65; see *Clark* at paragraphs two and three of the syllabus (parents' grant of custody to a nonparent through an agreement recognized as lawful and enforceable).

{¶ 29} *Mullen* involved a dispute between a biological parent, Kelly Mullen, and a nonparent, Michele Hobbs, over Mullen's minor child. Specifically, *Mullen* addressed whether Mullen, by her conduct with Hobbs, entered into an agreement through which Mullen permanently relinquished sole custody of the child in favor of shared custody with Hobbs. *Id.* at ¶ 1. In affirming the juvenile court's conclusion that Mullen did not enter into such an agreement, the court set out the applicable evidentiary standards and standard of review to be utilized in such cases.

{¶ 30} Whether a parent has voluntarily relinquished the right to custody is a factual question to be proven by a preponderance of the evidence. *Id.* at ¶ 14, citing *In re*

Perales, 52 Ohio St.2d 89 (1977), syllabus; *Reynolds v. Goll*, 75 Ohio St.3d 121, 123 (1996). See also *Penna v. Rowe*, 11th Dist. No. 2012-P-0026, 2012-Ohio-5442 (in an R.C. 2151.23(A)(2) custody proceeding between a parent and nonparent, unsuitability is determined by a preponderance of the evidence). Likewise, whether a parent, through words and conduct, has agreed to share legal custody with a nonparent is also a question of fact. *Mullen* at ¶ 14. A trial court has broad discretion in proceedings involving the care and custody of children. *Id.*, citing *Reynolds* at 124. The determination of whether a "parent relinquishes rights to custody is a question of fact which, once determined, will be upheld on appeal if there is some reliable, credible evidence to support the finding." *Id.* at ¶ 15, quoting *Masitto* at 66. See also *Bechtol v. Bechtol*, 49 Ohio St.3d 21 (1990), syllabus ("[w]here an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court"). A valid shared-custody agreement is reviewed by the juvenile court and is an enforceable contract subject only to the court's determinations that the custodian is a "proper person to assume the care, training, and education of the child" and that the shared legal-custody arrangement is in the best interests of the child. *Mullen* at ¶ 11, quoting *Bonfield* at ¶ 48, 50.

{¶ 31} On the conflicting and disputed evidence presented in *Mullen*, the juvenile court concluded there was reliable, credible evidence that Mullen's conduct did not create an agreement to permanently relinquish sole custody of her child in favor of shared custody with Hobbs. On appeal, though noting the strong evidence supporting both Mullen's and Hobbs' positions, the appellate court determined that, "taken as [a] whole," reliable, credible evidence supported the juvenile court's findings that Mullen had not permanently given over partial legal custody of the child, and, therefore, the appellate court declined to disturb the trial court's decision. *Id.* at ¶ 19.

{¶ 32} In affirming, the Supreme Court of Ohio concluded the appellate court applied the proper standard of review and did not err when it affirmed the juvenile court's decision to dismiss Hobbs' complaint for shared custody of the child. Specifically, the court stated, "[l]ike that of the juvenile and appellate courts, our review of the record shows that not only was there evidence indicating that Mullen had intended to share custody of the child, there was contrary evidence indicating that Mullen did not agree to

permanently cede partial legal custody rights to Hobbs." *Mullen* at ¶ 20. While observing that the best way to safeguard both a parent's and a nonparent's rights with respect to children is to agree in writing or to apply to a juvenile court for an order under R.C. 2151.23(A)(2), the court expressly noted that its prior decisions have not required a parent to create a written contract to relinquish custody rights.

B. First Assignment of Error

{¶ 33} In her first assignment of error, Smith contends the trial court utilized an incorrect legal standard. Here, the trial court applied the standard set forth in *Mullen* and determined by a preponderance of the evidence that Smith voluntarily relinquished her right to sole custody of the child in favor of shared custody with Rowell. According to Smith, this is error because, rather than a preponderance of the evidence, clear and convincing evidence was required in order to terminate her parental rights.

{¶ 34} In support of her argument that the burden of proof in this instance requires clear and convincing evidence rather than a preponderance of the evidence, appellant relies on *Santosky v. Kramer*, 455 U.S. 745 (1982), which held "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Id.* at 747-48. The fallacy of this argument is that Smith's parental rights have not been terminated. Rather, Smith was found to have voluntarily relinquished her right to sole custody of the child in favor of shared custody with Rowell. A legal distinction exists between permanent custody, which divests parents of all parental rights, and legal custody, which does not. *In re D.H.*, 10th Dist. No. 11AP-761, 2012-Ohio-2272, ¶ 8; R.C. 2151.011(B). "Because legal custody where parental rights are not terminated is not as drastic a remedy as permanent custody, the trial court's standard of review in a legal custody proceeding is not clear and convincing evidence as it is in permanent custody proceedings, but is merely preponderance of the evidence." *Id.* at ¶ 9, citing *In re D.P.*, 10th Dist. No. 05AP-117, 2005-Ohio-5097, ¶ 52. Moreover, as we have set forth above, the Supreme Court of Ohio has expressly established the applicable evidentiary standard in *Mullen*, wherein the court stated, "[w]hether a parent has voluntarily relinquished the right to custody is a factual question to be proven by a preponderance of the evidence." *Id.* at ¶ 14 (citations omitted).

{¶ 35} Also under this assigned error, Smith contends the trial court failed to conduct an independent review of the evidence as required by Civ.R. 53(D)(4)(d). In ruling on objections to a magistrate's decision, "the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d). Ordinarily, it is presumed that the trial court performed an independent analysis in reviewing the magistrate's decision. *Arnold v. Arnold*, 4th Dist. No. 04CA36, 2005-Ohio-5272, ¶ 31, citing *Hartt v. Munobe*, 67 Ohio St.3d 3, 7 (1993) (presumption of regularity in the proceedings below). Accordingly, the party asserting error bears the burden of affirmatively demonstrating the trial court's failure to perform its Civ.R.53(E) duty of independent analysis. *Id.*, citing *Inman v. Inman*, 101 Ohio App.3d 115, 119 (1995); *Huntington Natl. Bank v. Findlay Machine & Tool, Inc.*, 3d Dist. No. 5-11-27, 2012-Ohio-748.

{¶ 36} In its decision, the trial court cited the appropriate law in regard to ruling on objections to a magistrate's decision. Additionally, the trial court's decision states it had "thoroughly reviewed the file, transcripts and evidence" contained therein. (Decision, 3.) After its review, the trial court found the magistrate's recitation of the facts "to be as clear, concise and correct as this Court could provide." (Decision, 3.) After addressing Smith's objections to the magistrate's decision, the trial court stated it has "thoroughly, carefully, and independently reviewed the entire case file and applicable law," and found Smith's objection not well-taken. (Decision, 48.) Thus, the trial court elected to adopt the magistrate's decision in its entirety with only one additional order pertaining to the parties leaving the court's jurisdiction.

{¶ 37} Upon review, we conclude that not only has Smith failed to affirmatively demonstrate the trial court failed to perform its duty and conduct an independent review of this matter, but, also, the record expressly demonstrates otherwise.

{¶ 38} For the foregoing reasons, Smith's first assignment of error is overruled.

C. Second Assignment of Error

{¶ 39} In her second assignment of error, Smith contends the trial court, in its own decision as well as that of the magistrate, failed to acknowledge her constitutional right to

raise her child. Additionally, Smith contends that, during these proceedings, the burden has been inappropriately placed upon her.

{¶ 40} Initially, we note, Smith did not include this argument in her objections to the magistrate's decision. Pursuant to Civ.R. 53(D)(3)(b)(iv), "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." *McLellan v. McLellan*, 10th Dist. No. 10AP-1105, 2011-Ohio-2418, ¶ 7. The doctrine of plain error is limited to exceptionally rare cases in which the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself. *See Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122 (1997).

{¶ 41} Throughout this assignment of error, as in her first, Smith refers to this as a *termination* of her parental rights; however, that is not what occurred in this case. As explained in our disposition of Smith's first assignment of error, this case concerns whether Smith, through words and conduct, agreed to share legal custody with Rowell and, if so, whether Rowell is a suitable custodian and shared custody would be in the best interest of the child. Also in our disposition of Smith's first assignment of error, we concluded the trial court applied the appropriate evidentiary standards. The trial court expressly relied on *Mullen*, which includes an acknowledgment of a parents' constitutionally protected due process right to make decisions concerning the care, custody, and control of their children and that such right is paramount to any custodial interest in the children asserted by nonparents. *Id.* at ¶ 11, citing *Troxel* at 66.

{¶ 42} Finding no error, plain or otherwise, in the evidentiary standard utilized by the trial court, Smith's second assignment of error is overruled.

D. Third Assignment of Error

{¶ 43} In her third assignment of error, Smith contends the trial court failed to indulge every reasonable presumption against waiver of her fundamental constitutional right to parent. It is Smith's position that, before she can be found to have "waived" such a right, there must be a showing that she did so knowingly and intelligently.

{¶ 44} Again, we note Smith did not include this argument in her objections to the magistrate's decision and, therefore, has waived all but plain error. *McLellan*. Additionally, this assignment of error, like the two asserted before it, challenges the evidentiary standard employed by the trial court. For the reasons stated in our disposition of Smith's first and second assignments of error, we conclude the trial court correctly utilized the standard as set forth by the Supreme Court of Ohio in *Mullen*.

{¶ 45} To the extent this assignment of error can be construed as challenging the weight of the evidence before the trial court, such contentions will be addressed in our disposition of Smith's remaining assignments of error.

{¶ 46} Accordingly, Smith's third assignment of error is overruled.

E. Fourth Assignment of Error

{¶ 47} In her fourth assignment of error, Smith asserts the trial court erred in finding a contractual relinquishment of custody because there was no finding of permanency. According to Smith, under *Mullen*, a temporary sharing of custodial responsibilities with a nonparent is not sufficient to establish a parent entered into a valid shared-custody agreement, and, because she did not execute any legal documents such as a power of attorney, guardianship or will giving Rowell any rights to the child, this record lacks any evidence that Smith permanently intended to relinquish her exclusive custodial rights to the child.

{¶ 48} Though Smith contends the trial court "completely ignored" the requirement of permanency, we cannot conclude as such. The trial court's decision expressly states, "[i]n this case, the magistrate engaged in an extensive analysis to determine whether Smith's conduct substantiated the existence of an agreement between Rowell and Smith by which Smith had knowingly, purposefully and *permanently* ceded partial legal custody rights to Rowell." (Emphasis added.) (Decision, 33.)

{¶ 49} Though stating no finding of permanency was made, it appears Smith is actually challenging the weight of the evidence supporting the trial court's finding of permanency. *Mullen* instructs that whether a parent, through words and conduct, has voluntarily agreed to permanently share legal custody with a nonparent is a question of fact to be proven by a preponderance of the evidence. *Id.* at ¶ 14. Once determined, the

finding of whether a parent has relinquished custodial rights is to be upheld on appeal if there is some reliable, credible evidence to support the finding. *Id.* at ¶ 15.

{¶ 50} Smith challenges the trial court's finding that she permanently intended to share legal custody of the child with Rowell. Thus, the issue before this court is whether there is "some reliable, credible evidence" to support said finding. With respect to this issue, the magistrate's decision, adopted by the trial court, states, in part:

Based upon Smith's testimony, one would conclude that Rowell was merely a roommate that looked after [the child] from 3:30 pm to 5:30 pm on weekdays, living separate lives within the same house, and there was never more than a "dating relationship" between them which quickly faded. * * * In Smith's view, she just "settled" for this sort of relationship because she was about to become a mother, was scared, and Rowell was stable and "okay" to be with and that was enough for her.

Rowell's testimony on this subject, "life got in the way" of attending to documentary details, including a co-custody agreement, is more credible and consistent with the actions of both parties. Despite the fact that Smith consulted with a financial advisor in July 2007, she prepared none of the documents recommended by the advisor to meet her stated goals to provide education funds for [the child], provide for financial independence, and to provide for [the child's] needs if Smith became disabled or died. Prior to the financial review, Smith had a small 529 plan for [the child] funded mainly by contributions from her credit card purchases. Although specifically advised to create a cash reserve for emergency and to prepare a will, designating [the child's] care/guardian, to consult with an attorney about a living trust, increasing life insurance benefits to provide sufficient funds for [the child], a durable power of attorney, a healthcare power o[f] attorney and/or living will and a custodial agreement for [the child], Smith still do not act to create any of these life planning documents until well after her separation from Rowell when she finally prepared a will naming her sister Stephanie as guardian for [the child]. Likewise, Rowell was equally inattentive to her financial affairs.

Prior to their separation and the onset of this litigation, neither of them acted to provide for [the child] in the event of their disability or death. Neither Smith nor Rowell prepared a

will or trust, let alone one with [the child] as beneficiary. Only Smith completed a life insurance beneficiary form for her employer when she changed jobs to the State of Ohio in 2005. Rowell had neglected to modify her life insurance beneficiary designation since 1996 for her employer provided policy. No one is designated as Rowell's OPERS beneficiary. Neither has a living will, healthcare power of attorney or durable financial power of attorney. This is true despite the fact that Smith admits she specifically did not want her mother to have guardianship of [the child] in the event of her death. Neither Smith nor Rowell attended to the preparation of any written formal shared custody arrangement, or for that matter, the preparation of important documents necessary to provide for [the child's] care in the event of disaster. Like many individuals, they neglected to act at all. It was not until late 2010, Smith finally created a will noting her desire for her sister Stephanie to be designated as [the child's] guardian in the event of her death.

* * *

Further, Rowell provided much objective evidence through Dr. Scudder and Norma Lucas's testimony as well as contemporaneously kept documentary evidence from their records and the records of Dr. Gaiser. This evidence directly refutes Smith's position as set forth in her testimony and her witnesses.

(Decision, 24-27.)

{¶ 51} After describing additional evidence and testimony, the magistrate expressly found "Smith as well as her remaining witnesses not credible." (Decision, 28.) After consideration, the magistrate concluded Rowell equally participated with Smith in the planning and birth of the child, including the selection of a donor, assisting with the artificial insemination procedure, attending all pre-natal visits, attending parenting and Lamaze classes with Smith, being present throughout labor and delivery, cutting the umbilical cord, staying at the hospital, and taking them to their home. Also noted was Smith's accession to and active fostering of the formation, establishment, and growth of a parental relationship between Rowell and the child, including living in a single family household for the child's first five years, Rowell's assumption of parental obligations, and

taking significant, equal responsibility for the child's care, education, and development, and contributing financially with no expectation of financial compensation.

{¶ 52} The trial court also noted the parties jointly selected doctors, daycare providers, attended all appointments and parent-teacher conferences together, and celebrated holidays together. Additionally, the trial court found that neither Smith nor Rowell assumed the role of primary caretaker of the child until Smith cut Rowell out of the child's life when the relationship failed. Also, Rowell was listed as a "parent" on the child's daycare forms and "co-parent" on the child's pediatric forms, and the pediatrician and daycare knew both parties as "mom" and equal parents.

{¶ 53} In addition to the magistrate's credibility determinations, the trial court stated, "Smith's testimony was not compelling and often patently unbelievable. Smith's witnesses also lacked credibility as clearly set forth in the *Magistrate's Decision*. Smith's witnesses clearly were not aware of the agreement and the details of the circumstances under which the parties were jointly raising this child and therefore the credibility of their perceptions was greatly compromised." (Emphasis sic.) (Decision, 34.) When reviewing a challenge to the weight of the evidence, we are mindful of the presumption that the factual findings of the trial court were correct. *In re N.P.*, 10th Dist. No. 07AP-797, 2008-Ohio-1727, ¶ 7, citing *In re Williams*, 10th Dist. No. 01AP-867, 2002-Ohio-2902. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *Id.*, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The rationale for this presumption is that the trial court is in the best position to evaluate the evidence by viewing witnesses and observing their demeanor, voice inflections, and gestures. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77 (1984).

{¶ 54} As set forth in *Mullen*, we are to consider whether there is some reliable, credible evidence to support the trial court's determination of whether there was a relinquishment of custodial rights. *Id.* at ¶ 1 (determination of whether a parent relinquishes custodial rights is a question of fact that will be upheld on appeal if there is some reliable, credible evidence to support the finding). Upon review of the record, we conclude the record contains "some reliable, credible" evidence, as required by *Mullen*, to support the trial court's determination that Smith, through words and conduct, agreed to share legal custody with Rowell. *Id.* at ¶ 14.

{¶ 55} Accordingly, Smith's fourth assignment of error is overruled.

F. Fifth and Seventh Assignments of Error

{¶ 56} Because they are interrelated, Smith's fifth and seventh assignments of error will be addressed together. In her fifth assignment of error, Smith contends Rowell lacked standing to bring this action. It is Smith's position that R.C. 2151.23 is limited by R.C. 3109.04, so as to prohibit the relief sought by Rowell. Based on her assertion that Rowell lacked standing to bring this action, Smith argues in her seventh assignment of error that the trial court erred in granting Rowell's request for a GAL.

{¶ 57} In support of her argument that allowing Rowell, an unrelated person, to have standing in this case violates her fundamental rights as a parent, Smith relies on the plurality opinion rendered by the United States Supreme Court in *Troxel*. We note the Supreme Court of Ohio has rejected such contention in *Smith v. Rowell*. In *Smith*, the Supreme Court of Ohio held that, in accordance with the Rules of Juvenile Procedure, a juvenile court may issue temporary visitation orders in cases within its jurisdiction under R.C. 2151.23 if it is in the child's best interest. Relying on *Troxel*, Smith argued this interpretation of the Rules of Juvenile Procedure violated her fundamental rights as a parent. The Supreme Court of Ohio stated:

We discussed *Troxel* within the realm of Ohio's nonparental visitation statutes in *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165. We acknowledged that *Troxel* states that there is "a presumption that fit parents act in the best interest of their children." *Id.* at ¶ 44. But that presumption is not irrebuttable. "Moreover, nothing in *Troxel* suggests that a parent's wishes should be placed before a child's best interest." *Id.*

Smith at ¶ 21, quoting *Harrold* at ¶44. Further, the court in *Smith* noted the petition for shared custody filed by Rowell was filed "under R.C. 2151.23(A)(2), which grants juvenile courts exclusive original jurisdiction 'to determine the custody of any child not a ward of another court of this state.' *This includes 'custodial claims brought by the persons considered nonparents at law.'* " (Emphasis added.) *Smith* at ¶ 14, quoting *Bonfield* at ¶ 43.

{¶ 58} Based on the above, we find no merit to Smith's contention that Rowell lacked standing to bring this action, and, accordingly, Smith's fifth and seventh assignments of error are overruled.

G. Sixth Assignment of Error

{¶ 59} In her sixth assignment of error, Smith contends the trial court erred in concluding shared custody was in the child's best interest. According to Smith, the trial court's best-interest analysis is "scant, inaccurate, unlawful and included no finding." (Brief, 51.) Additionally, Smith asserts the trial court's determination was contrary to the wishes of Smith, the child, and the recommendation of the GAL.

{¶ 60} In *In re R.N.*, 10th Dist. No. 04AP-130, 2004-Ohio-4420, this court held that, when making custodial determinations in R.C. 2151.23(A)(2) proceedings, a juvenile court should consider the totality of the circumstances and may, to the extent they are applicable, look to the factors set forth in R.C. 3109.04(F)(1) for guidance. *Id.* at ¶ 22. The magistrate dedicated over five pages of the decision to a recitation of the evidence applicable to the best-interest determination, and, in conclusion, the magistrate determined shared custody was in the child's best interest. In overruling Smith's objection to the magistrate's conclusion regarding the child's best interest, the trial court expressly considered R.C. 3109.04(F)(1). Said provisions provide:

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:

(a) The wishes of the child's parents regarding the child's care;

(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;

(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;

(d) The child's adjustment to the child's home, school, and community;

(e) The mental and physical health of all persons involved in the situation;

(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

(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;

(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;

(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;

(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶ 61} The trial court found subsections (b) and (g) were not applicable to these proceedings and that no evidence was presented with respect to subsections (e) and (h). Regarding subsection (a), the trial court noted Smith's opposition to any contact or ongoing relationship between the child and Rowell and Rowell's desire to spend as much time as possible with the child, preferably an equal-time division with Smith. Under subsection (c), the trial court noted the evidence indicated the child is closely bonded to both parties and was raised in an environment where she was closely bonded with the extended families of both parties. The court also considered the evidence supporting Rowell's position that the child loves and is "extremely attached" to Rowell. (Decision, 41.)

{¶ 62} With respect to subsection (d), the trial court considered how the child was raised for her first five years and where she has lived since the time the parties ended their relationship. The court also discussed the GAL's indication that the child was experiencing difficulty in adjusting to her new school. For subsection (f), the trial court expressed that Smith "has regularly and consistently" violated the court's orders regarding visitation, and that Smith "has demonstrated clearly that she will not honor or facilitate court-approved companionship rights." (Decision, 42.) According to the court's discussion of subsection (f), Rowell has abided by all court orders. Under (i), the court reiterated its discussion made under (f), and, with respect to subsection (j), the court found that neither party has expressed a definite plan to establish a residence outside of the state. However, the court also noted Smith's testimony that moving to Boston was "not out of the question." (Decision, 43.)

{¶ 63} Based on the considerations set forth in the decision of the trial court, which adopted the magistrate's decision in its entirety, we cannot agree with Smith's characterization of the best-interest analysis as scant, inaccurate, unlawful or containing no actual finding.

{¶ 64} Further, with respect to Smith's contention that the trial court made a best-interest determination that is contrary to the recommendations of the GAL, we disagree.²

² Though the determination in this case was not contrary to the GAL's recommendations, we take this opportunity to note that, while GALs play important roles in child custody matters and in evaluating the interest of children, their recommendations are not binding upon a trial court. *R.N.* at ¶ 4. The trial court

The GAL testified that a significant relationship and bond exists between the child and Rowell. The GAL indicated the child misses Rowell and, at one point, wanted more time with Rowell. Additionally, while the child relayed a fear of Rowell, it was related to Rowell showing up during periods when contact was not being permitted and that the child "was not fearful when she was actually with [Rowell] during those occasions." (Tr. 2338-39.) The GAL also testified about the child's performance socially and academically. It was the GAL's belief that the child is closer with Smith "and is well aware of the stakes and her mom's desires." (Tr. 2339.) In conclusion, the GAL testified that her recommendation "is that there should be a court order visitation between [the child] and [Rowell]." (Tr. 2339.)

{¶ 65} In the decision, the magistrate referenced the GAL's testimony regarding the relationship and bond between the child and Rowell, and further noted that, though the GAL did not set forth a recommendation for any specific time schedule, the GAL "recommended ongoing time resume and continue between [the child] and Rowell and that all three maintain ongoing counseling for [the child] with her current counselor Lisa Stromeier or other appropriate counselor and each participate in the counseling as requested by the counselor." (Magistrate's Decision, 33-34.) Thus, we find no merit to Smith's contention that the trial court failed to take into consideration the recommendations of the GAL.

{¶ 66} It appears Smith may be contending that the magistrate's finding is contrary to the GAL's recommendation because the GAL's trial testimony referenced visitation and not custody. However, the GAL's 16-page report of April 29, 2010, states the "GAL's recommendation is for shared custody of [the child] between the only parents she has ever known, [Smith and Rowell], with as close to an equal division of time as possible." (Report, 16.) When asked at trial if she was no longer relying on this April 2010 report, the GAL stated, "[o]h, no, no, no, no. I am asking the Court to—as it has already been admitted as an exhibit, I am asking the Court to consider that as well." (Tr. 2357.)

{¶ 67} Based on the evidence we have outlined throughout this decision, we cannot say that the trial court erred in concluding shared custody was in the child's best interest. After making a determination that Smith's conduct with Rowell created an agreement for permanent shared custody of the child, the trial court determined the child's best interest would be served with such custodial arrangement. In light of all the factors the trial court was required to consider in determining the child's best interest, the evidence does not so overwhelmingly favor Smith so as to render the trial court's decision against the manifest weight of the evidence.

{¶ 68} Accordingly, Smith's sixth assignment of error is overruled.

H. Eighth Assignment of Error

{¶ 69} In her eighth assignment of error, Smith contends the trial court erred in admitting at trial "several documents, photographs and video evidence not shared in discovery." (Brief, 56.)

{¶ 70} Initially, we note Smith does not direct us to the pages in the record where the alleged error occurred, nor does she identify the specific documents, photographs, and video evidence to which she refers in this assigned error. App.R. 12(A)(2) allows a reviewing court to "disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based." It is not an appellate court's obligation to search the record for evidence to support an alleged error. *Azher v. State Med. Bd.*, 10th Dist. No. 08AP-17, 2008-Ohio-3102.

{¶ 71} However, assuming Smith is referring to the exhibits addressed in the trial court's decision in response to Smith's objections to the magistrate's decision, we are guided by the well-established principle that the decision to admit or exclude evidence is subject to review under an abuse of discretion standard, and, absent a clear showing that the trial court abused its discretion in the manner that materially prejudices a party, we will not disturb the trial court's ruling. *KeyBank Natl. Assn. v. Columbus Campus, LLC*, 10th Dist. No. 11AP-920, 2013-Ohio-1243, ¶ 68, citing *Cashlink, L.L.C. v. Mosin, Inc.*, 10th Dist. No. 12AP-395, 2012-Ohio-5906, ¶ 9, citing *Boggs v. The Scotts Co.*, 10th Dist. No. 04AP-425, 2005-Ohio-1264, ¶ 35; *In re H.D.D.*, 10th Dist. No. 12AP-134, 2012-Ohio-6160, ¶ 36. An abuse of discretion connotes more than an error of law or judgment; it

implies that the trial court acted unreasonably, arbitrarily or unconscionably. *Cashlink* at ¶ 9, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 72} In the trial court, Smith challenged a family photograph taken when the parties were still in a relationship and a summary exhibit of dates and events used to refresh Rowell's recollection. As noted in the trial court's decision, continuances to review said exhibits were offered and declined by Smith. Also, with respect to the summary exhibit, Rowell was instructed to refer to it only if necessary and to testify from her recollection of events. Smith also challenged an exhibit regarding a website authored, in part, by Smith; however, this exhibit was not admitted into evidence. Additionally, Smith challenged the admission of a text message used to refresh the recollection of a witness. With respect to this evidence, the trial court concluded it was not used for the truth of the matter asserted but, rather, was used to refresh the witness's recollection of her mindset at the time the message was sent. Smith also raised a challenge to the admission of a drawing completed by the child; however, the record establishes her objection to the same was later withdrawn. Smith challenged the admission of a video recording that Smith claims was not produced during discovery. As noted by the trial court, the video was used for impeachment purposes and was not used during Rowell's case-in-chief.

{¶ 73} Even if an abuse of discretion occurred with the admission of the above-described evidence, other than the blanket assertion that she was prejudiced by the admission of "several documents, photographs and video evidence not shared in discovery," Smith does not explain how this alleged error prejudiced her. (Brief, 56.) Upon review, we find no such prejudice.

{¶ 74} For the foregoing reasons, Smith's eighth assignment of error is overruled.

IV. CONCLUSION

{¶ 75} Having overruled all of Smith's asserted assignments of error, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is hereby affirmed.

Judgment affirmed.

KLATT, P.J., and DORRIAN, J., concur.
