

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: G.F. : APPEAL NO. C-190146
 : TRIAL NO. F12-1276X
 :
 : *JUDGMENT ENTRY.*

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Mother appeals the juvenile court's judgment denying her motion for legal custody of her son, G.F. We affirm.

Because of mother's significant mental-health issues, G.F. was removed from mother's care when he was three days old. The juvenile court adjudicated G.F. dependent and, under R.C. 2151.353(A)(3), awarded legal custody of G.F. to paternal aunt. Four years later, G.F. was temporarily removed from paternal aunt's care due to allegations of neglect. The juvenile court ordered paternal aunt and parents to complete any recommended services. Father failed to engage in any services, and mother, who appears to have been living in Florida at that time, was properly served but failed to attend any hearings. Paternal aunt successfully completed all of the recommended services, and the juvenile court remanded legal custody of G.F. to paternal aunt, with orders of protective supervision. After custody had been remanded to paternal aunt, mother began to engage in services and moved for legal custody of G.F. The juvenile court denied her motion, determining it was not in G.F.'s best interest for mother to be awarded custody. Mother appeals, bringing forth two assignments of error.

In her first assignment of error, mother maintains that her due-process rights were violated because she was denied a fair and impartial fact-finder. Mother argues that the magistrate had a bias against her. Because mother failed to object to this alleged bias, we may only review this assignment for plain error. *See In re Etter*, 134 Ohio App. 3d 484, 631 N.E.2d 694 (1st Dist.1998). Plain error is not favored in civil cases and “may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *State v. Morgan*, 153 Ohio St.3d 196, 2017-Ohio-7565, 103 N.E.3d 784, ¶ 40, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997).

A review of the record does not demonstrate plain error. Under Juv.R. 40(C)(2)(c), magistrates are authorized to put witnesses under oath and examine them. Mother argues that the magistrate asked questions in an attempt to illicit negative information about mother, and that this demonstrated the court’s bias. But even though “[mother’s] answers to the trial court’s questions were beneficial to the agency’s case, that alone does not make the questioning biased.” *State v. Hamilton*, 11th Dist. Lake No. 2000-L-003, 2002-Ohio-1681 ¶ 13. Mainly, the magistrate asked mother questions because she kept providing conflicting answers to the other attorneys’ questions, and the magistrate was seeking clarification. The magistrate also offered each attorney the opportunity to ask mother additional questions based on the questions asked by the magistrate.

Because mother has not demonstrated that the fact-finder was unfair or biased, we overrule her first assignment of error.

Mother contends in her second assignment of error that the trial court's determination that it was in the best interest of G.F. to deny mother's motion for custody was against the manifest weight of the evidence. We are unpersuaded.

Under R.C. 2151.42(B),

[a]n order of disposition granting legal custody of a child to a person is intended to be permanent in nature and a court shall not modify or terminate an order granting legal custody of a child unless it finds, based on facts that have arisen since the order was issued * * * that a change has occurred in the circumstances of the child or the person who was granted legal custody, and that modification or termination of the order is necessary to serve the best interest of the child.

See In re James, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, ¶ 26 (an award of legal custody where a child has been adjudicated dependent, neglected, or abused is intended to be permanent and any modification requires a demonstration of a change in circumstances). Appellate courts review a dispositional order that awards, modifies, or terminates legal custody under the abuse-of-discretion standard. *In re T.J.*, 10th Dist. Franklin Nos. 10AP-201 and 10AP-202, 2010-Ohio-4191, ¶ 1; *see In re L.M.*, 2d Dist. Green No. 2010-CA-76, 2011-Ohio-3285, ¶ 15. An abuse of discretion exists if the court's decision is not supported by competent, credible evidence. *In re D.M.*, 1st Dist. Hamilton No. C-140648, 2015-Ohio-3853, ¶ 11.

Prior to modifying an award of legal custody, a juvenile court must first find that there has been a change in the circumstances of the child or the legal custodian. Here, the juvenile court did not address whether there had been a change in the circumstances of

the child or the legal custodian. Mother did not raise this as error. We will not address the trial court's failure to make this finding, since it did not modify the legal-custody order. Therefore, we will only review whether the trial court abused its discretion by determining it was in G.F.'s best interest to deny mother's motion for a change in custody.

While R.C. 2151.42(B) requires the court to look at the best interest of the child in determining whether to modify an order of legal custody, there are no specific factors enumerated for the court to consider. While the Third and Ninth Appellate Districts have both stated that a juvenile court considering a motion to modify an award of legal custody may look to the best-interest factors in R.C. 2151.414(D) relating to permanent custody or R.C. 3109.04(F)(1) relating to the allocation of parental rights and responsibilities, it is not necessary for the juvenile court to cite to a specific factor. *See In re K.D.*, 2017-Ohio-4161, 92 N.E.3d 123, ¶ 7 (9th Dist.); *In re N.L.*, 3d Dist. Hancock Nos. 5-12-38 and 5-12-39, 2013-Ohio-3983, ¶ 19 (juvenile court does not have to rely on or cite to a specific factor when making the best-interest finding under R.C. 2151.42(B)).

Here, the juvenile court did not rely on one specific factor, but its finding that it was not in the best interest of G.F. to change custody to mother is supported by competent, credible evidence.

Mother has significant mental-health issues. Her testimony at the modification hearing demonstrated this. She repeatedly told the magistrate that she would not answer "memory questions" and gave conflicting answers to the attorneys' questions. She testified that her children needed her, that she did not need them and that she should have custody of G.F. because she is his mom and has "raised him all this time." Mother has not had custody of G.F., who is now age six, since he was three days old.

Mother did not complete any of the court-ordered services including mental-health treatment and medication management. She has been diagnosed with personality

disorder, post-traumatic stress disorder and bipolar disorder and, in the past, has been inconsistent in taking her medication. Mother was also ordered to complete toxicology screens but refused to submit to the last screen. At the time legal custody was remanded to paternal aunt, mother had not visited G.F. for over three months.

Prior to the modification hearing, mother had been living in Florida. She has not maintained stable housing since returning to Ohio. She has moved twice, and it appears that she was recently evicted. She testified that she is now living with a man, who is not her current husband, and the Hamilton County Department of Job and Family Services (“HCJFS”) has not completed a background check on this person.

Finally, mother does not have custody of her two older children, her parental rights having been terminated with respect to one of those children.

The guardian ad litem for G.F. and the HCJFS caseworker both agreed that it was in G.F.’s best interest to remain in the legal custody of his aunt, who has raised him for the majority of his life.

Based on the foregoing, we cannot say that the juvenile court abused its discretion by denying mother’s motion to modify custody. Accordingly, the second assignment of error is overruled, and the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., BERGERON and WINKLER, J.J.

To the clerk:

Enter upon the journal of the court on May 29, 2019
per order of the court _____.
Presiding Judge