

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

IN RE: LILIANA FRIESEN : APPEAL NO. C-080243  
 : TRIAL NO. F05-1974X  
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CONNIE C. GLENN, : APPEAL NO. C-080279  
 : TRIAL NO. F05-1974X  
 Plaintiff-Appellant/Cross- :  
 Appellee, : *JUDGMENT ENTRY.*  
 :  
 vs. :  
 :  
 BRETT A. FRIESEN, :  
 :  
 Defendant-Appellee/Cross- :  
 Appellant. :

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

In two cases, consolidated for purposes of argument and disposition, plaintiff-appellant/cross-appellee Connie C. Glenn and defendant-appellee/cross-appellant Brett A. Friesen argue that the trial court made various errors involving the custody of their minor child, Liliana Friesen. For the reasons set forth below, we reject Glenn's arguments, but conclude that the argument in Friesen's cross-appeal warrants a remand to the trial court.

Liliana Friesen was born on November 25, 2004. Glen and Friesen were not married, but were living together at the time. They separated in February 2005. After the separation, they agreed informally to an equal custody schedule. This lasted until July of

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

that year and ended when Friesen claimed that Glenn had engaged in domestic violence. During the time that the couple had lived together, the relationship was “filled with episodes of violence, alcohol abuse, vandalism, and suicide attempts” by Glenn. The magistrate noted violence against Friesen, self-destructive behavior such as self-mutilation and intentionally causing automobile accidents, and other “irrational and psychotic behavior.” While Friesen wanted Glenn to seek treatment, Glenn denied that there was a problem and blamed all her outbursts on her relationship with Friesen.

When the couple separated in July 2005, each sought custody of Liliana. Glenn filed for custody in the Hamilton County Juvenile Court, and Friesen filed in the court of domestic relations. Glenn sought emergency custody of Liliana in an ex parte motion, which was denied. Friesen’s filing sought an order of protection for himself and Liliana, as well as a custody determination. Friesen received a protection order listing him and Liliana as protected persons.

In August, the court of domestic relations accepted an agreed entry permitting Glenn to have supervised visitation. On November 30, 2005, the court entered a consent order of protection listing only Friesen as a protected person, and it also set a visitation schedule that remained in effect throughout the course of the litigation in the juvenile court case.

After mediation proved unsuccessful, the juvenile court held hearings on Glenn’s petitions for custody and visitation. The court conducted hearings over several days. It heard testimony from friends, relatives, a psychologist, two psychiatrists, and the parties. And it received several exhibits.

At the conclusion of the proceedings, the magistrate issued a decision granting custody of Liliana to Friesen and retaining the visitation schedule set out in the entry from the court of domestic relations on November 30, 2005. The court concluded that “[w]hen mother believes that she can show to the court a consistent and regular course of mental

health treatment with a qualified professional, she may petition the court to expand her contact with [Liliana] to overnight visits and extended summer time.” Both parties have appealed.

In her first assignment of error, Glenn argues that the magistrate improperly denied her ex parte request for temporary custody of Liliana. But Glenn did not file an objection to that decision with the trial court,<sup>2</sup> and the record does not contain a transcript of that hearing for our review.<sup>3</sup> Finally, any error regarding the ex parte order became moot once the trial court issued its final custody and visitation order. For these reasons, we overrule her first assignment of error.

In her second assignment of error, Glenn argues that the trial court improperly determined the best interests of Liliana when making its custody order. We disagree.

A reviewing court considers a custody determination on an abuse-of-discretion basis.<sup>4</sup> When the trial court determines the best interests of a child for purposes of making a custody determination, it must consider the factors listed in R.C. 3109.04(F)(1). The core of Glenn’s argument is that the trial court’s decision “does not contain any reference to any of the mandatory statutory factors the court shall consider” under R.C. 3109.04(F)(1). But “there is no requirement that a trial court separately address and list each factor contained in R.C. 3109.04.”<sup>5</sup>

In the decision approved by the trial court, the magistrate clearly considered the wishes of the parents regarding the child’s care.<sup>6</sup> Since Liliana was just over two years old when the issue was decided, her wishes were not a factor for consideration.<sup>7</sup> While the

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<sup>2</sup> See Juv.R. 40(E)(3)(b) (“[a] party shall not assign as error on appeal the court’s adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule”).

<sup>3</sup> See *In re Welch Children*, 1st Dist. No. C-020066, 2002-Ohio-2102, at ¶6.

<sup>4</sup> *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 550 N.E.2d 178.

<sup>5</sup> *Rex v. Conner*, 8th Dist. Nos. 81210 and 81810, 2003-Ohio-4561, at ¶18, quoting *In re Petrella* (May 8, 1997), 8th Dist. No. 70914.

<sup>6</sup> R.C. 3109.04(F)(1)(a).

<sup>7</sup> R.C. 3109.04(F)(1)(b).

magistrate noted that Glenn’s witnesses testified that she did well with the child, “[f]or almost the last two years, Lilianna has been cared for and provided for in the home of her father with assistance from his parents for daycare needs.”<sup>8</sup> The magistrate did not make any findings regarding which party might be more likely to facilitate the court’s order, but did note that “the issues between the parties have been disputes over visitation days and times, but nothing to the extent of the seriousness of the prior incidents.”<sup>9</sup> There is no indication in the record that either party has failed to pay support orders or has been involved in abuse or neglect relating to children.<sup>10</sup> There is no indication that either parent planned to leave the state.<sup>11</sup>

Clearly, the main concern for the trial court was Glenn’s mental health.<sup>12</sup> The magistrate noted that, while the couple lived together, “the relationship was filled with episodes of violence, alcohol abuse, vandalism, and suicide attempts by the mother. The record is replete with incidents of the mother directing violence to father, of self-destructive behavior by cutting herself and intentionally causing car accidents, and of irrational and psychotic behavior.” Two different mental-health professionals testified that Glenn’s mental health, if untreated, could lead to dangerous behavior, physical violence when she is emotionally distressed, and had caused “major concern about mother’s ability to parent.”

The magistrate acknowledged that “the standard the Court must apply in a custody dispute between parents is the best interests of the child.”<sup>13</sup> Having reviewed the decision in light of the factors listed in R.C. 3109.04(F), we cannot conclude that the trial court

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<sup>8</sup> See R.C. 3109.04(F)(1)(c) (interaction and interrelationship with the child’s parents, siblings, and any other person who may significantly affect the child’s best interest), and R.C. 3109.04(F)(1)(d) (child’s adjustment to the child’s home, school, and community).

<sup>9</sup> R.C. 3109.04(F)(1)(f), and (i).

<sup>10</sup> R.C. 3109.04(F)(1)(g), and (h).

<sup>11</sup> R.C. 3109.04(F)(1)(j).

<sup>12</sup> R.C. 3109.04(F)(1)(e).

<sup>13</sup> See R.C. 3109.04(B)(1).

lost its way or that its decision reflected an abuse of its sound discretion. Glenn's second assignment of error is overruled.

In her third assignment of error, Glenn argues that the magistrate improperly considered the testimony of the two expert witnesses, who considered medical records outside the scope of the trial court's discovery order. But during the proceedings in which exhibits were considered for admission, the magistrate said that he would only consider that evidence that fell within the order. The magistrate acknowledged that the experts had relied on some evidence outside that order, but indicated that he would consider the portions of the opinions "that [were] relevant even with my order." An appellate court will only reverse in cases where it appears that the trial court actually considered improper testimony in reaching its decision.<sup>14</sup>

And while the order limited the consideration of "medical records pertaining to mother's medical or emotional treatment from 11-25-03 to the present time," there was nothing in the order that prohibited the experts from considering evidence of Glenn's behavior prior to that time. It is hard to imagine how Glenn's history of bizarre, self-destructive, and sometimes violent and criminal behavior would not have had some relevance to the determination of her fitness as a parent. While her behavior had certainly changed after Liliana was born, that went to the weight of the evidence, not to its relevance. For these reasons, it was not an abuse of discretion to consider this evidence. Glenn's third assignment of error is overruled.

In her fourth and fifth assignments of error, Glenn argues that the trial court improperly limited cross-examination of Friesen regarding photographs he had taken of her when she was 16 or 17 years old and he was 19, and improperly denied her requests that those photographs be admitted into evidence. We disagree.

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<sup>14</sup> *In re Pieper Children* (1984), 74 Ohio App.3d 714, 722, 600 N.E.2d 317, citing *In re Sims* (1983), 13 Ohio App.3d 37, 41, 468 N.E.2d 111.

The admission or exclusion of evidence by the trial court will ordinarily not be reversed unless there has been a clear and prejudicial abuse of discretion.<sup>15</sup> Under Evid.R. 103(A), error “may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.”<sup>16</sup>

In a “what’s good for the goose is good for the gander” argument, Glenn argues that it was unfair to allow admission of her history while not considering Friesen’s. But the trial court made clear during the hearing that it was concerned with patterns of behavior that might assist it in its determination of which parent would be a more suitable custodian. As one court has noted, “custody litigation, unlike most other litigation, attempts to predict the future rather than to understand the past.”<sup>17</sup> In this regard, the refusal to consider an isolated incident in which both parties participated was not an abuse of discretion. Furthermore, other evidence that illustrated Friesen’s behavior along these lines was admitted and considered by the magistrate. Glenn’s final two assignments of error are overruled.

In his cross-appeal, Friesen argues that the trial court’s entry is inconsistent and requires remand for clarification. We agree.

In its entry, the trial court first noted Glenn’s history and the prognoses provided by the two expert witnesses, and concluded that the “mother must show continuous and regular contact with a mental health professional before she is permitted additional contact with [Liliana] beyon[d] the present schedule of visits that has been in place since November 30, 2005. That schedule shall become the order of this court. When mother believes that she can show to the court a consistent and regular course of mental health

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<sup>15</sup> *Sutphin v. Sutphin*, 1st Dist. Nos. C-030747 and C-030773, 2004-Ohio-6844, at ¶15, citing *O’Brien v. Angley* (1980), 63 Ohio St.2d 159, 407 N.E.2d 490.

<sup>16</sup> *Id.*

<sup>17</sup> *Tenpenny v. Tenpenny* (Jan. 3, 1986), 5th Dist. No. 2333, citing Wexler, Rethinking the Modification of Child Custody Decrees (1985), 94 Yale L.J. 757, 762.

treatment with a qualified professional, she may petition the court to expand her contact with [Liliana] to overnight visits and extended summer time.”

The entry seems to indicate that the November 30, 2005, order did not allow for overnight visits and that such visits would only be allowed upon a showing of active treatment by a mental-health professional. But the November 30, 2005, entry allowed for overnight visits. Since it is impossible for this court to reconcile the two orders, we must remand this case to the trial court to address this inconsistency.<sup>18</sup> We sustain Friesen’s cross-assignment of error.

For the foregoing reasons, we affirm the trial court’s judgment in part, reverse it in part, and remand this case to the trial court for reconsideration of the inconsistent entries in accordance with the terms of this judgment entry.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., CUNNINGHAM and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on March 18, 2009

per order of the Court \_\_\_\_\_.

Presiding Judge

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<sup>18</sup> See, e.g., *Markowitz v. Markowitz*, 8th Dist. No. 87418, 2006-Ohio-5932 (remanding case to the trial court when “the terms of the \* \* \* order issued by the court are sufficiently unclear as to be unenforceable as written”).