



ORIGINAL

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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA **FILED**
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

DIVISION IV

JUL 29 2024

CHRIS SAXON,
Petitioner/Appellee,

JOHN D. HADDEN
CLERK

vs.

NICOLE SAXON,
Respondent/Appellant

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Case No. 120,026

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE LYNNE MCGUIRE, SPECIAL JUDGE

AFFIRMED

William R. Pierce
Oklahoma City, OK

For Petitioner/Appellant

John Alberts
Stephanie Marston Younger
Yukon, OK

For Respondent/Appellee

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Nicole Saxon, mother of the two children at issue in this case, appeals three decisions of the district court. First, she challenges the court's grant of sole custody to the children's father, Chris Saxon. Second, she appeals the court's finding that the father did not perpetrate domestic violence against her. Finally, she claims the trial judge was required to have recused. Upon review, we find that the court did not err in any respect, and thereby affirm judgment appealed.

BACKGROUND

The parties have been embroiled in contentious litigation since 2017, when Chris filed his first petition for dissolution of marriage in January. Throughout 2017, there were referrals made to DHS that Chris was sexually abusing the parties' minor child, S.S. However, both children, S.S. and A.S., were later removed from Nicole's custody on October 26, 2017. During this time, she was allowed only minimal supervised visitation with them until December 2017 when she regained custody. The parties also apparently attempted reconciliation during this time and Chris dismissed his first petition for dissolution. Reconciliation was unsuccessful and Chris again filed a petition for dissolution of marriage in April 2018. That same month, both children were again removed from Nicole's custody and DHS substantiated a finding against Nicole for mental injury and threat of harm. Nicole was allowed to have contact with her children again on June 11, 2018, and had supervised visits until December 8, 2018. On December 7, 2018, the court ordered that the parties were to begin shared custody.

In July 2019, upon emergency application of the guardian ad litem, Michelle Smith, the children were removed from Nicole's custody and were not permitted to have contact with her until July 7, 2020. On December 5, 2019, Nicole sought recusal of Judge McGuire, alleging that Judge McGuire was biased against her. *See* Supreme Court Case No. 118,597. This caused a stay of all proceedings. The recusal process was exhausted through filing a writ with the

Supreme Court. The Supreme Court assumed original jurisdiction but declined to grant a writ disqualifying Judge McGuire.¹

Trial on the merits began on September 8, 2020, and lasted several days over the span of a few months. Both parties sought sole custody of the minor children and Nicole sought to prove that she was a victim of domestic violence. Fifteen witness were called, including several doctors, caseworkers, friends, and the parties themselves. Trial did not conclude until April 26, 2021. The trial court took its ruling under advisement and instructed the parties to submit written closing arguments. In a letter ruling issued on August 22, 2021, the court granted Chris sole custody and Nicole standard visitation. The court also found that Nicole failed to prove by a preponderance of the evidence that domestic abuse had occurred.

The divorce decree was entered October 22, 2021. Nicole filed a motion reconsider on November 21, 2022, and on the same day filed a petition in error. The court heard Nicole's motion to reconsider on March 11, 2022, and subsequently denied it. This appeal proceeds solely from the decree of dissolution.²

¹ Nicole had also sought Judge McGuire's recusal from the later-dismissed 2017 divorce case, prior to its voluntary dismissal. The Supreme Court also assumed original jurisdiction in that matter but declined to disqualify Judge McGuire. See Supreme Court Case No. 116,368.

² In footnote one of her *Brief-in-chief* Nicole "respectfully requests the Court to consider" the proceedings on the motion to reconsider even though she admits "[t]he record in relation to the Motion to Reconsider was not included" in the record on appeal. We decline the request, as such a procedure is prohibited. See *Chamberlin v. Chamberlin*, 1986 OK 30, ¶4, 720 P.2d 721, 723-24 ("This court may not consider as part of an appellate record any instrument or material which has not been incorporated into the assembled record by a

STANDARD OF REVIEW

“[T]he trial court is vested with discretion in awarding custody and visitation. Nevertheless, the best interests of the child must be a paramount consideration of the trial court ... when determining custody and visitation.” *Daniel v. Daniel*, 2001 OK 117, ¶ 21, 42 P.3d 863, 871. “On appeal, this Court will not disturb the trial court’s judgment regarding custody absent an abuse of discretion or a finding that the decision is clearly contrary to the weight of the evidence. The burden is upon the party appealing from the custody and visitation award to show that the trial court’s decision is erroneous and contrary to the child’s best interests.” *Id.*

ANALYSIS

On appeal, Nicole raises eight allegations of error, though each, in effect, seeks to undo the grant of sole custody to Chris. Nevertheless, we will address each allegation of error separately.

Weight of the Evidence

First, Nicole argues that the trial court erred in awarding sole custody of the children to Chris because the “objective clear weight of the evidence” showed Chris “would not be the parent most likely to facilitate communication and contact with the appellant/petitioner.” *Brief-in-chief*, pg. 16 (capitalization modified). However, rather than pointing to evidence in the record that shows the court’s decision to grant sole custody to Chris was against the clear weight

certificate of the clerk of the trial court, nor may a deficient record be supplemented by material physically attached to a party’s appellate brief.” (footnote omitted)).

of the evidence, Nicole instead focuses on the court's purported failure to issue findings of fact and conclusions of law and the fact that that Nicole was unable to see the children for a year.

Nicole argues that in 2021, the legislature amended 43 O.S. § 110.1 to include language requiring the trial court to provide findings of fact and conclusions of law to support the court's decision to grant sole custody to Chris. The new statute reads in its pertinent part, "if requested by a parent, the court may provide substantially equal access to the minor children to both parents at a temporary order or final hearing, unless the court finds that shared parenting would be detrimental to the child. The court shall issue findings of fact and conclusions of law to support its decision *after a final hearing on the merits.*" 43 O.S. § 110.1 (emphasis supplied). The court in this case, after a final hearing on the custody issue, which began on September 8, 2020, and did not end until April 26, 2021, entered a letter ruling granting Chris sole custody of the minor children on June 22, 2021. Meanwhile, the current version of 43 O.S. § 110.1 was not effective until November 1, 2021. Nicole contends that the statute was in effect at the time the divorce decree was filed, on October 22, 2021, and also that it applies retroactively.

However, Nicole clarifies in a footnote in her brief that she requested the court issue findings of fact and conclusions of law in accordance with 43 O.S. § 110.1 at the hearing for the motion to reconsider, which was not until March 11, 2022. We note that the statute's mandate for a court to issue findings of fact and conclusions of law to support its decision must occur after a final hearing

on the merits. It does not indicate that a court must do so at any subsequent hearings, as Nicole's argument requires. The court issued its letter ruling in June 2021, which was before the amendment to the statute referenced by Nicole. The statute itself also contains no language in support of retroactive application.³ Therefore, it is clear that the court was not required to retroactively issue findings of fact and conclusions of law at a hearing on a motion to reconsider that occurred some five months after the statute was enacted and some eight months after the court had already issued a final ruling.

Nicole follows the statutory argument with a general statement that, "[a]s discussed throughout the totality of Ms. Saxon's Brief and Chief (sic), the evidence presented at trial was overwhelmingly in favor of granting custody to Ms. Saxon." *Brief-in-chief*, pg. 17. Yet, Nicole does not include a single citation to the record to support her argument that the record is replete with evidence demonstrating a custody decision in her favor was required. Instead, Nicole points out that she had no contact with her children for fifteen months and was effectively denied the "right" to see her children change and grow. Because the fifteen-month period of no contact is an argument Nicole raises throughout her brief, we will address it now.

³ As a rule, "[s]tatutes are generally presumed to operate prospectively." *Wickham v. Gulf Oil Corp.*, 1981 OK 8, ¶ 13, 623 P.2d 613, 615-16 (quoting *Scott Paper Company v. City of Anacortes*, 90 Wash.2d 19, 32, 578 P.2d 1292, 1299 (1978)). However, this presumption does not defy rebuttal if the purposes and intention of the legislature to give a statute a retrospective effect are expressly declared or are necessarily implied from the language used. *Id.*

On July 17, 2019, the GAL filed an application for an emergency hearing. The hearing was held on July 19, 2019, and the court subsequently issued a temporary emergency order suspending Nicole's visitation with the minor children and ordering her to attend counseling. On September 5, 2019, the court continued the no contact order between Nicole and the children.⁴ On October 8, 2019, Nicole's current counsel entered an appearance on her behalf. However, Nicole then filed a motion to disqualify⁵ Judge McGuire in December 2019, which stayed all proceedings in the case from then until March 30, 2020. On March 30, 2020, the Supreme Court denied Nicole's writ of mandamus to disqualify the trial judge. On May 22, 2020, Nicole filed a motion to vacate the temporary emergency order and to reinstate her custody and visitation of the minor children. The court set the hearing on the motion for visitation on September 1, 2020; however, the parties entered into an agreed order on June 25, 2020, allowing Nicole to have contact with the children.

While we understand Nicole's frustration that she could not see her children for that time period, it was her decision to file a motion to disqualify which caused a stay of proceedings during a period in which visitation was not permitted. We also fail to understand the correlation between the time lapsed in which she could not see her children and her argument challenging the sufficiency of the evidence presented at trial in favor of Chris obtaining sole

⁴ It appears at this time Nicole's prior counsel was allowed to withdraw. Apparently, Nicole also had difficulty starting counseling which was a requirement of the court's order.

⁵ This was not Nicole's first motion to disqualify Judge McGuire. See note 1, *supra*.

custody. To the extent there is a relevant connection, we find that any detriment caused was because of Nicole's chosen litigation strategy.

Nicole's second proposition of error related to the weight of the evidence is that the court erred in holding Chris was the best party to provide for the emotional and physical needs of the children as the objective clear weight of the evidence proved that sole custody to Chris was not in the best interests of the children as he was not a fit and proper party to exercise sole custody. Upon review, we find that the clear weight of the evidence supports Chris having sole custody of the children.

Despite Nicole's continuing efforts to raise sexual abuse allegations against Chris throughout trial,⁶ her allegations were never substantiated by DHS or a physician. Nicole herself testified that "there has been a thorough investigation and—there hasn't been enough evidence—there is not enough evidence to show that there has been sexual abuse."⁷ Tr. (April 19, 2021), pg. 189. Additionally, as discussed in detail below, there was insufficient evidence that domestic abuse or spousal rape occurred in this case. It appears that the basis for Nicole's contention that the evidence does not support sole custody for Chris is her belief

⁶ Nicole began her brief by attempting to introduce more evidence of Chris's purported sexual abuse. However, Nicole acknowledges that the evidence referenced was not designated as a part of the record on appeal. This court may not consider as part of an appellate record any instrument or material which has not been incorporated into the assembled record by a certificate of the clerk of the trial court, nor may a deficient record be supplemented by material physically attached to a party's appellate brief. *Chamberlin v. Chamberlin*, 1986 OK 30, ¶ 4, 720 P.2d 721, 723–24.

⁷ Nicole later testified that she did still believe her children had been molested. Tr. April 19, 2021, pg. 185. However, despite personal beliefs, she was still willing to acknowledge that there was not sufficient evidence to support a finding that the children were sexually abused and that the investigation was thorough.

that the trial court “bought into the false narrative of DHS and the Guardian ad Litem that she was causing mental injury to the girls, ‘doctor shopping,’ parading around a binder of graphic photos, and should be written off as a liar.” *Brief-in-chief*, pg. 18. However, it is unclear what evidence Nicole is relying on to support this contention. She does not point to any language in the court’s order, any sustained objection by the court, any testimony by any witness, or any other piece of evidence presented at trial which suggests the trial court “bought into a false narrative” that Nicole was a “liar.” Nor do we find such evidence.

The evidence presented at trial supports a decision of sole custody for Chris. Chris testified at length about the positive relationships he has with his children. Tr. (Nov. 9, 2020), pgs. 85-87. He also testified that he would be willing to work and cooperate with Nicole regarding any orders of the court. Tr. (Nov. 10, 2020), pg. 10. He testified that he was willing to work with the children’s counselor, Amy Newberry, regarding any recommendations she may have for the children as well as the GAL if she needed to continue to be involved in the case. *Id.* at 23. Chris stated that it was important to him that the counselor continued to work with the children because she is qualified and informed when helping make decisions regarding the best interests of the children. *Id.* For example, Chris testified that while he has concerns about Nicole having unsupervised visitation with the children due to their contentious past, when Dr. Newberry opined that Nicole could have unsupervised visits with the kids, he trusts that decision and knows she has the children’s best interests in mind. *Id.*

Additionally, Chris successfully had sole custody of the girls for extended periods of time since filing for divorce. He kept the minor children involved in their activities, enrolled them at a school where they are thriving, and was timely to all of his appointments. The children’s counselor, Amy Newberry, testified that “Mr. Saxon appears to be a very involved and caring parent. He asks appropriate parenting questions about what to do in every situation that came up with the girls over the last year. He is very involved with their care.” Tr. (Sept. 9, 2020), pg. 12. She also described him as “nurturing” and “engaged” and stated that when the girls come out of their sessions with her they are “excited to tell him what they’ve learned.” *Id.* at 13. Additionally, the GAL—who has represented the children and been involved with the parties for years—also recommended sole custody to Chris. Tr. (April 26, 2021), pg. 106.

There was additional testimony concerning Chris’s character as well as Nicole’s, some of which could be considered conflicting testimony. In cases of equitable cognizance, the appellate court will weigh the evidence and review to ensure that the trial court’s decision is not contrary to the weight of the evidence. *Brown v. Greever*, 1963 OK 49, ¶ 12, 379 P.2d 689, 691–92. However, “the findings of a district court in an equity case will not be disturbed on appeal simply because there is a conflict in the testimony, or for the reason that it is possible to draw another conclusion from the evidence.” *Id.* The court had the benefit of hearing the testimony and assessing witness credibility. Ultimately, upon review of the full record, we find that the trial court did not err in determining that Chris should have sole custody.

Fundamental Right to Parent

Next, Nicole argues that the court's decision to suspend her contact and visitation with the children in July 2019 caused interference with her "fundamental fourteenth amendment constitutional rights to parent her children." *Brief-in-Chief*, pg. 19 (capitalization modified).⁸ Again, we reiterate that the year-long suspension of Nicole's contact with her children was due in large part to her decision to file a motion to disqualify the judge which stayed all proceedings. Further, we are unsure what relief Nicole is seeking from this proposition in error. She has been able to see her children and continue to foster and maintain a relationship with them since 2020, as this year-long period of no contact occurred four years ago. The Supreme Court has repeatedly held that a party cannot complain of errors the party invited and participated in. *Oklahoma Ry. Co. v. State ex rel. Dep't of Highways*, 1951 OK 323, ¶ 14, 237 P.2d 878, 881. By filing the motion to disqualify which foreseeably stayed all proceedings from December to March, Nicole caused the delay in being reunited with her children she now complains of. Therefore, we hold the court did not err by ordering no contact between Nicole and her children in July 2019, nor were Nicole's fourteenth amendment rights implicated or infringed upon by such a decision.

⁸ We note, to the extent Nicole is asking us to review and somehow undo the trial court's temporary order suspending her visitation, we are unable to do so. *See In re Marriage of Sager*, 2010 OK CIV APP 130, ¶ 22, 249 P.3d 91, 96-97 ("[A] final decree supersedes any temporary or interlocutory order rendered during the suit's pendency." (quoting *Lincoln Bank and Trust Co. v. Oklahoma Tax Commission*, 1992 OK 22, ¶ 5, 827 P.2d 1314, 1317)). We review Nicole's complaints regarding this temporary order to the extent they are relevant to the overarching issues of whether sufficient evidence supports the trial court's final order granting sole custody to Chris and Nicole's claim of judicial bias (further discussed below).

Nicole also alleges that a series of misleading statements achieved their “greatest destruction” when the court ordered no contact with Nicole and her two children. *Brief-in-Chief*, pg. 19. Nicole argues that the court, in granting the emergency order, relied on “flawed evidence and misleading statements by the G.A.L including leading the Court to believe that the children’s counselor was recommending no contact between Nicole and her children.” *Id.* According to Nicole, because of the GAL’s inaccurate reporting and the court’s decision to order no contact, she was stripped of her fundamental right to mother her children.

First, it is unclear which statements made by the GAL to the court in her application for emergency hearing were misleading, but Nicole’s complaints appear to revolve around the GAL’s handling of Nicole’s allegations of sexual abuse. The GAL reported that she had previously and explicitly instructed Nicole that if she had any concerns regarding her children’s genital areas that they should be taken to OU Children’s Hospital ER immediately and that the GAL and current DHS worker should also be notified immediately. Petitioner’s Exhibit 32A, *Guardian Ad Litem’s Update to the Court*, pg. 3. The GAL further explained that she contacted daycare workers on July 5, 2019, seeking information regarding new concerns with Nicole at daycare. *Id.* For example, the GAL reported that when Nicole arrived a few days prior to pick up the children a daycare worker informed Nicole that one of her children had not been urinating as much and they should keep an eye on that. *Id.* at 4. Nicole proceeded to remove the child’s diaper and show the worker what she described as “extreme

redness and ripping on the child's bottom." *Id.* Nicole then, as reported by the GAL, asked the worker to continue to inspect the child's private area and document it, telling the worker "I think you know what I mean." *Id.* The worker responded that she did not see anything concerning in the child's private area and the worker reported feeling very uncomfortable during the situation. *Id.* Nicole also notably did not notify the GAL or DHS of any of the concerns she witnessed at the daycare regarding any redness or ripping.

Later, on July 10, 2019, the GAL reported being contacted by the professional overseeing child exchanges between the parents with additional concerns. *Id.* Nicole had told the worker that the oldest child had asked to speak with the worker to make a disclosure. *Id.* at 5. The worker spoke with the child briefly, but the child reported not being able to remember what she was supposed to tell the worker.

Finally, on July 17, 2019, the GAL reported speaking with the children's counselor at the time. *Id.* The counselor noted that on July 16, 2019, Nicole told the counselor that the oldest child needed to make a disclosure to the counselor. Petitioner's Exhibit 32A, *Guardian Ad Litem's Brief Update to the Court*, pg. 11. The counselor spoke with the child and reported having concerns after their discussion. *Id.* The counselor specifically asked the child if she had anything she needed to share, and the child indicated that Nicole told the child to tell the counselor that "my dad is not safe for me." *Id.* Counselor further inquired if her father had ever hurt her and the child responded that it could be when she was sleeping, but when asked if she had ever been woken up from her dad hurting

her the child answered “no.” *Id.* at 12. The report as written opined that Nicole’s behavior was “erratic with rapid thought process.” *Id.* Further, it read:

Ms. Newberry said it appears that Nicole is having an emotional/mental breakdown. She can’t keep her thoughts together. The disclosure by [the child] appears to have been coached by Nicole. Ms. Newberry also has serious concerns about the many photographs of the children’s vaginal area and the effect that is having. Ms. Newberry said [the child] told her that her Nicole takes a lot of pictures of her privates so she can show the doctor. Ms. Newberry said she was considering making a referral to DHS CPS for concerns about mental injury to the children by Nicole.

Id.

Nicole does not identify which of these statements she finds to be misleading or inaccurate, nor does she identify which piece of evidence that the GAL relied on she considers to be “flawed.” There was no transcript of the emergency hearing, so statements made during that time are now unavailable. It appears the GAL was doing her job by reaching out to these witnesses and investigating the statements made by Nicole and the children. Based on the information the GAL had at the time, we find it reasonable for her to file the application for emergency hearing, recommend temporary custody to Chris, and to recommend suspending visitation and contact with Nicole.

Testimony of the GAL

On appeal Nicole raises two issues directly related to the testimony of the GAL. First, she alleges that the district court erred in “giving any weight to the recommendations and testimony of the guardian ad litem ... as she breached her ethical duties as an advocate for the minor children as exhibited by the demonstrable perjury and substantial bias against the appellant” *Brief-in-*

chief, pg. 21 (capitalization modified). Nicole alleges that the GAL's actions, or inaction, caused infliction of substantial mental harm to her children which in turn caused a "direct unconstitutional interference" to her fourteenth amendment right to parent her children. *Id.*

First, we note that Nicole does not point to any specific instance during trial where the GAL perjured herself despite alleging so in the proposition in error. Second, while a GAL is considered an arm of the court to help the court ascertain the best interests of the child, we find no evidence that the court specifically relied on the GAL's reports or testimony in granting custody to Chris in either its letter ruling or the divorce decree. In its order, the court generally stated that it made its decision regarding custody and not finding domestic violence based on the evidence and testimony presented in trial. Thus, it is unclear how much weight, if any, the court gave the testimony and reporting of the GAL in this case.⁹ Finally, regardless of whether the court gave the GAL's testimony any weight, upon review of the full record, we find that the GAL showed no demonstrable bias that could have caused substantial harm to the children or Nicole's constitutional right to parent her children.

Nicole argues that the GAL's biased testimony went unchallenged because the court "protected [the GAL] from a more extensive cross examination." *Id.* at 22. However, the examples listed by Nicole in her brief of the court "shielding"

⁹ Nicole argues that the GAL's improper influence was exhibited by the Court's near full adoption of the GAL's recommendations. However, we note that the court could have reached a similar conclusion on its own without necessarily following the recommendation of the GAL.

the GAL appear to take issue with the court's commentary that it would consider DHS's initial interviews and investigations as well as the later protocol review initiated by DHS which overturned some of the findings of the initial investigation, rather than with any testimony by the GAL herself. Nicole argues the two investigations are mutually exclusive, and the initial investigation should not have been considered. We disagree. Chris's attorney explicitly asked Latasha Granillo, the DHS caseworker responsible for the protocol review if her review invalidated the work that Lacy Warren did in the first investigation. Ms. Granillo responded that it did not. Additionally, when asked if the court should disregard the information Lacy accumulated, Ms. Granillo stated as to the finding itself, yes, but otherwise, no. Tr. (Sept. 11, 2020), pg. 149.

Nicole contends that nothing demonstrates the GAL's "duplicity and bias" more than her rejection of the "objective evidence" of the children's purported disclosures of sexual abuse to Beth Combs.¹⁰ *Brief-in-chief*, pg. 25. Nicole also alleges that the GAL improperly questioned, doubted, or otherwise did not give the proper weight to the testimony of several other witnesses.¹¹ Rather than

¹⁰ Nicole's attorney asked Ms. Smith specifically: "But at least in the case of Beth Combs and [S.S.] making the statements and the conduct that she demonstrated in front of Beth Combs, at least for your purposes, that is not objective evidence; is that fair?" Tr. (Apr. 21, 2021), pgs. 153-54. To which Ms. Smith responded, "It could be objective. I'm just not sure that once it was investigated by the people that Beth Combs said would be determining factors, it was not substantiated." *Id.* Upon review, we cannot find support for Nicole's contention that this was a rejection that the disclosures were objective evidence. Rather, the GAL noted that they could have been objective; however, upon further investigation by DHS, the sexual abuse allegations were not substantiated.

¹¹ Nicole's attorney asked the GAL if she would acknowledge that DHS unsubstantiating sexual abuse against Chris formed the basis for her opinion that he did not sexually abuse the children. *Id.* at 154. The GAL indicated that it was, indeed, a strong

going through each example, we note that the GAL is not the trier of fact. Instead, the GAL assists the court in assessing the needs of the children. Thus, it is irrelevant whether the GAL thought any one witness's testimony was credible or whether she gave enough weight to certain evidence. That is the exclusive province of the court. Further, Nicole does not show that, because of this GAL's purported failures in her role, that the court would have reached a different outcome and given custody to Nicole.

The next proposition in error Nicole raises regarding the testimony of the GAL is that the court erred by preventing Nicole's counsel from fully impeaching the GAL's investigation and recommendations. Nicole argues that by preventing Nicole's counsel from eliciting "relevant material testimony directly germane to the veracity and reliability of the *guardian ad litem's* testimony" it amounted to clear and objective bias against her. *Id.* at 26.

Again, we reiterate that there is nothing in the court's letter ruling or final divorce decree that indicates what weight, if any, the court gave to the testimony of the GAL. Thus, whether or not the GAL was impeached, or counsel was able

factor in that determination. *Id.* Nicole's attorney then asked the GAL if she would acknowledge that Chris had perpetrated domestic violence against Nicole by virtue of the fact that it was substantiated against Chris. *Id.* The GAL responded by saying that the allegations against Chris for domestic abuse were "originally unsubstantiated." *Id.* She testified that, "I know that Ms. Postlewait testified that they had done a review and it had been substantiated. I do have some concerns about maybe some of the evidence she relied on. I wasn't very clear about where that all came from." *Id.* (We note here that it appears that the GAL accidentally referred to Ms. Granillo as Ms. Postlewait). The GAL clarified that when she was first brought on to the case, the allegation for domestic abuse was unsubstantiated and then when DHS did the protocol review, it was substantiated. *Id.* She noted specific concerns because Ms. Granillo referenced a forensic review of electronics that ultimately had not been done, so there was confusion about what evidence she had reviewed. *Id.*

to elicit all of the testimony it deemed material or relevant from the GAL does not directly show how the court's decision to grant Chris sole custody or fail to find domestic abuse was against the clear weight of the evidence, which are the ultimate issues here. Nevertheless, upon review, we find that Nicole's counsel was not prevented from impeaching the GAL, that the GAL's testimony did not demonstrate a clear and objective bias against Nicole, and that Nicole did not identify any material or relevant testimony that counsel was prevented from eliciting from the GAL.

Nicole begins this proposition of error in her brief not by highlighting the GAL's testimony, but by taking issue with the court's questioning of Nicole. While Nicole's brief specifically discussed testimony that occurred towards the end of the court's questioning of Nicole, the matter began with a simple question. After the conclusion of Nicole's testimony, the court asked her to "clarify for me the concern with regard to the September 5th, 2019, hearing and what transpired that caused concern about Ms. Smith. I'm trying to recall what—what you might be referring to." Tr. (Apr. 20, 2021), pg. 160. Nicole responded that there was a "misrepresentation of information." *Id.* The court asked Nicole what information had been misrepresented and Nicole responded, "actions by myself and others." *Id.* at 161.

The court then asked what actions Nicole was referring to, to which she responded that, for example, "it was portrayed that my mother had made a DHS report after one of the hearings; which was inaccurate, it was before. That I had continued taking photographs, that I was being investigated for child porn or

something of that nature.” *Id.* The court specifically asked if Nicole remembered that the court had been shown photographs at the hearing. *Id.* Nicole agreed that she did “remember some photos” being shown to the court. *Id.* The court then attempted again to get a clear answer from Nicole regarding what caused her lack of trust for the court-appointed GAL because, “those are, in the court’s mind, very serious concerns and allegations and I’m asking you to clarify, in your own words, what you’re talking about.” *Id.* at 163.

Nicole’s brief describes the court’s questioning on this issue as “hostile,” yet, it appears the court was taking Nicole’s allegations regarding the truthfulness of the GAL seriously and wanted to be clear what Nicole’s basis for her distrust was. *Brief-in-chief*, pg. 27. The court was not dismissive of Nicole’s characterization of the GAL, but rather, wanted specific examples from Nicole that caused her to distrust the GAL, so much so, that Nicole would almost exclusively communicate with the GAL via her attorneys. The court was met with very broad and apparently not entirely accurate answers, which caused the questioning to continue. We cannot construe this interaction as the court “advocating” for the GAL despite Nicole’s contention that this Court should do so.

Nicole also argues that another example of the court’s “inappropriate protection of the GAL” was that the court denied Nicole’s counsel the opportunity to “fully probe the depths of the GAL’s failures to adequacy [sic] advocate for the children and fully investigate the issues as demonstrated by her serious inconsistencies and claims within her testimony and reports.” *Brief-in-chief*, pg.

27. Specifically, Nicole notes that during cross examination of Ms. Smith, Nicole's attorney "attempted to confront Ms. Smith on the inconsistencies in her reports. The Court continued to interrupt counsel." *Id.* However, the eight preceding pages to Nicole's citation in the record, Tr. (April 26, 2021), pg. 195, do not contain any interruptions by the court.

Nonetheless, Nicole contends that the court's interruptions culminated with an admonishment from the court that, "I don't want to get stirred up. And so I need the tone—you are two officers of the court and this is getting personal and confrontational, and I don't know if that's clear from the record, but it doesn't help me." *Id.* However, the court did not just admonish Nicole's attorney for getting too personal and confrontational. The court specifically states you "two" in reference to the GAL herself and the attorney questioning her. Thus, it is unclear how this instance could be construed as an attack on Nicole's attorney or demonstrative of the court "shielding" the GAL. If anything, the court was indeed admonishing both the attorney and the GAL for acting unprofessionally in their questions and answers. Additionally, it is unclear how the court's admonishment barred Nicole's attorney from either impeaching the GAL about any perceived inconsistencies in her statements or eliciting any material relevant statement. The court was merely advising the parties to keep an even tone, to not get too contentious with each other, and to stick to questions and answers that would be helpful to the court.

In sum, upon review of the entire record, we reject each of Nicole's Propositions-in-Error I through V and find that the trial court's decision to grant

sole custody to Chris was not against the clear weight of the evidence or an abuse of discretion for any reason stated therein.¹²

Domestic Violence

Next, Nicole argues that the trial court erred in finding that she failed to prove domestic abuse by a preponderance of the evidence. Upon review, we find there was conflicting evidence presented regarding purported instances of domestic violence between the two parties.

Nicole and Chris, when asked about certain events throughout their marriage, characterized them in drastically different ways. Additionally, DHS originally found that there was not enough evidence to substantiate domestic violence. However, the DHS caseworker that performed a review of the case later found that some domestic violence evidence had been overlooked and that there had been a bias in favor of Chris. Thus, the finding of domestic violence against Chris was later substantiated. A substantiated finding, however, need only be supported by “some credible evidence.” *Montes v. State ex rel. Oklahoma Dep’t of Human Servs.*, 2019 OK CIV APP 42, ¶ 17, 445 P.3d 245, 250. The fact that DHS found evidence of domestic abuse did not compel the trial court to accept that domestic abuse occurred. Several other witnesses gave conflicting testimony about Chris’s purported domestic violence. “The credibility of the various witnesses and weight and value to be given to their testimony is for the jury or for the trial court on waiver of a jury, and conclusions there reached will not be

¹² Note: Proposition-in-Error VII, related to certain hearsay objections, also concerns custody. It is discussed below.

disturbed on appeal, unless appearing clearly to be based upon caprice or to be without foundation.” *Hinds v. Johnston*, 2009 OK CIV APP 54, ¶ 5, 211 P.3d 236, 239.

Witness and forensic psychologist Dr. Shawn Robertson reported that Chris denied any history of being physically violent towards others or any history engaging in domestic violence. Dr. Robertson acknowledged that Chris admitted breaking an iPad on one occasion when getting frustrated by Nicole; however, there were numerous instances where he described defending himself from physical attacks from Nicole. Tr. (Sept. 8, 2020), pg. 36. Additionally, Philip Altes, director of the batterer’s intervention program at Family Builders, testified that Chris was given a domestic violence inventory screening which ultimately determined that Chris would was not an appropriate candidate for the batterer’s intervention program. Tr. (Sept. 10, 2020), pg. 50. Lacy Warren, DHS caseworker responsible for the initial investigation which resulted in domestic violence against Chris being unsubstantiated and threat of harm to the children substantiated against Nicole, testified that she began investigating Chris for a domestic violence referral in 2017. She testified that domestic violence was unsubstantiated, explaining as follows:

I could not verify any of the information I was being told. There were no disclosures made by the children. There was no independent third-party witness that I could find. There were no police reports. There were no photographs of any injuries. There were no neighbors that witnessed hearing anything or seeing anything that was provided to me.

The collaterals that I spoke with that Ms. Saxon provided to me all reported that the information that they had received about the domestic violence or any concerns for sexual abuse told me that

they—the only time they found out about that information was after the divorce had been filed and it was recently told to them. Not told to them at the time that it actually had alleged to have happened.

Tr. (Sept. 10, 2020), pg. 78.

However, witness Cheslie Jackson, who is a friend of Nicole, testified that Nicole had told her about an altercation between her and Chris over an iPad in which he “drug her up the driveway.” Tr. (Sept. 11, 2020), pg. 8. Additionally, Latasha Granillo, the DHS worker who was responsible for reversing the DHS findings against the parties, testified regarding the first DHS investigation that, “It doesn’t appear that they considered or even acknowledged—I’m not even sure if they were aware of the entire history of domestic violence allegations as well against the father that had never been fully and thoroughly investigated up to that point.” *Id.* at 121.

Further, the parties’ own testimony was very contradictory. For example, Chris testified that there was a time where Nicole was sitting in their vehicle in the garage, either on her phone or reading. Tr. (Nov. 9, 2020), pg. 22. Chris stated that he went out to check on her and she got very upset. He testified that she was sitting on the passenger side, she had her feet on the window, and eventually she started kicking the window so hard that it broke. *Id.* Meanwhile, Nicole testified that while she was sitting in the car reading, Chris approached her and was trying to communicate with her. Tr. (Nov 10, 2020), pg. 159. She stated that she would not respond to him and as a result, he tried to pull her out of the car. *Id.* While that was occurring, Nicole testified that her feet had been pressed up against the windshield and that is what caused the damage to it. *Id.*

Chris also testified about one instance where he came home from work and offered to show Nicole his phone in attempt to ease her concerns about his phone activity. Tr. (Nov. 10, 2020), pg. 15. He stated that she inquired about an email, which he opened up, and she claimed it was something else. *Id.* Then, he testified that she tried to grab his phone and he said “no,” so she jumped on his back and ripped three buttons off his shirt. He stated that she started screaming that he had attacked her while he was trying to leave and go back to work. *Id.* Nicole similarly testified that Chris came home and showed her his phone. *Id.* at 203. However, she added that when she opened up the email, he began attacking her for the phone. *Id.*

Chris’s attorney also inquired about whether Nicole had ever ripped a TV off the wall because she was upset with him. Chris indicated that she had. *Id.* at 18. In turn, Nicole’s attorney inquired if she had ever damaged a television set, to which she responded that she had not. *Id.* at 156. There were other instances where Nicole testified about various unwanted sexual advances made by Chris throughout their separation; however, Chris denied ever making such advances. Ultimately, the evidence at trial regarding domestic violence was conflicting and it was within the province of the trial court to determine the credibility of the witnesses and evidence. Therefore, upon review, we find that the trial court properly weighed the evidence, the testimony, and the credibility of the witnesses and its findings as to domestic violence are not contrary to the weight of the evidence.

Hearsay

Next, Nicole argues that the court erred in sustaining various hearsay objections against her attempts to introduce evidence of statements made to third parties in front of the witnesses.

Hearsay is defined as an out of court statement offered for the truth of the matter asserted. 12 O.S. § 2801(A)(3). Hearsay statements are excluded by the court unless otherwise allowed by Oklahoma’s Evidence Code. Nicole argues that two statements her counsel was attempting to elicit were not offered for the truth of the matter asserted; rather, they were being offered for their effect on the hearer, Nicole. Many common “legitimate purposes” are exemplified in the common law including one claimed here—the “effect on the listener.” Oklahoma case law provides little or no analysis of the admission of testimony for its effect on the listener. However, “[e]vidence of an out-of-court statement may be admitted for the non-hearsay purpose of showing its effect on the listener so long as that effect is relevant to an issue in dispute.” *People v. Ramirez*, 13 Cal. 5th 997, 1115, 515 P.3d 1085, 1174 (2022), *reh’g denied* (Oct. 12, 2022), *cert. denied sub nom.* Hence, the effect on the listener must, itself, have a tendency to prove or disprove any disputed fact and constitute admissible evidence. The usual purpose of admitting “effect on the listener” hearsay is to show that the listener took some action relevant to the case, based on the statement they heard.¹³

¹³ See, e.g., *Maes v. Leprino Foods Co., Inc.*, No. 15-cv-00022-WJM-MEH, 2017 WL 1077638, at *4 (D. Colo. Mar. 22, 2017) (statements spoken to the plaintiff could help explain the plaintiff’s perception of the workplace discrimination and subsequent filing of a complaint); *W.J. v. Liquid Transp. Corp.*, 2:17-CV-0191-CG-B, 2018 WL 3432532, at *4 (S.D.

The first statement that Nicole's attorney attempted to elicit through the testimony of Ms. Rudnicki was allegedly made by one of the Saxon children in the presence of Ms. Rudnicki and concerned an allegation of inappropriate sexual touching between the child and Chris. Tr. (March 2, 2021), pg. 27. At the time Chris's counsel made the hearsay objection, Nicole's attorney responded that he was trying to offer the statement to demonstrate "her state of mind and her reaction to hearing something that caused her concern. This is not going to the truth of the matter. It goes to the state of mind and I believe its admissible." *Id.* at 28. Thus, it appears that the statement was offered to show the effect of the statement on Ms. Rudnicki. When making an offer of proof later to the court, counsel stated that the statement was being offered to "go towards" her (Ms. Rudnicki's) reaction to the child's statement. *Id.* at 43.

On appeal, Nicole argues that the effect of this statement, as well as the other hearsay statement addressed below, "supports the reasonableness of Ms. Saxon's responses" to the reports that Chris had sexually abused the children. The argument at trial, however, was that the statements could be introduced to show their effect on *Ms. Rudnicki*, not Nicole. This Court will not consider for the first time those arguments which were not presented to the trial court. *Coulter v. Carewell Corp. of Oklahoma*, 2001 OK CIV APP 36, ¶ 27, 21 P.3d 1078, 1084. Thus, any argument made on appeal regarding the effect of the statements on

Ala. July 13, 2018) (statement not admissible because proponent made no attempt to show what relevant effect the statement had on the hearer).

Nicole or any subsequent action she took as a result of hearing such statements is waived as it was not what counsel argued below.

However, since it appears at the time the objection was made Nicole's counsel properly argued that the statement went to the effect on the listener, Ms. Rudnicki, and not Nicole, we will address the court's decision to sustain the hearsay objection in light of offering the statement for its effect on Ms. Rudnicki. While that might have been the stated purpose of offering the statement, Nicole fails to show that the effect of the child's statements on Ms. Rudnicki was material or relevant to the present case. As stated above, counsel argued during his offer of proof that the introduction of the statement would go towards Ms. Rudnicki's reaction to the statement but does not articulate why her reaction to the statement is relevant to the present case. Relevant evidence tends to make any fact of the case more or less probable; evidence which is not relevant is not admissible. 12 O.S. § 2401-2. Because counsel failed to show at trial and now fails to argue on appeal why the effect on the statement made in the presence of Ms. Rudnicki was relevant, we hold that the trial court properly sustained the objection preventing testimony about the statement allegedly made by the child.

Nicole's counsel attempted to introduce a second hearsay statement purportedly made by one of the children to their nanny "Gladis," which Gladis had then repeated to witness Rudnicki. Counsel argued that its admission was justified to show the effect of the statement on Ms. Rudnicki. Tr. (March 2, 2021),

pg. 38.¹⁴ Counsel argued that this statement should be admitted because it “had an impact on the witness and caused her to do certain things.” *Id.* at 43.¹⁵

While Nicole again argues on appeal that the admission of the statement would show the reasonableness of her own actions regarding reports of her children suffering the abuse, the witness being asked about the statement was Ms. Rudnicki. Thus, we find as we did above that counsel failed to show how the statement affected Ms. Rudnicki and her actions in this case, and also how any such effect is material to this case. Further, if a statement was made by the child directly to Nicole, counsel could have questioned Nicole about this interaction as opposed to Ms. Rudnicki in order to establish that the effect on the listener was

¹⁴ In his later offer of proof, counsel *appears* to argue that child had made the statement in *Nicole's* presence. The offer of proof was somewhat confused, however.

Judge, our offer of proof is that the Gladis, the child—the children’s nanny, at the time, overheard a statement that Ms. Rudnicki overheard. Gladis made the statement that [a child] *in the presence of our client*, Ms. Saxon, made the statement “[child’s alleged statement].”

This had an impact on the witness [Ms. Rudnicki] and caused her to do certain things. We are not offering it for the truth of the matter asserted. We are not offering to prove [child’s alleged statement]. We are offering it for the effect on her [Ms. Rudnicki], which by definition is not hearsay.

Tr. (March 2, 2021), pg. 42-43 (emphasis supplied) (child’s alleged statement redacted by this Court). On balance, we cannot find the alleged statement excluded at trial on March 2, 2021, was purportedly made directly to Nicole. And, as noted below, if it had, the appropriate witness to ask about the statement would have been Nicole.

¹⁵ This chain of statements, evidently that “Gladis said to Ms. Rudnicki that child had said to Gladis” would normally constitute hearsay within hearsay. This is allowed pursuant to 12 O.S. § 2085, “each part of the combined statements [must conform] with an exception to the hearsay rule provided in this Code.” Hence, for this statement to be relevant and admissible, Nicole must show a legitimate purpose for admitting both child’s statement to Gladis and Gladis’s statement to Ms. Rudnicki. This question is complicated, however because statements not admitted for the truth of the matter pursuant to § 2801(3) are technically not hearsay at all, and it is unclear whether the § 2805 requirement of an “hearsay exception” applies when such a statement passes through more than one person.

material. Ultimately, the court did not err by preventing Ms. Rudnicki from testifying about this hearsay statement either.

Recusal of Judge McGuire

Nicole's last allegation of error is that the court erred in denying her two recusal requests that allege Judge McGuire exhibited bias against Nicole throughout trial. Nicole brought two distinct Rule 15 applications to recuse Judge McGuire from the case. Both recusals were denied by the Supreme Court. Nicole now argues that despite the Supreme Court's decision to deny her two requests to recuse Judge McGuire, she is not precluded from further appellate consideration of the issues arising from the premises of the original recusal requests. With this, we agree. *See Miller Dollarhide, P.C. v. Tal*, 2006 OK 27, ¶ 13, 174 P.3d 559, 565 ("We ... hold that our summary denial of a writ of mandamus, even after we have assumed jurisdiction, has no preclusive effect."). Accordingly, we turn to the merits of Nicole's requests, as briefed.

We first note that, aside from mentioning that this Court can review the prior motions for recusal, Nicole does not advance her argument any further in relation to rejected motions for recusal. Thus, it is unclear what error or errors she is alleging occurred regarding the motions for recusal. The court has on many occasions held that judicial review will not be given to issues that receive only superficial treatment in an appellate brief or to assignments of error that lack a reasoned argument or supporting authority. *Cox Oklahoma Telecom, LLC, v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶ 33, 164 P.3d 150, 162.

Nevertheless, even upon review of the prior motions, we find that there was sufficient evidence to show that Judge McGuire need not recuse from this case.¹⁶

Rather than point to evidence in either prior motion for recusal that would demonstrate error, Nicole supplements her argument that Judge McGuire was biased towards her by arguing that during trial the court “exhibited a continuing pattern of open hostility towards” her. *Brief-in-chief*, pg. 35. Specifically, she points out that Judge McGuire originally allowed the parties to present the witnesses out of order to better accommodate the witnesses’ schedules. For example, the parties could begin the day with one witness’s testimony, take a break in that testimony to examine another witness, and then resume the first witness’s testimony. Apparently, this rule was agreed upon by counsel at some point; however, later, Chris’s counsel objected to their arrangement. The court instructed the parties to work out the issue and took a brief recess. Tr. (March 1, 2021), pgs. 10-11. However, the parties were unable to resolve the issue, and the court decided that “we will not interrupt a witness until that witness has been released to start a new one.” *Id.* at 16.

This court has repeatedly held that “the trial judge has great latitude concerning the conduct of the trial, and the trial judge’s conduct of a trial is generally reviewed under the abuse of discretion standard. *Ingram v. Ingram*, 2005 OK CIV APP 87, ¶ 13, 125 P.3d 694, 697 (citing *Andrews v. Independent*

¹⁶ We note that, for the sake of the fullest possible review, we have reviewed the briefing in Case Nos. 116,368 and 118,597, as well as the record in relation to those requests contained in this appeal, and conclude that Judge McGuire was not required to recuse based on any allegation made in either of those cases.

Sch. Dist. No. 57, 2000 OK CIV APP 103, ¶ 13, 12 P.3d 491, 495). Generally, a trial judge has control of the case and has the duty to provide a litigant with sufficient time to make an orderly presentation of their case. *Ingram*, ¶ 18. We cannot find on this record that Judge McGuire abused her discretion by requiring the attorneys to start and finish one witness before bringing in another. She still allowed both parties their opportunity to present their case and cross examine each witness, no witness or attorney was subject to any time constraint, and, notably, her ruling was a direct result of counsels' own failure to reach an agreement. Judge McGuire did not demonstrate bias toward Nicole in making her ruling, and her decision was clearly within her authority.

Additionally, Nicole argues that Judge McGuire's interaction with counsel during the testimony of a DHS caseworker demonstrated that the court "was not a detached and unbiased magistrate." *Brief-in-chief*, pg. 39. Nicole's attorney was asking the witness whether or not the court should consider certain evidence before it. The court advised counsel that it may be best to move along because the court would consider what it deemed to be important. Tr. (Sept. 11, 2020) pgs. 159-60. Counsel offered an explanation for the line of questioning, to which the court responded that she was going down the wrong path. *Id.* As stated above, the "credibility of the various witnesses and weight and value to be given to their testimony is for the jury or for the trial court on waiver of a jury" *Hinds v. Johnston*, 2009 OK CIV APP 54, ¶ 5, 211 P.3d 236, 239. The court did not demonstrate bias by reminding counsel of this principle. Additionally, the court did not prohibit the witness's testimony, nor did she demand counsel move

on; rather, the court advised her that it may not be necessary to continue with that line of questioning, largely in attempt, it appears, to move the already lengthy trial along. Upon review, the record does not support any conclusion that Judge McGuire was required to have disqualified from this case.

CONCLUSION

The court's decision to grant Chris sole custody of the parties' minor children was supported by the clear weight of the evidence; the court did not err in finding Chris had not committed domestic abuse; and Judge McGuire was not required to recuse from this case for any reason. Accordingly, the trial court's judgment is affirmed.

AFFIRMED.

HUBER, P.J., and HIXON, J., concur.

July 29 2024