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

IN RE: L.E.S., E.S., N.S.	:	APPEAL NOS.	C-220430 C-220436
	:	TRIAL NO.	F/12/728 Z
	:		
	:	*JUDGMENT ENTRY*	

This cause was heard upon the appeals, the record, the briefs, and arguments.

For the reasons set forth in the Opinion filed this date, the judgment of the trial court is affirmed.

Further, the court holds that there were reasonable grounds for these appeals, allows no penalty, and orders that costs be taxed under App.R. 24.

The court further orders that (1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and (2) the mandate be sent to the trial court for execution under App.R. 27.

To the clerk:

Enter upon the journal of the court on 9/16/2026

Pursuant to App.R. 30, the clerk is directed to send all parties, or their counsel if represented, a copy of the court's judgment and note such action on the docket.

By: Jennifer Hunsley
Administrative Judge

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	:	TRIAL NO.	F/12/728 Z
	:		
	:	*O P I N I O N*	

Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 16, 2026

Durst Kerridge, Alexander J. Durst, Paul R. Kerridge, Link Nestheide Family Law and *Diana M. Link*, for Appellant/Cross-Appellee,

Hilton Parker LLC, Jonathan L. Hilton, Geoffrey C. Parker, Essig & Evans LLP and *Danielle L. Levy*, for Appellee/Cross-Appellant,

ACLU of Ohio Foundation, Amy R. Gilbert and *Freda J. Levenson*, for Amici Curiae American Civil Liberties Union of Ohio Foundation and National Association of Social Workers,

Frost Brown Todd LLP, Ryan W. Goellner, *Lewis Brisbois, Bisgaard & Smith LLP* and *Jason A. Paskan*, for Amicus Curiae The Nathaniel R. Jones Center for Race, Gender, and Social Justice.

ZAYAS, Judge.

{¶1} This cause is before this court upon remand from the Ohio Supreme Court. *See In re L.E.S.*, 2026-Ohio-1449 ("*L.E.S. II*"). The case arises from cross-appeals from the juvenile court's judgment concerning the care and custody of three children: L.E.S., E.S., and N.S. These children were conceived as a result of nonspousal artificial insemination. Appellant/cross-appellee P.S. is the children's biological mother. Appellee/cross-appellant C.E. was her same-sex partner at the time of conception. The parties entered into a written shared-custody agreement concerning the oldest child, L.E.S. The parties did not enter into a written shared-custody agreement for E.S. or N.S.

{¶2} Below, the juvenile court determined that there was no pathway under Ohio law for C.E. to be recognized as the legal parent of the children consensually conceived by P.S. as a result of nonspousal artificial insemination during their relationship, despite C.E.'s assertion that the parties would have been married at the time of conception had they been legally able to do so. *See In re L.E.S.*, 2024-Ohio-165, ¶ 4 (1st Dist.) ("*L.E.S. I*"). Instead, the trial court found that P.S. relinquished sole custody of the children in favor of shared custody with C.E. under *In re Bonfield*, 2002-Ohio-6660, and *In re Mullen*, 2011-Ohio-3361. *L.E.S. I* at ¶ 4. Each party appealed from the juvenile court's judgment.

{¶3} The question addressed by this court in the first appeal was "whether the same-sex consenting partner of a woman subject to nonspousal artificial insemination can be recognized as the legal parent of the child(ren) conceived as a result of the nonspousal artificial insemination where the parties were never married but would have been at the time of the child(ren)'s conception had they legally been able to do so and have the marriage recognized in their home state of Ohio." *Id.* at ¶

3. This court ultimately reversed the juvenile court's judgment on the basis that "the juvenile court should have first determined whether the parties would have been married at the time of the child(ren)'s conception—but for Ohio's unconstitutional ban on same-sex marriage—before finding that C.E. could not be recognized as a legal parent of the child(ren) under Ohio law." *Id.* at ¶ 4. In doing so, this court declined to address P.S.'s assignments of error pertaining to custody and visitation as premature "[s]ince the juvenile court's judgment on remand could render P.S.'s assignments of error pertaining to custody and visitation moot." *Id.*

{¶4} P.S. appealed from this court's opinion, and the Ohio Supreme Court ultimately reversed this court's parentage determination. *See L.E.S. II* at ¶ 4. The Ohio Supreme Court held that, "[b]ecause the couple was never married, nothing in Ohio's statutory scheme provided an avenue for C.E. to be recognized as a parent of the children." *Id.* at ¶ 2. Accordingly, it remanded the cause to this court to "consider the remaining assignments of error." *Id.* at ¶ 31.

{¶5} The assignments of error that were not addressed in the first appeal were the four assignments of error presented by P.S. in her appeal concerning the juvenile court's judgment on custody and companionship time. *L.E.S. I* at ¶ 4, 37. Below, the juvenile court found that a shared-custody agreement existed for all three children, through either the written agreement or "words and conduct." The juvenile court also found that permanent companionship time with C.E. was both permitted under Ohio law and in the best interest of the children.

{¶6} In the first assignment of error, P.S. argues the juvenile court erred in "abrogating Ohio's well-established legal framework for same-sex custody disputes." In the second assignment of error, P.S. argues that the juvenile court erred in determining that a shared-custody agreement exists for E.S. and N.S. In the third

assignment of error, P.S. argues that the juvenile court erred in awarding C.E. companionship time with E.S. and N.S. without affording any special weight to her wishes. In the fourth assignment of error, P.S. argues that the juvenile court erred in not terminating L.E.S.'s shared-custody agreement. For the reasons that follow, we overrule the assignments of error and affirm the judgment of the juvenile court regarding custody and companionship time.

I. Background

{¶7} In March 2012, P.S. and C.E. filed a joint petition for nonparent custody of L.E.S., who was born in February 2012. The petition indicated that P.S. was the biological mother of L.E.S. and had "contractually relinquished custody" of L.E.S. in the "attached co-custody agreement." P.S. and C.E. also filed a "memorandum in support of petition of shared custody," in which they "jointly" petitioned the court for shared custody of L.E.S. The memo claimed that the juvenile court had jurisdiction to award them shared custody of L.E.S. under *In re Bonfield*, 97 Ohio St.3d 387, 395 (2002). The shared-custody agreement was "accepted and approved" by the juvenile court in May 2012 and entered as the judgment of the court.

{¶8} In October 2018, P.S. filed a motion to terminate or modify the shared-custody agreement. The motion requested that the court "restore" her as the "sole legal custodian" of L.E.S. "due to the fact that [she] is her birth mother." The motion claimed that C.E. did not act "in the best interest of the child and . . . refused to make decisions jointly with [her] for the benefit of the minor child." Alternatively, P.S. requested that the shared-custody agreement be modified to permit her to have "decision-making authority over school, activity, and medical matters and instituting a set parenting time schedule."

{¶9} Shortly after, C.E. filed a "Complaint for Parentage, Custody, and in the

Alternative, Shared Custody, Visitation, or Companionship Rights" regarding L.E.S., as well as E.S. and N.S. who were born in April 2014. The complaint asserted that all three children were conceived via an anonymous sperm donor with C.E.'s "consistent and active involvement, both financially and otherwise, and both parties' written consent." The complaint further asserted that C.E. "helped bathe, nurture, care for, change and develop these children as her own children, with the express agreement of [P.S.] that the parties would jointly raise the children as their own." C.E. also filed a memorandum in response to P.S.'s motion to terminate the shared-custody agreement for L.E.S., arguing that the agreement "clearly established [the parties'] intent to be treated as equal parents of their children."

{¶10} P.S. filed a motion to dismiss and a motion to bifurcate, claiming that C.E.'s request as to E.S. and N.S. was "improperly filed in an existing case number despite the fact that it is a completely new action." The motion asserted, "A Shared Custody Agreement was never prepared or discussed for [E.S. and N.S.] and the issue of their care and custody has never come before a Court until now." The motion further asserted that C.E.'s complaint should be dismissed as no established Ohio law allows her any parental rights for any of the children.

{¶11} P.S. also filed a memorandum in opposition to C.E.'s complaint. The memo asserted that she now recalled that she refused, upon request, to sign a shared-custody agreement regarding E.S. and N.S. Thus, the memo argued that (1) no established law in Ohio would entitle C.E. to parental rights of any of the children, (2) C.E. cannot establish that she contractually relinquished her parental rights regarding E.S. and N.S., and (3) C.E.'s only potential avenue to prevail was for companionship rights under R.C. 3109.012.

{¶12} C.E. filed a memorandum in opposition to dismissal and bifurcation, in

which she argued that bifurcation was a waste of time and judicial resources and P.S.'s request for dismissal was "based solely upon outdated law and equitable principles." Among other things, the motion asserted that the court "should follow the clear directive in *Obergefell v. Hodges*, which affirms and legitimizes family formation by same-sex couples despite the State of Ohio's insistence otherwise - and permit [C.E.] to establish that she is a parent to her children."

{¶13} P.S.'s request for dismissal and bifurcation was denied, and the matter proceeded to trial on December 6 and December 13, 2019, and January 31, September 11, and September 18, 2020. At trial, C.E. presented the testimony of herself, her partner, two friends, and a teacher. P.S. presented the testimony of herself, her partner, her sister, and a friend that dated C.E. after the parties separated. Beyond that, the guardian ad litem ("the GAL") also testified.

{¶14} In January 2021, the magistrate issued a decision. Relevant here, the magistrate denied P.S.'s request to terminate the shared-custody agreement regarding L.E.S. but modified the shared-custody agreement to reflect that L.E.S. should spend the same amount of time with C.E. that E.S. and N.S. do. Further, the magistrate denied C.E.'s request for custody or shared custody of E.S. and N.S. but granted her "companionship rights and visitation" with these children. The magistrate denied C.E.'s request for custody of E.S. and N.S. on the basis that he was prevented from granting shared custody of these children to C.E. under *In re Mullen*, 2011-Ohio-3361. Throughout the magistrate's decision, the magistrate made numerous findings about how it was in the best interest of all three children to spend time with C.E. Additionally, the magistrate expressly found P.S. to be unpersuasive when she testified that she did not understand the shared-custody agreement when she entered into it. He further found that P.S.'s "actions before and after the children were born to be

much more convincing than her testimony at trial." Beyond that, the magistrate stated that he was giving a "great deal of deference and credence to [the GAL's] observations and testimony." The magistrate specifically noted the GAL's testimony that the children were closely bonded to both parties and each other, and each party provided a "loving family environment that was completely safe and appropriate" for the children.

{¶15} Both parties objected to the magistrate's decision. Relevant here, P.S. argued that (1) her wishes should have been given "extreme deference" when it comes to companionship time, (2) the magistrate did not have a legal basis to provide C.E. with an order of permanent companionship time, and (3) the magistrate applied the wrong standard when determining whether to terminate the shared-custody agreement for L.E.S. She ultimately asserted that (1) C.E. "cannot establish that [P.S.] contractually relinquished custody of [E.S. and N.S.], and thus [C.E.] cannot move past the suitability test to determine whether it would be in the best interests of [E.S. and N.S.] for [C.E.] to be awarded custody of them," (2) the companionship time awarded to C.E. should have been consistent with P.S.'s agreement for companionship time—which was for C.E. to have time with all three children every other weekend, during certain holidays, and for certain vacations—where the law does not provide an avenue for C.E. to receive an award of permanent companionship time, and (3) her motion to terminate the shared-custody agreement regarding L.E.S. should have been granted "due to the complete inability of the parties to effectively co-parent [L.E.S.] and upon consideration of the best interest factors, particularly the factor requiring the Court to give extreme deference to [P.S.]'s wishes as the children's only parent."

{¶16} In August 2022, the juvenile court entered a decision modifying the magistrate's decision "consistent with its judgment entry." The juvenile court found

that the magistrate properly determined the factual issues, despite stating "some factual inaccuracies," but found that the magistrate did not "properly apply the law to the facts of the case." Relevant here, the juvenile court found that, "although the magistrate did not err in not ordering shared *parenting*, a review of the record does indicate a shared-*custody* agreement existed for all three children." (Emphasis added.) Regarding L.E.S., the juvenile court found that the parties entered into a valid, written shared-custody agreement. In doing so, the juvenile court expressly deferred to the magistrate's credibility finding regarding P.S.'s testimony that she did not understand the agreement when she entered into it. Regarding E.S. and N.S., the juvenile court found that the parties entered into a shared-custody agreement "through their words and conduct." The court said,

> The parties made a joint decision to have all three children, and when choosing a sperm donor, they chose a donor of Columbian descent to match [C.E.'s] heritage. The parties held themselves out as co-parents of all three children to the community. All three children refer to both parties in a maternal way. Additionally, all three children were initially given the last name [E-S], although [P.S.] had [E.S. and N.S.]'s last name changed to [S] after the couple's relationship ended.
>
> Although the parties did not enter into a written shared-custody agreement for [E.S. and N.S.], [P.S.] did execute a will, a living will, and healthcare power of attorney, and appointed [C.E.] as the guardian if anything happened to [P.S.].

The juvenile court then considered the factors under R.C. 3109.051 and found that the companionship time set forth in the magistrate's decision for C.E. was in the best interest of the children.

{¶17} When addressing P.S.'s objection about the standard for determining when to terminate a shared-custody agreement, the juvenile court found that a shared-custody agreement is "substantially similar" to a shared-parenting agreement "insofar as two individuals share custody of the subject child." Thus, the juvenile court found that "a best interest determination [under *In re Mullen*] for a shared-custody agreement should resemble a best interest determination for shared parenting." Accordingly, the juvenile court looked to R.C. 3109.04(E)(2)(c) and found that a court can "similarly" terminate a shared-custody agreement if it is not in the best interest of the children. The court then applied the factors under R.C. 3109.04(F)(1) and (F)(2) and found that shared custody was in the best interest of the children.

{¶18} P.S. appealed from the juvenile court's decision, and C.E. filed a cross-appeal. As reflected above, C.E.'s cross-appeal was resolved in the first appeal and by the decision of the Ohio Supreme Court in *L.E.S. II*, reversing this court's initial opinion in *L.E.S I*. The assignments of error remaining for determination are the assignments of error raised in P.S.'s appeal.

{¶19} Upon remand from the Ohio Supreme Court, this court entered an order scheduling the matter for oral argument and permitting the parties to file supplemental briefing on the issues raised in the remaining assignments of error, if they wished to do so. P.S. and C.E. both filed supplemental briefing, and the cause is now before this court on the remaining assignments of error and any supplemental arguments within the scope of the original appeal.

II. First Assignment of Error

{¶20} In the first assignment of error, P.S. claims that the juvenile court did not apply "Ohio's well-established legal framework for same-sex custody disputes." She argues that the juvenile court "abrogated" Ohio law and erred to the extent that it

found that the United States Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) ("*Obergefell*"), somehow expanded established Ohio law.

{¶21} We note that, in her supplemental brief, P.S. claims to "sharpen the focus" of her assignments of error in light of the Ohio Supreme Court's parentage determination and argues that the well-established Ohio law she previously relied on in her initial brief is improper where Ohio law fails to "consider the United States Supreme Court precedent providing a higher bar for waiver of fundamental constitutional rights." This argument was not raised in her initial brief and substantially departs from the initial line of arguments raised. Beyond that, there is no indication that P.S. could not have made this argument prior to the Ohio Supreme Court's parentage determination. For these reasons, we decline to address this argument, and any related arguments, as beyond the scope of the original appeal and the Ohio Supreme Court's remand order. *See generally State ex rel. AWMA Water Solutions, L.L.C. v. Mertz*, 2024-Ohio-200, ¶ 19 ("It is axiomatic that an inferior court lacks jurisdiction to depart from a superior court's mandate.").

{¶22} Regarding her initial argument, "[p]arents have a constitutionally protected due process right to make decisions concerning the care, custody, and control of their children, and the parent's right to custody of their children is paramount to any custodial interest in the children asserted by nonparents." *In re Mullen*, 2011-Ohio-3361, at ¶ 11 ("*Mullen*"), citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000), *In re Murray*, 52 Ohio St.3d 155, 157 (1990), and *Clark v. Bayer*, 32 Ohio St. 299, 310 (1877). "A parent's rights to make decisions concerning the care, custody, and control of his or children, however, is not without limits." *Id.* "For example, Ohio does not recognize a parent's attempt to enter into a statutory 'shared *parenting*' arrangement with a nonparent, same-sex partner because the nonparent does not fall

within the definition of 'parent' under the current statutes." (Emphasis added.) *Id.*, citing *In re Bonfield*, 2002-Ohio-6660, at ¶ 35, and R.C. 3109.04. "Rather, a parent may voluntarily share with a nonparent the care, custody, and control of his or her child through a valid shared-*custody* agreement." (Emphasis added.) *Id.*, citing *In re Bonfield* at ¶ 50, and R.C. 2151.23(A)(2). "The essence of such an agreement is the purposeful relinquishment of some portion of the parent's right to exclusive custody of the child." *Id.* "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 *In re Bonfield* at ¶ 48, citing *Masitto v. Masitto*, 22 Ohio St.3d 63, 65 (1986). "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." *Id.*, citing *In re Bonfield* at ¶ 48, 50.

{¶23} Thus, a court must determine three things in order to grant shared-custody rights to a nonparent same-sex partner: (1) that the parent voluntarily shared some portion of the parent's right to exclusive custody with the nonparent, (2) that the nonparent is a proper person to assume the care, training, and education of the child(ren), and (3) that the shared-legal-custody arrangement is in the best interest of the child(ren). *See id.*

{¶24} "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, and *Reynolds v. Goll*, 75 Ohio St.3d 121, 123 (1996). "Likewise, whether a parent, through words and conduct, has agreed to share legal custody with a nonparent is also a question of fact." *Id.* "A trial court

has broad discretion in proceedings involving the care and custody of children." *Id.*, citing *Reynolds* at 124. Thus, the juvenile court's "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. However, whether the trial court applied the correct legal standard is a legal issue that is reviewed de novo. *T.H. v. N.H.*, 2021-Ohio-217, ¶ 49 (10th Dist.), citing *E.W. v. T.W.*, 2017-Ohio-8504, ¶ 13 (10th Dist.).

{¶25} Here, in making its determination of whether a shared-custody agreement existed between the parties, the juvenile court stated, "Although the Ohio Supreme Court's holding in the Mullen case explicitly disallows a Court order [of] Shared *Parenting* involving a non-parent, the Mullen Court does allow for a non-parent to enter into a shared-*custody* agreement." (Emphasis added.)

{¶26} The juvenile court then relied upon two cases as setting forth the governing law: *T.H.*, 2021-Ohio-217 (10th Dist.), and *In re G.R.-Z. and C.R.-Z.*, 2017-Ohio-8393 (9th Dist.).

{¶27} In *T.H.*, the court said that the Ohio Supreme Court confirmed in *Mullen* that a parent, through words and conduct, can agree to share legal custody with a nonparent. *T.H.* at ¶ 58. The court also said that "no court order is required in order for a parent to demonstrate through their words and conduct that they manifested an agreement to share legal custody with a non-parent." *Id.* at ¶ 59.

{¶28} In *G.R.-Z.*, the court similarly discussed *Mullen* and said, "More recently, the Supreme Court of Ohio has recognized that a parent, through mere conduct, may create a contract with a non-parent to share legal custody of the children." *In re G.R.-Z.* at ¶ 8, citing *Mullen* at ¶ 14.

{¶29} Thus, both cases relied upon by the juvenile court recognized that

Mullen was the governing law applicable between the parties. Contrary to P.S.'s assertion, there is no indication that the juvenile court did not apply *Mullen* when entering its decision.

{¶30} Rather, P.S. points to an interim order of the juvenile court that addressed a motion to set aside the magistrate's temporary visitation order during the pendency of the case. In the entry, the juvenile court overruled the motion to set aside where both parties agreed that, under *Rowell*, 2012-Ohio-4313, the court had jurisdiction to order interim companionship time.[1] P.S. argued to the juvenile court in support of the motion to set aside the temporary order that the interim order was not in the best interest of the children where C.E. did not ultimately have standing to receive *permanent* companionship time. The trial court rejected this argument, finding that it "ignored the implications of *Rowell*." It further noted that *Rowell* was released prior to *Obergefell* and noted that cases such as *Rowell* and *Obergefell* showed a "clear disconnect" between the laws of the State of Ohio and the precedent set by higher courts. The court went on to say,

> The issue the Court now faces is whether, and if so when, a non-parent should benefit from the same rights and responsibilities afforded biological parents. The Court finds that when a child is born to a biological parent whom is in a same-sex relationship at the time of the child's birth, and there is sufficient evidence the biological parent planned and intended to raise the child with their partner, the partner is entitled to the same rights under the law as a biological parent for

[1] In *Rowell*, the Ohio Supreme Court held, "In exercising its jurisdiction under R.C. 2151.233(A)(2), a juvenile court may issue temporary visitation orders that are in the best interest of the minor child during the litigation." *Rowell* at syllabus, citing Juv.R. 13(B)(1).

purposes of custody and parenting time.

{¶31} P.S. argues that this shows that the juvenile court relied on *Obergefell* to abrogate well-established Ohio law. She asserts that the juvenile court proclaimed that, upon nothing more than a showing of intent to coparent, same-sex partners of biological parents are "entitled to the same rights under the law as a biological parent for purposes of custody and parenting time," and such a proclamation exceeded its judicial authority, usurped the legislative role, and departed from stare decisis.

{¶32} As stated above, the juvenile court did apply *Mullen* in the entry at issue in this appeal. Thus, P.S.'s assertion that the juvenile court "reaffirmed" this announcement in the shared-custody decision is incorrect. Further, to the extent that P.S. is challenging the juvenile court's decision pertaining to the temporary order, the temporary order terminated upon entry of the juvenile court's ultimate shared-custody decision and the juvenile court applied the correct law in this decision. Thus, any error in the temporary order was harmless.

{¶33} Because the juvenile court applied the *Mullen* framework in its shared-custody decision, we overrule the first assignment of error.

III. Second Assignment of Error

{¶34} In the second assignment of error, P.S. argues that the juvenile court erred and abused its discretion in finding that the parties entered into a shared-custody agreement for E.S. and N.S. based on words and conduct where (1) the court failed to apply the correct legal standard, (2) the juvenile court's conclusion contradicts its own factual findings even when analyzed under the correct legal standard and (3) shared custody is not in the children's best interests.

{¶35} As to the first issue, P.S. argues that the juvenile court only looked to whether the parties shared an intent to coparent together, which is insufficient as a

matter of law under *Mullen* where *Mullen* requires the court to determine whether there was a voluntary relinquishment of sole custody in favor of shared custody. As to the second issue, she argues that there was insufficient evidence to establish a voluntary relinquishment and asserts that the weight of the evidence "conclusively demonstrates the *absence* of any such intent on [P.S.]'s part." (Emphasis in original.) More specifically, she asserts that, in *Mullen*, "Mullen's refusal to sign a shared custody agreement overcame numerous facts that the Court considered indicative of intent to co-parent," and, here, the juvenile court confined its analysis to the intent to coparent rather than P.S.'s refusal to sign a shared-custody agreement. As to the third issue, P.S. argues that the juvenile court's best-interest determination was erroneous where it was not supported by sufficient evidence and against the manifest weight of the evidence.

A. Intent to Coparent

{¶36} P.S. first argues that the juvenile court failed to correctly apply *Mullen* where it applied a "relaxed standard" with respect to whether a shared-custody agreement exists for E.S. and N.S. She claims that the magistrate found that she did *not* voluntarily relinquish any of her rights and that the juvenile court adopted such "factual" finding but nevertheless found that a shared-custody agreement existed. She further claims that the juvenile court disregarded her alleged refusal to enter into a shared-custody agreement for the twins and only required a showing that the parties intended to coparent, which is insufficient under *Mullen*.

{¶37} As an initial matter, the magistrate never made any express factual finding that P.S. did not relinquish any of her rights. Rather, the magistrate found that he was prevented from making such a finding even though he "strongly considered" doing so based on P.S.'s action before and after the children were born (which included

referencing C.E. as a coparent and guardian in the documents she executed at the hospital just prior to the twins being born, holding C.E. out to friends and family as a coparent, and always maintaining some sort of time for the children with C.E. despite no obligation to do so). Thus, the magistrate's decision not to find a voluntary relinquishment was based on a *legal* issue related to the magistrate's interpretation of *Mullen*, not based on any factual finding from the evidence. Thus, the juvenile court did not ultimately adopt any factual finding from the magistrate that P.S. never relinquished any of her rights. Rather, the juvenile court found that the magistrate failed to properly apply the law to the facts.

{¶38} Beyond that, there is no indication that the juvenile court disregarded any refusal to enter into a shared-custody agreement. Rather, the juvenile court agreed with the magistrate that P.S.'s words and action around the time of the children's births constituted the more compelling evidence in this case. This is indicated in its analysis related to the finding of a shared-custody agreement that states,

> The parties made a joint decision to have all three children, and when choosing a sperm donor, they chose a donor of Columbian descent to match [C.E.'s] heritage. The parties held themselves out as co-parents of all three children to the community. All three children refer to both parties in a maternal way. Additionally, all three children were initially given the last name [E-S], although [P.S.] had [E.S. and N.S.]'s last name changed to [S] after the couple's relationship ended.
>
> Although the parties did not enter into a written shared-custody agreement for [E.S. and N.S.], [P.S.] did execute a will, a living will, and healthcare power of attorney, and appointed [C.E.] as the guardian if

anything happened to [P.S.].

{¶39} While the court did consider evidence of the parties' intent to coparent, the Ohio Supreme Court expressly found this to be permissible in *Mullen*. The Court said,

> 'Coparenting' is not synonymous with an agreement by the biological parent to permanently relinquish sole custody in favor of shared legal parenting. "Coparenting' can have many different meanings and can refer to many different arrangements and degrees of permanency. The parties' use of the term, together with other evidence, however, may indicate that the parties shared the understanding of its meaning and may be considered by the trial court in weighing all the evidence.

Mullen, 2011-Ohio-3361, at ¶ 22. Thus, the court was permitted to consider any intent to coparent in combination with the other evidence to determine whether the parties shared an understanding of the meaning of coparenting that was equivalent to a voluntary relinquishment of some of P.S.'s custodial rights.

{¶40} In the documents that P.S. executed at the hospital in anticipation of the birth of the twins, there is evidence of the extent of the parties' understanding of this term. First, in the health-care power of attorney *and* the living-will declaration, P.S. states,

> I consider [C.E.] as my children's co-parent/co-custodian. [C.E.] and I *have an agreement to have and raise the children subject of this POA as equal co-custodians. This document is evidence of that agreement. This document, even if subsequently revoked, is evidence that I have ceded exclusive custody in favor of shared custody with*

[C.E.].

(Emphasis added.) Beyond that, in the will, she states,

> I appoint [C.E.] as the guardian of the person and property of my minor child. I define children as my natural born children, those children adopted by me, and any children I am co-parenting with [C.E.] pursuant to a written *or oral co-custody agreement*."

(Emphasis added.)

{¶41} The juvenile court, and the magistrate, relied heavily on this evidence and found this evidence to be more persuasive than P.S.'s testimony at trial that she never intended to enter a co-custody agreement for the twins. Thus, the juvenile court did not apply any "relaxed standard" with respect to whether a shared-custody agreement exists for E.S. and N.S. as it did not simply rely on any intent to "coparent" that was insufficient under *Mullen*. Rather, it found an intent to coparent that indicated an understanding between the parties that P.S. intended to relinquish some of her rights to exclusive custody of the children. This analysis was proper under *Mullen*. Therefore, we overrule this argument.

B. Sufficiency and Manifest Weight

{¶42} P.S. next argues that the juvenile court's decision was not supported by sufficient evidence and against the manifest weight of the evidence where P.S. refused to sign any formal shared-custody agreement. In doing so, P.S. again argues that the juvenile court confined its analysis to whether P.S. intended to jointly raise the twins with C.E. However, we reject this argument for the same reasons expressed above.

{¶43} P.S. further argues that this case was substantially similar to the facts in *Mullen* and thus should have resulted in the same outcome. First, while there are some factual similarities between *Mullen* and the instant case, we do not agree that the

instant case is *substantially* similar to the facts in *Mullen*. Nevertheless, even assuming for purposes of this opinion that this case is substantially similar to *Mullen* in that similar evidence was presented, it does not automatically follow that the weight of the evidence is the same.

{¶44} In *Mullen*, the Ohio Supreme Court explained "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*, 2011-Ohio-3361, at ¶ 20. The Ohio Supreme Court thus upheld the factual finding of the trial court because there was "competent, credible, and reliable evidence" supporting the trial court's finding "that Mullen did not create an agreement to permanently relinquish sole legal custody of her child in favor of shared legal custody with Hobbs." *Id.*; *see also generally State v. Reillo*, Slip Opinion No. 2026-Ohio-2701, ¶ 24, quoting *State v. Jordan*, 2023-Ohio-3800, ¶ 15 (""[A] challenge to the sufficiency of the evidence attacks its adequacy . . . while a challenge to the weight of the evidence attacks it persuasiveness."""). In other words, the Ohio Supreme Court upheld the decision of the trial court where the evidence presented could support a determination either way, and the trial court, as the trier of fact, was free to weigh the evidence and enter a decision consistent with its assessment of the weight of the evidence. *See generally id.* at ¶ 28 ("The underlying rationale of giving deference to the findings of the [fact-finder] rests with the knowledge that the [fact-finder] is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony."). This type of decision will not be overturned on appeal absent a manifest miscarriage of justice. *See id.* at ¶ 26 ("[U]nder a manifest-weight review, a court ""weighs the evidence and all reasonable inferences, considers the credibility

of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'"").

{¶45} In this case, the juvenile court found that the weight of the evidence showed that a shared-custody agreement exists. A determination of the weight and credibility of the evidence lies with the trial court as the trier of fact. *See id.* at ¶ 28 (""'If the evidence is susceptible to more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.'""). While P.S. asserts that her testimony supports a finding that no shared-custody agreement existed for E.S. and N.S., the magistrate, as the trier of fact, expressly found that P.S.'s "actions before and after the children were born [was] much more convincing than her testimony at trial." The juvenile court acknowledged that the magistrate was best able to view the demeanor of the witnesses and judge the credibility and weight of their testimony and accordingly found that the magistrate properly determined the factual issues.

{¶46} Ultimately, the weight and credibility of P.S.'s testimony was for the trier of fact to determine, and the trier of fact was free to determine that the weight of the evidence lay elsewhere when documentation between the parties at the time of the children's birth undermined P.S.'s testimony that she did not want to enter into a shared-custody agreement for the E.S. and N.S. *See id.* ("'[I]n weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact.'"); *Mullen* at ¶ 15, citing *Masitto*, 22 Ohio St.3d at 66 ("We have consistently held that 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.'"). Accordingly, we overrule this

argument as the juvenile court's decision was supported by sufficient evidence and was not against the manifest weight of the evidence.

C. Best Interest

{¶47} The Ohio Supreme Court has said that, in deciding whether a parent voluntarily relinquished his or her right to sole custody in favor of shared custody, the juvenile court must give "due consideration to all known factors in determining what is in the best interest of the children." *In re Bonfield*, 2002-Ohio-6660, at ¶ 49, citing *In re Adoption of Charles B.*, 50 Ohio St.3d 88 (1990), paragraph three of the syllabus.

{¶48} P.S. first asserts that the juvenile court "strayed" from this standard when it considered "inapplicable statutory factors." In doing so, P.S. seems to agree that the court was permitted to consider the factors in R.C. 3109.04(F)(1) as these are "akin to a codification of the analysis" required by *Bonfield*. Thus, P.S. appears to concede that these factors pertain to a determination of the children's best interest.

{¶49} What P.S. takes issue with is the juvenile court's consideration of the factors in R.C. 3109.04(F)(2) as these factors are said to pertain to determining whether shared *parenting* is in the child's best interest, which is not at issue here. She asserts that consideration of these factors is "error" when applied "outside of the particularly narrow context in which they apply."

{¶50} The juvenile court acknowledged that these factors were not directly applicable to determining whether shared custody was in the best interest of the children as they only applied to shared parenting. Nevertheless, the court noted that a shared-custody agreement is "substantially similar" to a shared-parenting agreement "insofar as two individuals share custody of the subject child." Thus, the juvenile court found that "a best interest determination [under *In re Mullen*] for a shared-custody agreement should resemble a best interest determination for shared

parenting."

{¶51} P.S. asserts that this was in error as, with shared parenting, both parents have paramount parental rights. However, it is unclear how this argument weighs in favor of her argument where the factors in R.C. 3109.04(F)(2) are there for a court to consider when determining whether it is in the best interest of the child(ren) to *limit* one of the parent's custodial rights. Here, the juvenile court was using these factors as guidance to determine the third requirement of *Mullen*, which is whether the shared-custody arrangement is in the best interest of the child(ren). Thus, the court was determining whether it should limit *C.E.'s* custodial rights. The court did not use these factors to determine whether P.S. should lose any custodial rights as this was already determined by the court's analysis under *Mullen* that P.S. voluntarily ceded some of her rights in favor of shared custody. Thus, P.S. was not at risk of losing any rights beyond what she already relinquished. The court did not find that C.E. was a parent, did not treat C.E. as a parent, and did not elevate C.E.'s wishes over P.S.'s wishes. Rather, the court used these factors as guidance to determine what was in *the children's* best interest, and these factors are certainly relevant to determining whether the shared-custody arrangement was in the best interest of the children and the trial court was required to consider "all known factors" in making this determination under *Bonfield*. Therefore, we hold that juvenile court's use of these factors as guidance was not error.

{¶52} P.S. next argues that the juvenile court's best-interest determination was not supported by sufficient evidence and against the manifest weight of the evidence. In making the best-interest determination, the juvenile court found that (1) P.S. wished to terminate shared-custody and for C.E. to have limited time with the children, (2) both parties are closely bonded with the children and one another, (3)

the children are well-adjusted to C.E.'s home, (4) there are no health concerns with C.E., (5) both parties are very likely to honor the court's order, (6) neither party has acted in a manner resulting in an abused or neglected child, (7) neither party plans to establish a residence out of state, (8) the more recent communication between the parties has been more cordial, (9) the parties are able to cooperate and make joint decisions, (10) both parties are capable of encouraging the sharing of love, affection, and contact between the children and the other parent, (11) neither party has a history of kidnapping, (12) the geographic proximity between the parties is not prohibitive, and (13) the GAL recommends shared custody.

{¶53} P.S. does not directly dispute any of these findings. Rather, she asserts that the juvenile court disregarded certain evidence. However, the juvenile court was permitted to determine the weight of the evidence and the juvenile court's findings are ultimately supported by the record.

{¶54} Most notably, in her report, the GAL expressed that the children have "lived between the parties' homes for years, and are well adjusted to the transitions." She said,

> Each party has created a loving and nurturing home for the children, wherein their basic needs are met. Each home provides adequate bedrooms and beds for the children. In addition, the children enjoy in each home more than ample toys and play areas.

The GAL noted how the children have always been treated as one unit and P.S. "has ensured that the twins have an ongoing relationship with [C.E.], although not legally obligated to do so." Notably, the GAL said that P.S. pays for all expenses for the children's tuition, health care, and expenses in her home while C.E. pays for all expenses in her home.

{¶55} The GAL testified that the children see C.E. "as their mother" and appear bonded to C.E. She described the children's demeanor with C.E. as "very bubbly," "vivacious, and playful." She said, "The house is a -- it is a controlled playhouse from top to bottom. Every inch of it is there for the children to play in." She described the house as "not chaotic," but "exuberant." She did not directly observe the children with P.S. as they were playing on a swing at the very end of the yard when she spoke with P.S. She said P.S.'s home is large and nice with a beautiful yard and pool. She opined that the parties are capable of, and have been, making decisions together in L.E.S.'s best interest. To her knowledge, the parties have been following the schedule in the interim order, which includes both weekday and weekend time for C.E. She testified that the children have always been treated as siblings, as a unit, so "it seems important to keep them together." So, she opined that it was in their best interest to remain together. She said, "I see that the parties have been able to raise the kids together, and there's no reason why that shouldn't continue." She agreed that she believed that the parties could communicate and make decisions in the children's best interest. She acknowledged that some of C.E.'s communication close to the breakup could be described as "threatening," but said C.E. was "pretty traumatized" at the time and "in no way has that affected the kids." When asked if she agreed that communication between the parties is, for the most part, respectful, she answered, "Very respectful. Astoundingly so."

{¶56} P.S. argues that the juvenile court ignored the threatening behavior of C.E. However, as shown above, the GAL noted that, while some of the communication at the time of the breakup may have been threatening, this communication did not affect the children and the communication between the parties now is largely respectful. When again asked about potential intimidation from C.E., the GAL said,

> The dynamics of this couple, each side had -- I can see that [P.S.] might have felt a little intimidated by some of the texts early on, but [C.E.] also felt intimidated based upon the legal status that [P.S.] had as biological parent, and so she also felt intimidated because she didn't have any legal rights to the twins, so she felt like she needed to kind of submit to [P.S.]'s decision-making. So each party had some of that going on.

{¶57} The GAL's observations were based on her interactions with the parties and reading emails and texts that the parties presented to her. The juvenile court found that the recent communication between the parties was much more cordial. This finding is consistent with the GAL's testimony. Thus, the juvenile court did not disregard any evidence of threatening behavior. Rather, the juvenile court relied on the more recent interactions between the parties when making its decision.

{¶58} P.S. further asserts that the juvenile court disregarded that P.S. has historically handled the children's medical, educational, and other major decisions. This appears to be a challenge to the parties' ability to make decisions jointly.

{¶59} When asked about which decisions the parties have done well in making together, the GAL testified, "Well, most of it has to do with scheduling. They have divided up the medical care between the parties. It seems that [P.S.] is the person that does more of the decision-making, although there's no reason that [P.S.] wouldn't be able to incorporate [C.E.] in that." When asked to clarify that P.S. has been making all the decisions for the children, she said, "She's been making a lot of them, yes." She agreed this included school, doctors, medical treatment, and activities. When asked to confirm that they really haven't made decisions together in the past two years, she replied, "Just because they haven't doesn't meant they can't." She confirmed the

parties have been making scheduling decisions together. She further testified, "And a lot of times couples will just -- out of habit one parent will be more involved in say taking kids to the doctor routinely, that type of thing. So it's not unusual that one would take more of a leading role on that."

{¶60} The juvenile court found that the parties are certainly able to cooperate and make decisions jointly with respect to the children. This finding is supported by the GAL's testimony that there is nothing that would prevent the parties from making decisions jointly moving forward.

{¶61} Based on the foregoing, we overrule P.S.'s argument as to the juvenile court's best interest finding as the juvenile court's finding is supported by the record.

D. Conclusion

{¶62} For all the foregoing reasons, we overrule the second assignment of error.

IV. Third Assignment of Error

{¶63} In the third assignment of error, P.S. argues that the juvenile court erred in awarding C.E. companionship time without affording special weight to her wishes as a fit parent. She asserts that this requirement exists because there remains a "presumption that fit parents act in the best interests of their children."

{¶64} We note that, in her supplemental brief, P.S. also argues that the juvenile court erred in considering the factors under R.C. 3109.051(D) when determining companionship time. However, this argument was not raised in the initial briefing. Therefore, we decline to address this argument as beyond the scope of the original appeal and the Ohio Supreme Court's remand order. *See generally Mertz*, 2024-Ohio-200, at ¶ 19 ("It is axiomatic that an inferior court lacks jurisdiction to depart from a superior court's mandate.").

{¶65} Regarding her initial argument, all the cases relied upon by P.S. do not pertain to a situation where the parent has voluntarily ceded sole custodial rights in favor of shared custody with a nonparent. Rather, they pertain to attempts by a grandparent to get visitation rights by statute even though the parent has maintained full custodial rights. *Compare Grant v. Martin*, 757 So.2d 264, 266 (Miss. 2000) ("[W]e adopt a new standard and hold that a natural parent who voluntarily relinquishes custody of a minor child, through a court of competent jurisdiction, has forfeited the right to rely on the existing natural parent presumption. A natural parent may reclaim custody of the child only upon showing by clear and convincing evidence that the change in custody is in the best interest of the child. This new rule not only reaffirms that the polestar consideration in all child custody cases is the best interest of the child, but also gives the chancellor the authority to make a 'best interest' decision in voluntary relinquishment cases without being fettered by the presumption in favor of natural parents which applies in other child custody cases."); *see also generally Masitto*, 22 Ohio St.3d at 66 ("Under the law pronounced in *Perales*, [52 Ohio St.2d 89], if a parent contracts away custody rights of his minor child, he may be considered to have forfeited his right to custody of such child, and may accordingly *be found to be unsuitable* for custody." (Emphasis added.)).

{¶66} P.S. conceded at oral argument that, if the juvenile court was awarding companionship time under a shared-custody agreement, then there was "no harm no foul." Because the juvenile court made this exact determination, we overrule the third assignment of error.

V. Fourth Assignment of Error

{¶67} In the fourth assignment of error, P.S. argues that the juvenile court applied the wrong legal standard when deciding whether to terminate the written

shared-custody agreement for L.E.S., which "led to a result that was contrary to L.E.S.'s best interest." In doing so, she makes the same arguments pertaining to the juvenile court's best-interest determination that were presented under the third issue of the second assignment of error. We overrule these arguments for the same reasons already expressed above and therefore overrule the fourth assignment of error.

VI. Conclusion

{¶68} For all the foregoing reasons, we overrule the assignments of error and affirm the judgment of the juvenile court.

Judgment affirmed.

KINSLEY, P.J., and **MOORE, J.,** concur.