REL: August 30, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2170980

Trista Lynn Rogers

v.

Robert Rogers III

Appeal from Franklin Circuit Court
(DR-14-900007.01)

DONALDSON, Judge.

Trista Lynn Rogers ("the mother") appeals from a judgment of the Franklin Circuit Court ("the trial court") modifying the judgment divorcing her from Robert Rogers III ("the father") and granting the father sole physical custody of

G.L.R. and L.A.R. ("the children"). We reverse the judgment and remand the case with instructions.

Facts and Procedural History

This is the third time the parties have been before this court from the underlying modification action. In Rogers v. Rogers, 260 So. 3d 840 (Ala. Civ. App. 2018), we set forth the following facts and procedural history of the modification action:

> "On June 17, 2015, the trial court entered a judgment divorcing the parties. The divorce judgment, which incorporated an agreement reached by the parties, granted the parties joint legal and physical custody of the children.[1] On June 14, 2016, the father filed a complaint seeking modification of the divorce judgment to obtain sole legal and physical custody of the children, child support from the mother, and a finding of contempt against the mother for noncompliance with the divorce judgment. The mother filed an answer and a counterclaim seeking sole legal and physical custody of the children, child support from the father, and a finding of contempt against the father. A guardian ad litem was appointed to represent the children's interests.
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> "On July 1, 2016, the mother filed a motion requesting that Judge Terry Dempsey, who had been presiding over the case, recuse himself. On July 5, 2016, the trial court entered an order denying the

[1]Pursuant to the settlement agreement, the divorce judgment granted the mother final decision-making authority over health-care and medical issues regarding the children.

> motion to recuse. On July 11, 2016, the mother filed a petition for a writ of mandamus to this court seeking an order directing Judge Dempsey to recuse himself. This court denied the mother's petition, holding that, even though Judge Dempsey had previously recused himself in the parties' divorce action, the present action was a separate case and the mother had not demonstrated a clear legal right to the recusal of Judge Dempsey in this action. Ex parte Rogers, 218 So. 3d 859, 867 (Ala. Civ. App. 2016).
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> "On August 2, 2016, the parties reached a mediated agreement regarding the father's visitation pending the outcome of the case. The parties did not reach an agreement as to the other issues in the case.
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> "On March 23, 24, and 27, 2017, the trial court conducted a hearing in which it received ore tenus testimony. At the time of the hearing, G.L.R. was seven years old and L.A.R. was five years old."

260 So. 3d at 841-42.

The mother lives in Decatur, and the father lives in Russellville with his current wife and stepchild. During the ore tenus hearing, the father testified that, since the parties' divorce, G.L.R. had been hospitalized for 9 to 10 days and eventually had been diagnosed with systemic juvenile idiopathic arthritis. In her testimony, the mother described juvenile idiopathic arthritis as an autoimmune disease that affects G.L.R.'s joints and could affect her liver, spleen, and eyes. The mother further testified that, if the disease

remains untreated, G.L.R. could develop pain and stiffness, which could affect her ability to walk, and inflammation, which could cause blindness, and that there was the possibility that G.L.R. could die from the disease. According to the father, G.L.R. had been receiving infusion treatments at Vanderbilt University Medical Center in Nashville, Tennessee, every two weeks but, he said, about two months before the trial the treatments stopped controlling her disease and the doctors were trying to obtain approval for her to take a drug that required daily injections.

The father testified that the divorce judgment granted the mother decision-making authority over medical decisions. According to the father, once she was diagnosed with the disease, G.L.R. had to have her eyes screened as early as possible. The father testified that G.L.R. did not have her eyes checked for over two months after being advised to do so because the mother did not schedule an appointment. In her testimony, the mother attributed the two-month delay to her not being able to find an eye doctor she thought was suitable and having to ask a doctor at Vanderbilt University Medical Center for a referral.

The father testified that, regarding G.L.R.'s participation in playing for a softball team, G.L.R.'s doctor had told the mother and him that it was good for G.L.R. to be active and to let pain be the guide in the level of activity but recommended against overhand throwing motions. The father testified that at times G.L.R. complained of pain and that the mother did not follow the doctor's instructions about letting pain be the guide. The mother testified that, after G.L.R. had complained of pain in her shoulder on one occasion, she talked to G.L.R. and told her that she needed to attend her softball practice because the team was depending on her but also stated that G.L.R. did not have to play if she was hurting during the practice. The mother further testified that G.L.R. stated that she did not want to practice and that she responded by telling G.L.R. that she had to try.

The father testified that, on February 28, 2017, G.L.R. had appointments with doctors at Vanderbilt University Medical Center for testing and treatment and that, in the morning on the next day, she had an appointment for further treatment. The mother testified that she had driven G.L.R. to Nashville on February 28, 2017, for her appointment that lasted until

8:00 p.m., that she drove them to her residence afterward, and that she drove them back to Nashville for G.L.R.'s morning appointment. According to the father, he had notified the mother that he was staying overnight in Nashville between the two days of appointments and offered to let G.L.R. stay with him. The father testified that there had been only 15 hours between the appointments and that he had not wanted G.L.R. to unnecessarily spend 4 to 5 hours between these appointments traveling. The mother testified that the traveling had been fine and that L.A.R. becomes worried when G.L.R. goes to her medical appointments. In her testimony, the mother agreed that she and the father had previously reached an agreement regarding the father's visitation to avoid less travel time for the children and that, with her condition, G.L.R. can become stiff during long automobile rides.

At the time of the trial, G.L.R. attended an elementary school in Decatur and L.A.R. was enrolled in a preschool in Decatur. The father testified that, during his visitation periods, he would drive about an hour to transport the children to and from school. When the divorce judgment was entered, the mother worked in a school near the elementary

school and the preschool. The mother's employment was not renewed in 2016, however, and she obtained another job with the Huntsville school system for about a month. She then began working for a high school in Moulton in September 2016. According to the testimony of the mother and the father, the mother's workplace was a 25-30 minute drive from the children's schools. The mother employed a high-school student to take the children to school several days a week.

The father testified that he was concerned about the distance between the mother's workplace and the children's schools in the event of an emergency, but he acknowledged that no emergency had occurred so far. The father testified that, if he were to have custody of the children, he would enroll the children in schools in Russellville. He testified that G.L.R. could attend a school where his wife worked, which is located less than a 10 minute drive from his house and is near his workplace. The father testified that the children had lived in Russellville before and that, if they attended school in Russellville, the children would have friends and know other children from church and social events.

When asked if, in the event that the father had physical custody, she would like the opportunity to watch either child if the child was sick, the mother testified:

> "Well, it just depends. If the child is sick and they're at home in their pajamas, I mean, asking them to ride in a car for an hour and a half because I assume he wouldn't want me in his home. I mean, asking a child to ride for an hour and a half so I could watch them for six hours, and then put them back in a car for another hour and a half, I don't know that that's exactly feasible."

The father testified that, since the entry of the divorce judgment, he has worked at a bank in Russellville and that he still lives in the same residence. According to the father, he has 10 or more family members in the area who could help in the case of an emergency with the children. Cynthia Ham, the mother's mother, testified that she helped care for the children and that her mother and the mother's two brothers could also help with the children.

The mother testified that her contract had not been renewed with the Decatur school system because she had not obtained a master's degree by May 2016. As to her leaving her job with the Huntsville school system, the mother testified: "I wanted to get closer to my girls and, frankly, find a job that better fit me." The mother admitted that, even after her

contract with the Decatur school system had not been renewed, she had indicated on job applications that she had never had her contract not renewed. The mother testified that she has notified her current employer of G.L.R.'s diagnosis, and, according to the mother, her employer stated that it would accommodate her when she needed to take time off for G.L.R.'s appointments or for an emergency.

The father testified that he and the mother do not have a good relationship. The mother and the father agreed in their testimony that they do not communicate well regarding the children. The mother testified that they do not work well together for G.L.R.'s treatment despite a statement by one of G.L.R.'s doctors indicating that they did.

The mother testified that, in college in 2005, she told people, including the father, that she had cancer to gain attention. The mother testified that the father found out that she had lied about having cancer during their divorce proceedings.

The father testified that he was concerned about the mother's relationship with J.C. and with J.C.'s being around the children. The father testified that J.C. is currently

employed as a teacher and baseball coach at a school in Lawrence County. In his testimony, the father admitted that he knew that the mother and J.C. had dated while the parties' divorce proceedings were ongoing and that he was aware at that time that J.C. had had a past history of substance addiction. J.C. and the mother were both teachers at the same school in Decatur. The mother testified that they met in August 2014 and that J.C. disclosed his prior drug addiction to her shortly afterward. According to the mother, she learned that, before he went to a rehabilitation clinic eight or nine years before the trial in this matter, J.C. had been addicted to painkiller pills, that he had started out abusing prescription medication, and that he had then started buying drugs off the street. The mother testified that they began dating in October 2014 while her divorce proceedings with the father were ongoing. The mother denied that J.C. had resided in her home or had moved things into her residence but then she admitted that J.C. had a fish tank in her home and that he received mail at her residence.

The mother testified that she and J.C.'s relationship ended in May 2015 but that they rekindled their relationship

in early December 2016. The mother denied that they cohabited but admitted that J.C. received mail at her residence after their relationship was renewed. Ham testified that the mother and J.C. became engaged on New Year's Eve. The mother testified that she became engaged in early January 2017 but that she could not remember the date. According to the mother, J.C. was still going to meetings and talking to his sponsor regarding his drug addiction. During examination by the children's guardian ad litem, the mother's testimony included the following:

> "Q. And you told me on Wednesday night you've got the number to his sponsor in case you need it; correct?
>
> "A. Correct.
>
> "Q. So, obviously, if that was something that you needed the number to a sponsor, this is something that he still deals with?
>
> "A. I mean, as you said yourself, once an addict, always an addict. You've got to follow the steps and stay on top of it."

The mother further testified that, in early December 2016, J.C. informed her that he was taking Percocet as prescribed for back pain, that she told him that she did not want him around the children while taking Percocet, and that, after

their discussion, J.C. began taking Suboxone. In her testimony, the mother acknowledged that the United States Food and Drug Administration has issued similar warnings against driving, using machinery, or participating in other activities requiring alertness, until those activities could be performed safely, for people taking either Percocet or Suboxone.

The mother testified that, after he had been issued a subpoena to testify at trial, J.C. told her that he had relapsed in his drug addiction two years before. According to the mother, she then broke off their engagement. Regarding whether she would resume a relationship with J.C., her testimony ranged from stating that she was done with him to stating that she did not know what the future would hold.

Regarding the issue of child support, the mother submitted a Child-Support-Obligation Income Statement/Affidavit ("CS-41 form"). The father did not submit a CS-41 form or present testimony as to his income.

At the conclusion of the trial, the trial court requested a report from the guardian ad litem as follows:

> "[The guardian ad litem]: And I will let the Court know, and I discussed this with both counsels last week, I have started writing a recommendation, actual formal recommendation based only off of

things that were put into court. I don't think it's fair that any party when I'm G.A.L. to put in additional things that they're wanting in court.

"I did not want to finalize that because I knew [the mother] wanted to put on her case this morning and I didn't feel like it would be fair for me to finalize that until I heard from her.

"THE COURT: Why don't you give me a written report.

"[The guardian ad litem]: Okay.

"THE COURT: Let's do that. Give me a written report.

"[The guardian ad litem]: And I can do that based solely off of testimony from court.

"THE COURT: I think testimony and any other [relevant] thing. I guess you can't put hearsay in there, obviously.

"[The guardian ad litem]: I'm telling you there was no physical issues in either parent's home whatsoever. That there wasn't anything that caused me any great concern for either parent.

"THE COURT: All right. Would you like to do a written report?

"[The guardian ad litem]: I would like to submit, and I can submit that probably within 24 hours.

"[The mother's counsel]: Judge, I would object to that. I mean, you've heard the testimony, and she's had limited contact in [the mother's] home, and it's been clear to me that she's not been objective in this case. And I'm not trying to be disrespectful or anything, but it certainly sounds

to me in the questioning it's all been against her. It hasn't been from an objective point of view at all.

THE COURT: Well, I'll overrule your objection, and I think she's objective. I think she's an officer of the Court. The evidence is what the evidence is, and you just have to go that way.

"[The mother's counsel]: Just for the record['s] sake. Judge, I understand, but the objection would be based on the number of visits. I think she's been in the home more with [the father] --

"[The father's counsel]: Judge, there's no testimony to that and I think the guardian [ad litem] can clear that up on the record.

"[The guardian ad litem]: There was one extra visit, she knew I was going that Wednesday that I talked to her outside of the court -- I mean, outside of deposition right outside of [the father's counsel]'s office. At any point she could have called me over the weekend and I would have probably tried to make some arrangements.

"I'm sorry, I didn't want to expose the children to another stomach virus. Also, I've said in court and breaks that my nephew has fallen deep after being exposed to us this weekend.

"[The mother's counsel]: And I think that's correct. I'm not --

"[The guardian ad litem]: They make it sound like I did anything -- I do take offense to that, and it doesn't have any bearing off of my recommendation, but I can make a recommendation to this Court as to what I truly feel is in the best interest of these children.

"THE COURT: That's what I want.

> "[The mother's counsel]: And I was present when all of that conversation took place, too, about coming to visit and these kind of things, but just for the record, we object to the report.
>
> "THE COURT: Your objection is denied, and I'll look for the report."

On April 17, 2017, almost a month after the conclusion of the trial, the guardian ad litem filed an 18-page report to the trial court over the objection of the mother. A certificate of service indicates that the report was served on all the parties. In the report, the guardian ad litem recommended that the trial court grant the father sole physical custody of the children with visitation to the mother and order the mother to pay child support to the father.

On April 21, 2017, the mother filed a motion to strike the guardian ad litem's report. On April 23, 2017, the trial court entered an order denying the mother's motion to strike.

On May 3, 2017, the trial court entered a judgment that granted the father sole physical custody of the children with visitation to the mother. In the judgment, the trial court stated the following findings:

> "3. Has there been a material change in circumstances? The answer is 'yes'. The most concerning change in circumstances for the Court is the mother's relationship with [J.C.]. The mother

knew that [J.C.] was a drug addict when she entered into a relationship with him. She knowingly exposed her two minor children to him. The Court understands that people recover from addiction and lead good clean lives. However, the evidence in this case shows that [J.C.] still uses Suboxone. Suboxone is one method of treating drug addiction but is a substance itself. It affects a person's ability to operate machinery and a person's mental state. It may be a lesser evil for the person to use this substance to avoid other substances, however, the use still puts the two minor children at risk.

"4. The mother testified she broke up with [J.C.] a couple of days before trial. Her testimony was that she found out he relapsed in 2015. This compelled her to end their relationship. The Court does not believe this is the reason. She already knew [J.C.] was an addict and was still taking Suboxone. A relapse two years ago is not likely to end the relationship. A more likely answer is that the mother understood any trier of fact would be troubled that she was currently engaged to [J.C.] and about to marry him and expose her children to him on an everyday basis.

"5. Putting the lack of good explanation for the breakup in context with other testimony is important. The mother testified she lied about having cancer to gain sympathy and attention. This was done over the course of several years. The Court does not comprehend this. At a very minimum, it makes the Court disbelieve the mother when her reason for the sudden breakup does not make sense. The Court would be very concerned that the mother would resume this relationship after the Court enters its order.

"6. There have been other material circumstances since the decree as well. The oldest child, [G.L.R.], now suffers from systemic juvenile idiopathic arthritis. She receives extensive

> treatment at Vanderbilt Hospital. It appears that the treatment is not going as well as hoped. Testimony indicates the father has a job that allows flexibility in making sure [G.L.R.] makes her appointments and receives the best medical care possible. The mother does not have quite the same flexibility in her job as a teacher.
>
> "7. Another material change in circumstances is that the mother is no longer employed with the Decatur School system. She is now employed with the Moulton School system. Initially, the mother was able to transport her children to their school and daycare because of the close proximity to her work. She is now no longer able to do so. She has to employ a teenager to transport her children to school in the morning. Both parents are quite a distance away if an emergency arises with the children. The father testified that he has flexibility in transporting the children to school. He has a support network that would ensure that the children's needs could be met easily, if he chooses the school.
>
> "8. Considering that there has been a material change, then is it in the best interest of the children for a modification? The answer is 'yes'. The father has had extensive contact with the minor children. Any disruption in the children's lives would be overcome by the advantages of the stable loving home that he can provide. It's not that the mother does not have a good loving relationship with the minor children. She does. However, the advantages of the stable home of the father outweigh the disadvantages that have been discussed earlier regarding the material change in circumstances."

The trial court denied all other relief not addressed in the judgment, but, noting that the father had not submitted a CS-

41 form, the trial court reserved ruling on the issue of child support.

On May 31, 2017, the mother filed a "Motion to Alter, Amend, or Vacate [the May 3, 2017,] Judgment." Among other arguments, the mother argued that she did not have the opportunity to cross-examine the guardian ad litem about the findings in the report that she had filed.

On June 23, 2017, the father filed a motion requesting an order establishing a child-support obligation for the mother. The father attached a CS-41 form and a copy of a paycheck stub to his motion.

On August 7, 2017, the trial court entered a judgment establishing the mother's monthly child-support obligation to be paid to the father in the amount of $699. The trial court also entered an order on the same day that denied the mother's May 31, 2017, motion.

On September 5, 2017, the mother filed a motion to alter, amend, or vacate the judgments entered on May 3, 2017, and August 7, 2017. Among other arguments in her motion, the mother argued that she was denied due process because she was not afforded the opportunity to rebut the information in the

father's CS-41 form, that insufficient evidence supported the change in custody, and that her due-process rights were infringed when the trial court considered the guardian ad litem's report without providing the mother the opportunity to cross-examine the guardian ad litem. The mother requested a hearing on the motion. On September 8, 2017, the trial court entered an order denying the mother's September 5, 2017, postjudgment motion, without having conducted a hearing on the motion.

The mother filed a timely notice of appeal to this court. On March 30, 2018, we issued the opinion in Rogers. We held that the denial of the mother's postjudgment motion without a hearing was not harmless error because, we held, she "was deprived of the opportunity to dispute newly submitted evidence in the father's CS-41 form." 260 So. 3d at 845. We pretermitted discussion of other issues raised on appeal, reversed the judgment, and remanded the cause to the trial court. Id.

On June 12, 2018, the mother filed another motion seeking the trial judge's recusal. In that motion, the mother argued, among other assertions, that findings in the judgment were

improperly based on the trial judge's personal experiences and extrajudicial facts. Later that day, the trial court entered an order denying the motion to recuse.

On June 13, 2018, the trial court conducted a hearing on the mother's postjudgment motion. On July 2, 2018, the trial court entered an order, stating:

> "The parties announced they had a settlement concerning child support. It is therefore Ordered that [the mother] shall pay the amount of $410.00 a month to [the father] for child support. These payments shall begin on January 1, 2019.
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> "After consideration of oral arguments at the hearing it is hereby Ordered that the remainder of [the mother's] Motion to Alter, Amend or Set Aside is denied."

The mother filed a timely notice of appeal to this court. As her issues on appeal seeking reversal of the judgment, the mother argues that the trial judge improperly considered extrajudicial facts, that there was insufficient evidence presented to support the change of custody, and that the trial judge should have granted her motion to strike the guardian ad litem's report or her request to cross-examine the guardian ad litem.

We have jurisdiction pursuant to § 12-3-10, Ala. Code 1975. The mother filed a motion to incorporate the record from Rogers, which we granted.

Discussion

The mother contends that the judgment must be reversed because of the trial court's consideration of the guardian ad litem's report. The record indicates that the trial court appointed the guardian ad litem soon after the initiation of the case. The order appointing the guardian ad litem did not specify any specific duties for the guardian ad litem to perform, nor did it specify the role of the guardian ad litem in the case. The record indicates that the guardian ad litem engaged in various activities, including visiting the homes of the parties, observing the interactions between the parties and the children within the home setting, examining witnesses at trial, and making statements and arguments during the trial. At the conclusion of the trial, the trial court requested a report from the guardian ad litem, and almost a month later the guardian ad litem submitted an 18-page report. The mother filed a motion to strike the report, arguing, among other things, that the guardian ad litem had "exceeded her

role improperly by offering opinions and position statements which invade the province of the Court," by exhibiting biased conduct, by acting as the finder of fact, and by basing her recommendation, at least in part, on facts and circumstances not before the trial court. The trial court denied the motion, stating that "[it] will not consider any part of [the guardian ad litem's] report that may invade the province of the Court." The mother then argued the following in her September 5, 2017, postjudgment motion:

> "The Court also improperly considered a report filed by the Guardian Ad Litem after the trial was completed. Said report contains 'findings' and assertions that were not testified to at trial and should not be considered as evidence. The Mother was given no opportunity to cross-examine the Guardian ad Litem about these findings and the report was never admitted into evidence, thereby depriving the Mother the right to object. The Mother filed a Motion to Strike said report. The motion was erroneously denied. The Mother's procedural due process rights were impinged upon by the admission and consideration of this report. ..."

The trial court denied the mother's postjudgment motion. On appeal, the mother argues that the trial court denied her the right to cross-examine the guardian ad litem regarding aspects of the report and that portions of the guardian ad litem's

report invaded the province of the trial court despite the trial court's statements otherwise.

In Ex parte R.D.N., 918 So. 2d 100, 105 (Ala. 2005), our supreme court held that a parent had "the right to contest the accuracy, substance, impartiality, and quality of the guardian ad litem's recommendation to the court concerning the custody of the child." Although a trial court may consider "the report and recommendation of any expert witnesses or other independent investigator" as a factor in its determination of custody of a child, Ex parte Devine, 398 So. 2d 686, 697 (Ala. 1981), "'[t]he fundamental principle is that the decision of a court must be based on evidence produced in open court lest the guarantee of due process be infringed.'" Ex parte R.D.N., 918 So. 2d at 104 (quoting Ex parte Berryhill, 410 So. 2d 416, 418 (Ala. 1982)).

In Ex parte R.D.N., the guardian ad litem made recommendations to the trial court ex parte. The supreme court noted that the guardian ad litem's recommendation was not presented as evidence in open court and that the recommendation "was based on information that may or may not have been properly presented to the court." 918 So. 2d at 104.

Consequently, the parties did not have the opportunity to respond with evidence and arguments in support of or rebuttal to the guardian ad litem's recommendation. The supreme court further noted that the guardian ad litem's recommendation conflicted with "the recommendation of its court-appointed professional in evaluating the custody issue." Id. at 105. Therefore, the supreme court held that, based on the circumstances in that case, the trial court's "reliance upon [the guardian ad litem's] recommendation, given to the court as part of an ex parte communication, violated the fundamental right of the father to procedural due process under the Alabama and United States Constitutions." Id. at 105. This court has distinguished the holding in Ex parte R.D.N. from the holding in cases in which a guardian ad litem's recommendation was not made ex parte and the parties were afforded the opportunity to challenge the recommendation in open court. See, e.g., Ex parte Gentry, 238 So. 3d 66, 81 (Ala. Civ. App. 2017), and Cooper v. Cooper, 160 So. 3d 1232, 1243 (Ala. Civ. App. 2014).[2]

[2]We additionally note that a timely objection to the improper submission of a guardian ad litem's recommendation is required to preserve the issue for appeal. See K.U. v. J.C., 196 So. 3d 265, 273 n.3 (Ala. Civ. App. 2015).

In M.B. v. R.P., 3 So. 3d 237 (Ala. Civ. App. 2008), the guardian ad litem served all the parties with a recommendation regarding child custody after the final hearing. The guardian ad litem, however, had not been present at the final hearing. Noting that the recommendation was not based on evidence elicited at the final hearing, we held that, even though the recommendation had not been submitted ex parte, the juvenile court's consideration of the recommendation under the circumstances deprived the father in that case of his right to contest the recommendation. See also Driggers v. Driggers, 240 So. 3d 602, 606 (Ala. Civ. App. 2017) (concluding "that the trial court's denial of the father's postjudgment motion injuriously affected the father's substantial rights" because "[t]he father was not given an opportunity to challenge the guardian ad litem's report, findings, impartiality, or recommendations").

In this case, as in M.B. v. R.P., the guardian ad litem did not submit her report containing her recommendation to the trial court ex parte because she served all the parties with the report. Unlike the guardian ad litem in M.B. v. R.P., the guardian ad litem in this case was present during the whole

trial and participated by asking witnesses questions. Both parties had the opportunity to present and controvert evidence at the trial. Therefore, to the extent that the report merely referred to evidence presented at trial, the mother had the opportunity to present evidence supporting or controverting the information in the guardian ad litem's report. The mother, however, contends that the guardian ad litem's report contained more than the evidence presented at trial. In her brief on appeal, she asserts that the guardian ad litem's "report is replete with opinion, conjecture, and speculation that should have been explored through cross-examination." The father argues that the trial court properly considered the guardian ad litem's report because, he says, issuing such a report was a proper function in her role as guardian ad litem in the case and the trial court stated that it would not consider matters that would "invade the province of the court."

We recognize that the role of a guardian ad litem in a domestic-relations case involving custody is not always clear. Guardians ad litem in such cases have recently been described as having an "ill-defined and hybrid role" with the potential

for conflict among their various functions. See Ex parte J.G., [Ms. 1170064, March 22, 2019] ___ So. 3d. ___, ___ (Ala. 2019) (Bolin, J., dissenting, joined by Wise, J.)(questioning the actions of a guardian ad litem in filing a petition for custody and describing at length some of the potential for abuse of the role). In some circumstances, we have held that the parties have a right to cross-examine the guardian ad litem, and, in other circumstances, we have held they do not. Compare M.B. v. R.P., 3 So. 3d at 250 ("Ex parte R.D.N., [918 So. 2d 100 (Ala. 2005)], does not require that the parties be allowed to cross-examine the guardian ad litem regarding the basis for his or her recommendation."), and Jones v. McCoy, 150 So. 3d 1074, 1081 (Ala. Civ. App. 2013) ("In M.B.[v. R.P., 3 So. 3d 237 (Ala. Civ. App. 2008)], this court held that a party had been prejudiced because the juvenile court considered a recommendation of a guardian ad litem who did not attend the trial and, thus, did not consider the evidence presented at the trial when making the recommendation and, further, had not been subject to cross-examination."). In Jones v. McCoy, we stated that "the role of the guardian ad litem is to zealously advocate for the best interests of the

child" but also noted that "'judges often appoint guardians ad litem, who serve as court investigators and take on a quasi-expert role in rendering opinions concerning the best interest of the children.'" 150 So. 3d at 1080 (quoting Steven N. Peskind, Evidentiary Opportunities: Applicability of the Hearsay Rules in Child Custody Proceedings, 25 J. Am. Acad. Matrimonial Law 375, 396 (2013)). Accordingly, to analyze the issue presented by the mother, we think it is helpful to consider three possible roles of a guardian ad litem in a custody case: as counsel, as an investigator and/or fact witness, and as an opinion witness.

A guardian ad litem serving in the role of counsel may participate in the litigation through activities associated with the role of an attorney, such as examining witnesses and presenting arguments to the court in the same manner as counsel for a parent. See, e.g., S.D. v. R.D., 628 So. 2d 817, 818 (Ala. Civ. App. 1993) ("The guardian ad litem correctly observes that he is an officer of the court and is entitled to argue his client's case as any other attorney involved in the case. § 15-12-21(b), [Ala.] Code 1975."). A guardian ad litem serving in the role of counsel represents a child but owes a

duty to the appointing court. Jones v. McCoy, 150 So. 3d at 1080 ("'[T]he [guardian ad litem] "owes his or her primary duty to the court and not to the child-client alone."'" (quoting M. Boumil, C. Freitas & D. Freitas, Legal and Ethical Issues Confronting Guardian Ad Litem Practice, 13 J.L. & Fam. Stud. 43, 45-46 (2011), quoting in turn John Crouch, The Child's Attorney: New ABA Rules Clarify the Roles of Lawyers Who Represent Children, 26 Fam. Adv. 31, 34 (2004))). Accordingly, a guardian ad litem acting in his or her role as counsel is not necessarily an advocate for a child's desires if those wishes are not in the child's best interests. Id. Importantly, when a guardian ad litem serves in the role of counsel, the guardian ad litem's arguments are not evidence from which a trial court may rely to determine a custody issue. Ex parte Dean, 137 So. 3d 341, 347-48 (Ala. Civ. App. 2013) (holding that guardian ad litem's input on a custodial matter was an argument of counsel and, therefore, not evidence upon which a trial court may rely in making a ruling). Although a guardian ad litem serving as counsel may present evidence to a trial court through witnesses and or exhibits, acting in this role does not permit the guardian ad litem to

be the source of evidence. Any "report" or other written submission of a guardian ad litem serving solely in the role as counsel would be similar to a trial brief or memorandum of any attorney for a party to the case that does not interject facts or opinions not presented in open court. Therefore, a party would not have a right to call a guardian ad litem serving in the role of counsel as a witness. See, e.g., King v. State ex rel. Stallworth, 408 So. 2d 515, 516-17 (Ala. Civ. App. 1981)(affirming trial court's denial of request to call attorney prosecuting the case to testify as a witness for impeachment purposes).

A guardian ad litem may also be appointed in a role that authorizes or requires the guardian ad litem to obtain facts to be presented to the trial court. See Jones v. McCoy, supra. In this role, a guardian ad litem may perform tasks such as visiting the parties' homes and observing the interaction between a parent and a child or obtaining information about or from a child's school or health-care provider. As a fact witness, the guardian ad litem must have personal knowledge of the subject matter of the testimony. See Rule 602, Ala. R. Evid. (except for expert witnesses, testimony must be based on

personal knowledge). In the event that the guardian ad litem presents facts to the trial court, parties generally are entitled to call the guardian ad litem as a witness or otherwise examine the guardian ad litem as with any other fact witness, including subjecting the guardian ad litem to cross-examination. Although a guardian ad litem could be asked to prepare a report or other written materials, we note that Rule 43(a), Ala. R. Civ. P., provides, in relevant part:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided in these rules. ... However, nothing contained in this paragraph shall prevent the parties from taking testimony by agreement in a manner different from herein provided unless the court limits or prohibits such agreed manner."

In some cases, guardians ad litem have been permitted to give opinions to the trial court in custody cases. See, e.g., Ex parte Gentry, 238 So. 3d at 71 (noting that "the children's guardian ad litem had stated his opinion that visitation would be in the best interest of the two younger children and that the guardian ad litem had stated that denial of that visitation 'may[,] has been, or will be likely harmful to that relationship and the children'"); Cooper v. Cooper, 160 So. 3d at 1237 (observing that "the guardian ad litem noted that she

had been involved in the case only for a week but that, in her opinion, the children were in a stable home environment living with the wife"); and T.O.B. v. C.J.B., 986 So. 2d 433, 437 (Ala. Civ. App. 2007) (guardian ad litem submitted report of findings and opinions on issue of child custody). Under our Rules of Evidence, witnesses may give a lay opinion under Rule 701 or an expert opinion under Rule 702. We note that a trial court may appoint an expert witness under Rule 706. Upon a proper objection being raised, the opinion of the guardian ad litem may not be admissible if he or she is not qualified to give the opinion or for other reasons. Because the opinion of the guardian ad litem is evidence if admitted, it could be considered by the trial court in its decision. Accordingly, parties generally are entitled to call the guardian ad litem as a witness or otherwise examine the guardian ad litem as with any other opinion witness, including subjecting the guardian ad litem to cross-examination. Again, any report or written material of a guardian ad litem that contains opinions would not, unless otherwise agreed to by the parties, obviate the requirement that evidence must be presented in open court. We observe that we have serious doubts about the

qualifications of many guardians ad litem to give opinion testimony in a custody case and whether such testimony is admissible under Rules 701 or 702, but that issue may be properly analyzed on a case-by-case basis as in any trial.

The possible roles of a guardian ad litem--serving as counsel for a child's best interests, as a fact witness, and as an opinion witness--are not necessarily mutually exclusive. But no matter the role, a guardian ad litem must not usurp a trial court's authority or be "delegated any special authority of the court." K.D.H. v. T.L.H., 3 So. 3d 894, 900 (Ala. Civ. App. 2008) (citing Moody v. Nagle, 811 So. 2d 546, 548 (Ala. Civ. App. 2001)); see Marsh v. Smith, 67 So. 3d 100, 106 (Ala. Civ. App. 2011)(holding that a trial court may consider but is not bound by a recommendation made by a guardian ad litem). We do not think the appointment of a guardian ad litem should be a perfunctory part of each domestic-relations case involving custody. To the contrary, the appointment of a guardian ad litem should be made when the trial court determines that the fulfillment of one or more roles of a guardian ad litem is needed for the case.

In this case, the guardian ad litem's report included a review of legal authorities, her conclusion as to the relevant legal standard for custody in the case, an account of testimony produced at trial, an account of her observations and impressions from her visits to the parties' homes, the expression of opinions based on her investigations and evidence produced at trial, a discussion of the issues, her recommendation on custody and child support, and a proposed custodial and visitation arrangement. We find that the guardian ad litem not only acted as counsel representing the children's best interests but also provided information to the court as an investigator and opinions on the parties and their interactions with the children. As a result, the guardian ad litem's report was also a source of evidence and the guardian ad litem's recommendation on custodial issues was based, at least in part, on both factual and opinion evidence not produced in open court. The mother did not object to the qualifications of the guardian ad litem to express an opinion, but the mother argued against the guardian ad litem's providing evidence to the trial court without having the opportunity to question the guardian ad litem. Therefore, the

denial of the mother's request to examine the guardian ad litem as a witness deprived the mother of "the right to contest the accuracy, substance, impartiality, and quality of the guardian ad litem's recommendation to the court concerning the custody of the child." Ex parte R.D.N., 918 So. 2d at 105; see M.B. v. R.P., supra. Furthermore, the denial of the mother's request to cross-examine the guardian ad litem to challenge the contents of her report or to strike the report violated "[t]he fundamental principle ... that the decision of a court must be based on evidence produced in open court lest the guaranty of due process be infringed." Ex parte Berryhill, 410 So. 2d 416, 418 (Ala. 1982).

We next consider whether the mother was prejudiced by the submission of the guardian ad litem's report. In its judgment, the trial court stated that "[t]he most concerning change in circumstances ... is the mother's relationship with [J.C.]." The trial court acknowledged that "people recover from addiction and lead good clean lives" but concluded that J.C.'s use of Suboxone poses a danger to the children. In her report, the guardian ad litem stated that "[J.C.], in mid-December 2016, began taking Suboxone, a medication used to treat opioid

(narcotic) dependency/addiction." In addition to offering her opinion that a material change in circumstances had occurred from, in part, "the mother['s] [engaging] in a relationship with a drug addict," the guardian ad litem also stated: "Further, it is my opinion that the mother's choice in who she is introducing the children to as her possible mate in life is not appropriate and poses a risk of danger to the minor children."

There is no evidence of what detrimental effects resulted from J.C.'s addiction, and the mother's testimony indicated that J.C.'s last active use of illegal drugs was a relapse in his addiction two years before the trial. Although evidence was provided indicating that the label for Suboxone warns: "Do not drive, use machinery or do any activities that requires alertness until you are sure you can perform such activities safely," there was no evidence presented to show that J.C. could not drive safely while using Suboxone. Without the guardian ad litem's report, the only evidence regarding the purpose of J.C.'s Suboxone use was the mother's testimony that J.C. used Suboxone to treat his back pain. Therefore, the trial court's finding that the mother's relationship with J.C.

put the children at risk was not sufficiently supported by evidence aside from the evidence in the guardian ad litem's report. We conclude that the trial court relied on evidence in the guardian ad litem's report, resulting in prejudice to the mother's rights.

Furthermore, the guardian ad litem's report contains evidence pertaining to other grounds for the trial court's decision, and we note that the record contains conflicting evidence regarding many of the issues in this case. Despite the trial court's expression of an intent not to consider material that should not be considered, we cannot determine what portion of the guardian ad litem's report the trial court considered to be inappropriate for consideration. To the contrary, it is evident that the report was considered in its entirety because the trial court refused to strike it. As a result, we reverse the trial court's judgment and remand the case for a new trial. See S.J.R. v. F.M.R., 933 So. 2d 352, 362 (Ala. Civ. App. 2004)(reversing judgment modifying custody and remanding the cause for a new trial when trial court was presumed to have considered inadmissible evidence).

Conclusion

For the foregoing reasons, we reverse the judgment and remand the cause to the trial court for a new trial and proceedings consistent with this opinion. We pretermit discussion of the issues raised on appeal regarding whether the trial judge improperly considered extrajudicial facts and whether the evidence was sufficient for the change in custody.

The mother's request for attorney fees on appeal is denied.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Hanson, J., concurs.

Thompson, P.J., concurs specially.

Edwards, J., concurs in the judgment of reversal but dissents from the instructions on remand, with writing, which Moore, J., joins.

THOMPSON, Presiding Judge, concurring specially.

I concur with the main opinion. I write specially to note that Trista Lynn Rogers ("the mother") did not challenge on appeal of the final judgment in this case the trial court's denial of her motion to recuse. Although this court had previously denied the mother's petition for a writ of mandamus on that issue, see Ex parte Rogers, 218 So. 3d 859, 867 (Ala. Civ. App. 2016), that ruling did not bar reconsideration of that issue on appeal. See Curvin v. Curvin, 6 So. 3d 1165, 1170 (Ala. Civ. App. 2008) (considering on appeal a challenge of a trial judges's refusal to recuse himself after this court had denied a petition for a writ of mandamus on that issue); and Jadick v. Nationwide Prop. & Cas. Ins. Co., 98 So. 3d 5, 9 (Ala. Civ. App. 2011) ("'"[T]he denial [of a petition for a writ of mandamus] does not operate as a binding decision on the merits." R.E. Grills, Inc. v. Davison, 641 So. 2d 225, 229 (Ala. 1994).'" (quoting Ex parte Shelton, 814 So. 2d 251, 255 (Ala. 2001))). Accordingly, this court has not addressed the issue of any perception of bias on the part of the trial judge. See, e.g., Ex parte George, 962 So. 2d 789, 791 (Ala. 2006) ("The test is whether '"facts are

shown which make it reasonable for members of the public[,] or a party, or counsel opposed to question the impartiality of the judge."'" (quoting In re Sheffield, 465 So. 2d 350, 355-56 (Ala. 1984), quoting in turn Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982))).

This court is reversing the judgment and remanding the cause for a new trial. Therefore, the mother is not barred from raising an allegation of bias, if warranted, in the new trial on remand.

EDWARDS, Judge, concurring in the judgment of reversal but dissenting from the instructions on remand.

Although I agree with the main opinion that the Franklin Circuit Court ("the trial court") erred by admitting into evidence the report of the guardian ad litem, I do not agree that a new trial is warranted in the present case. In my opinion, the evidence presented at the trial does not support the trial court's judgment awarding Robert Rogers III ("the father") sole physical custody of the parties' children. Thus, I would reverse the judgment of the trial court and remand the cause for the entry of a judgment denying the father's petition to modify custody.

The father and Trista Lynn Rogers ("the mother") were divorced by a judgment entered by the trial court on June 17, 2015. The 2015 divorce judgment incorporated the parties' settlement agreement, which awarded the father and the mother joint custody of their two children. The father filed his petition to modify the 2015 divorce judgment on June 14, 2016, less than one year after the entry of the 2015 divorce judgment.

Because the parties had joint custody of their children, in order to be entitled to a modification of the custody

provisions of the 2015 divorce judgment, the father was required to establish "'a material change of circumstances of the parties since the prior [judgment], which change of circumstances is such as to affect the welfare and best interest of the child or children involved.'" Watters v. Watters, 918 So. 2d 913, 916 (Ala. Civ. App. 2005) (quoting Ponder v. Ponder, 50 Ala. App. 27, 30, 276 So. 2d 613, 615 (Civ. 1973)). We have explained that "[t]he alleged material changes must 'affect[] the best interest and welfare of the child such that a change in the existing custodial arrangement [is] warranted[]' and [that] mere tangential effects on the child are not sufficient to make changes in circumstances material. Watters, 918 So. 2d at 916." R.D.F. v. R.J.F., 271 So. 3d 831, 835 (Ala. Civ. App. 2018). We have previously described "[t]he 'best interests and welfare' standard [as] focus[ing] on the particular child's adjustment to his present environment, i.e. home, family, school, and community." Hovater v. Hovater, 577 So. 2d 461, 465 (Ala. Civ. App. 1990).

The evidence at trial established that the parties' children were happy in their current environment and that they had adjusted well to the joint-custody arrangement instituted

under the 2015 divorce judgment. No evidence suggested that the children were not doing well academically or that they suffered socially, as they had friends at both the mother's and the father's homes. The parties had altered the provisions of the 2015 divorce judgment relating to the children's custody slightly by agreement during the pendency of the modification action, and both parents appeared to find the adjusted joint-custody schedule beneficial to the children. Both parents have a suitable home and have been good parents to the children, the older of which had been diagnosed with a serious autoimmune disease after the filing of the modification action. The evidence suggested that the parents did not communicate well and that a few small incidents involving failures to communicate about doctor's appointments for emergent illnesses or accidents and a few issues with swapping the older child's medication had occurred. However, the evidence further suggested that, despite their animosity toward one another, they had both been involved in the older child's care and had participated in that child's frequent medical appointments.

The mother's relationship with J.C. formed the basis of the trial court's conclusion that a material change of circumstances had occurred. The evidence involving the mother's on-again/off-again relationship with J.C. revealed that the mother had been seeing J.C. during the pendency of the 2015 divorce action. The father was aware of the mother's relationship with J.C. at that time, although he indicated at the trial on the modification petition that he did not know for certain whether that relationship was continuing when the parties entered into the settlement agreement. In addition to his knowledge of the mother's relationship with J.C., the father admitted that he had been informed during the pendency of the divorce action that J.C. had had a drug addiction in the past. The father admitted that he had been given this information by the mother of J.C.'s child, C.C., and that C.C. had described J.C. as "a good dad." The father further admitted that he had no evidence indicating that J.C. was, at the time of the trial of this action, abusing any drug or medication or that J.C. had had a negative impact on the parties' children.

The mother testified that she and J.C. had ended their relationship in June 2015 but had resumed it in December 2016, at which time, the mother testified, J.C. had discussed with her whether to stop taking a narcotic pain medication, which had been prescribed by his physician for back pain, and to try a medication known as "Suboxone" instead. According to the mother, J.C. had not, however, revealed to the mother that he had suffered a "relapse" in June 2016 until days before the trial of this action. The mother testified that she had ended her relationship with J.C. once he revealed his failure to disclose his relapse.

I cannot conclude that the mother's relationship with J.C. was a material change of circumstances warranting a modification of custody in the present case. The mother had been involved with J.C. at the time of the parties' divorce, and, although the mother and J.C. had ended their relationship for the first time around the time of the entry of the 2015 divorce judgment, the father was aware of the existence of the relationship between the mother and J.C. and of J.C.'s status as a recovering addict, but was not certain of the status of the mother's relationship with J.C., at the time the parties

entered into their settlement agreement. Thus, the mother's relationship with J.C. does not appear to be a change from the circumstances existing at the time of the entry of the 2015 divorce judgment.

Furthermore, the evidence does not reveal how the mother's resumption of her relationship with J.C. in 2016 affected the best interest and welfare of the children. At best, the evidence demonstrated that J.C. might have operated a vehicle occupied by one child on one occasion and might have been left alone with one child on two occasions; however, no testimony indicated that the children were exposed to any harmful consequence on any of those occasions. Although the trial court was concerned about J.C.'s addiction, noting "once an addict, always an addict," and his use of Suboxone, the evidence relating to the use of Suboxone was merely that it might cause drowsiness and impair one's ability to drive or operate machinery. No evidence indicated that J.C.'s ability to drive or to perform other tasks was affected by his use of Suboxone or that J.C. had been abusing that substance or any other substance during the time that the children might have been in his presence.

Nearly all the "evidence" regarding Suboxone was not, in fact, evidence. As the main opinion concludes, any information regarding J.C. or his use of Suboxone contained in the guardian ad litem's report was improperly considered by the trial court. In addition, the statements made by counsel regarding the intended use of Suboxone in his questioning were not evidence. Parker v. Parker, 10 So. 3d 567, 569 (Ala. Civ. App. 2008) (quoting Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005)) ("'The unsworn statements, factual assertions, and arguments of counsel are not evidence.'"). Finally, the trial court's comments regarding an addict's propensity for relapse or about the use of Suboxone as a substitute for other addictive drugs were derived from extrajudicial sources. See S.A.M. v. M.H.W., 261 So. 3d 356, 366 (Ala. Civ. App. 2017) (reversing a custody judgment because the juvenile court relied on facts derived from his own experience instead of legal evidence). Therefore, none of that "evidence" could properly form the basis of a conclusion that the mother's relationship with J.C. affected the best interest and welfare of the children.

Because I find no evidence supporting a conclusion that a material change of circumstances affecting the best interest and welfare of the children had occurred, I would reverse the judgment of the trial court and remand the cause for the entry of a judgment denying the father's modification petition.

Moore, J., concurs.