[Cite as *Allen v. Allen*, 2010-Ohio-475.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

KEVIN ALLEN,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0070**
- vs -	:	
DEBRA L. ALLEN,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 2004 DR 141.

Judgment: Reversed and remanded.

Debora K. Witten, 465 Robbins Avenue, Niles, OH 44446 (For Plaintiff-Appellee).

Christopher Sammarone, 20 West Federal Street, Ste. M-6, Youngstown, OH 44503 (For Defendant-Appellant).

Patrick E. Parry, Urban Co., L.P.A., 434 High Street, N.E., P.O. Box 792, Warren, OH 44482 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Debra L. Allen, appeals the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, overruling her objections to and adopting a Magistrate's Decision, which denied her Motion for Contempt and Other Relief. For the following reasons, we reverse the decision of the court below and remand the cause for further proceedings consistent with this Opinion.

{¶2} Debra and plaintiff-appellee, Kevin Allen, were married in Warren, Ohio, on October 23, 2002. One child was born as issue of the marriage: Nicole D. Allen (dob July 15, 2003).

{¶3} On April 7, 2004, Kevin filed a Complaint for Divorce.

{¶4} On February 2, 2005, the domestic relations court issued a Judgment Entry, granting the parties a divorce and incorporating their Separation Agreement and adopting the parties' Share Parenting Agreement.

{¶5} On March 1, 2007, Debra filed a Motion to Terminate Shared Parenting and Reallocate Parental Rights and Responsibilities.

{¶6} On April 5, 2007, Kevin filed a Motion seeking to terminate the Shared Parenting Agreement.

{¶7} On April 12, 2007, Debra filed a Notice of Intent to Relocate to Rincon, Georgia.

{¶8} On July 10, 2008, the domestic relations court issued a Judgment Order terminating the Shared Parenting Agreement and designating Kevin as Nicole's residential parent.

{¶9} July 17, 2008, Debra filed a Motion for Contempt and Other Relief, in which she alleged Kevin had denied her companionship with Nicole and sought a change in Nicole's custody.

{¶10} On August 15, 2008, the domestic relations court issued a Judgment Order, appointing Attorney Patrick Parry as guardian ad litem for Nicole.

{¶11} On November 20 and 24, 2008, hearings were held on Debra's Motion. A third day of hearings was scheduled for April 9, 2009.

{¶12} On January 8, 2009, Attorney Parry filed a Motion for Continuance, on the grounds that he would be unable to attend the April 9, 2009 hearing.

{¶13} On January 14, 2009, the domestic relations court denied Attorney Parry's Motion and ordered him to submit a written report prior to the hearing.

{¶14} On April 8, 2009, Attorney Parry filed his written report, recommending that Kevin retain custody of Nicole.

{¶15} On April 9, 2009, the final hearing on Debra's Motion was held.

{¶16} On May 15, 2009, the family court magistrate issued his Magistrate's Decision, denying Debra's Motion. The magistrate stated that Attorney Parry "was present for all of these hearings and granted the opportunity to question the parties and witnesses." The magistrate referred several times to Attorney Parry's written report, noting "that the GAL did not find an active attempt to prevent any companionship for either party in this case during his active investigation." The Magistrate's Decision further ordered Debra to pay child support in the amount of $332.58 plus 2% retroactive to July 10, 2008.

{¶17} On May 26, 2009, Debra filed a Motion to Set Aside Magistrate's Decision (Objections). Debra complained that the Magistrate's Decision was against the weight of the evidence and that the factual evidence contradicted the findings contained in the guardian ad litem report. Debra also argued that, since Attorney Parry was not present at the April 9, 2009 hearing, "he was unable to hear the testimony of the witnesses or to be cross-examined on his report and recommendation."

{¶18} On June 1, 2009, the domestic relations court issued a Judgment Order, overruling Debra's objections and adopting the magistrate's recommendations.

{¶19} On June 30, 2009, Debra filed her Notice of Appeal. On appeal, she raises the following assignments of error:

{¶20} "[1.] The trial court erred as a matter of law in relying upon the report of the Guardian ad Litem of the child without providing appellant an opportunity to cross examine the Guardian ad Litem thereby violating her procedural right to due process."

{¶21} "[2.] The trial court erred as a matter of law by allowing the Guardian ad Litem to submit his report on the day of the hearing and not formally filing his report until after the conclusion of the contested custody trial."

{¶22} "[3.] The trial court erred as a matter of law by considering the recommendation of the Guardian ad Litem in its decision to grant custody of the minor child to Appellee when the Guardian ad Litem's report was not admitted into evidence as an exhibit in accordance with Rule 48 of the Ohio Rules of Superintendence."

{¶23} "[4.] The trial court committed plain error by adopting a Magistrate's Decision that contains blatant and obvious errors of law and other defects on the fact of the Magistrate's Decision."

{¶24} "The standard of review generally applied when reviewing a court's adoption of a magistrate's decision is abuse of discretion." *DeFrank-Jenne v. Pruitt*, 11th Dist. No. 2008-L-156, 2009-Ohio-1438, at ¶8.

{¶25} As an initial matter, Kevin asserts that Debra has not preserved this issue for review. Kevin notes that only one volume of transcripts, that of the April 9, 2009 hearing, is included in the record.[1] It is Kevin's "recollection that the appearance of the

1. Regarding the partial transcript, a note in the Appellant's Brief states: "Transcripts from the 11-20-08 and 11-24-08 hearings were not available to Appellant. The trial court did not keep the digital recordings for which [sic] a transcript could be prepared. A transcript of the hearing on 4-9-09 has been filed." The failure of the trial court to preserve digital recordings does not relieve the appellant from complying with App.R. 9, setting for the procedure when the record is incomplete.

Guardian ad Litem was waived" and Debra "elected to proceed irrespective of the presence of the Guardian ad Litem." Moreover, the limited record before this court does not provide evidence that Debra objected to Attorney Parry's absence. We disagree.

{¶26} In the absence of a transcript, the reviewing court must presume the regularity of the proceedings below. Such an absence hinders, but does not preclude all appellate review. This court has held that when a party objecting to a Magistrate's Decision fails to provide a transcript of the proceedings, "she may still properly appeal issues of law related to the findings of fact." *Tierney v. Tierney*, 11th Dist. No. 2008-T-0104, 2009-Ohio-2438, at ¶22 (citations omitted).

{¶27} Kevin's suggestion that Debra waived the presence of Attorney Parry at the final hearing is not credible. At both of the hearings in 2008, Attorney Parry was present. That he intended to be present for the April 9, 2009 hearing is evident from the fact that he moved the court to continue the hearing in light of a scheduling conflict for that day. Thus, the question of Attorney Parry's presence at the 2009 hearing was not an issue in 2008. Moreover, Debra duly filed objections to the Magistrate's Decision based on Attorney Parry's absence and the lack of opportunity to cross-examine him. In the transcript of the final hearing, the magistrate states, contrary to his written decision, that "the Guardian ad Litem is not present." For these reasons, the issue is properly before us for review.

{¶28} We will consider Debra's arguments out of order.

{¶29} Debra asserts that Attorney Parry's performance violated several provisions of Ohio's Rules of Superintendence regarding guardians ad litem. Rule 48 states that its provisions "shall apply in all domestic relations and juvenile cases in the courts of common pleas where a court appoints a guardian ad litem to protect and act in

the best interest of a child." Sup.R. 48(A). "A guardian ad litem shall appear and participate in any hearing for which the duties of a guardian ad litem or any issues substantially within a guardian ad litem's duties and scope of appointment are to be addressed." Sup.R. 48(D)(4). "In domestic relations proceedings involving the allocation of parental rights and responsibilities, the final report shall be filed with the court and made available to the parties for inspection no less than seven days before the final hearing unless the due date is extended by the court." Sup.R. 48(F)(2).

{¶30} In the present case, Attorney Parry did not attend the final day of hearings and did not make his written report available to the parties until the day before the final hearing.

{¶31} Such violations of the Rules of Superintendence, however, are not grounds for reversal. The "Rules of Superintendence are designed (1) to expedite the disposition of both criminal and civil cases in the trial courts of this state, while at the same time safeguarding the inalienable rights of litigants to the just processing of their causes; and (2) to serve that public interest which mandates the prompt disposition of all cases before the courts." *State v. Singer* (1977), 50 Ohio St.2d 103, 109-110. "They are not the equivalent of rules of procedure and have no force equivalent to a statute. They are purely internal housekeeping rules which are of concern to the judges of the several courts but create no rights in individual defendants." *State v. Gettys* (1976), 49 Ohio App.2d 241, 243. Accord *State v. Navedo*, 11th Dist. No. 2007-L-094, 2008-Ohio-2324, at ¶18, citing *State v. Kowalski*, 11th Dist. No. 93-P-0057, 1995 Ohio App. LEXIS 1089, at *16-*17.

{¶32} Next, Debra argues that Attorney Parry violated the Local Rules of the Trumbull County Family Court, specifically the guardian ad litem's in-court duty to

"[a]ctively participate in all Court proceedings" and "[m]ake reports to the Court and be subject to cross-examination as to those reports." Rule 35(F)(i) and (iv). Debra also cites the Rule that "[t]he report [containing the final recommendations of the GAL in cases involving the allocation of parental rights and responsibilities] shall be subjected to cross examination by the parties." Rule 35(G)(B)(ii) (sic).

{¶33} As with the Rules of Superintendence, violations of local court rules do not typically constitute grounds for reversal. "It is well-settled that the enforcement of Local Rules is a matter within the discretion of the court promulgating the rules." *Dvorak v. Petronzio*, 11th Dist. No. 2007-G-2752, 2007-Ohio-4957, at ¶30 (citations omitted).

{¶34} Debra's final argument regarding Attorney Parry's absence at the final hearing is that she was denied due process by not having the opportunity to cross-examine him regarding the content of his written report. Debra relies on the Ohio Supreme Court decision in *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, which held: "In a permanent custody proceeding in which the guardian ad litem's report will be a factor in the trial court's decision, parties to the proceeding have the right to cross-examine the guardian ad litem concerning the contents of the report and the basis for a custody recommendation." Id. at syllabus.

{¶35} The question before this court is whether *Hoffman*'s holding applies in custody proceedings outside of the context of the termination of parental rights. We hold that it does.

{¶36} This court has, on at least one occasion, applied *Hoffman* in another context. In *Schill v. Schill*, 11th Dist. No. 2002-G-2465, 2004-Ohio-5114, where a child's custody was at issue in a divorce proceeding, we held that "the trial court's consideration of the guardian's finding, without providing the parties opportunity to

cross-examine the guardian, violated due process and was an abuse of discretion." Id. at ¶59.

{¶37} In *In re Gruber*, 11th Dist. No. 2007-T-0001, 2007-Ohio-3188, this court reached a similar conclusion, holding that, "[b]y failing to hold an evidentiary hearing *** and instead relying entirely on the ex parte communication of the GAL, we find that the trial court abused its discretion." Id. at ¶21. The decision in *Gruber*, however, did not rely directly on *Hoffman*, but rather on *Schill* and R.C. 2705.05 (requiring a hearing in contempt proceedings). Further indirect support for the application of *Hoffman* outside of the context of termination of parental rights is found in dicta of this court in *In re Seitz*, 11th Dist. No. 2002-T-0097, 2003-Ohio-5218: "The rule has emerged that a court errs when it receives testimony in the form of a guardian ad litem's report, but does not allow the parties to cross-examine the guardian ad litem regarding the contents of their report." Id. at ¶27, citing *Hoffman*, 2002-Ohio-5368, at syllabus; cf. *Burnip v. Nickerson*, 7th Dist. No. 07-CO-42, 2008-Ohio-5052, at ¶65 ("[t]he court's consideration of a GAL's report does not violate any party's due process rights as long as the party had an opportunity to cross-examine the GAL on issues raised in the report") (DeGenaro, J., concurring).

{¶38} The cases where this court has declined to apply *Hoffman* are distinguishable factually. In *Bates-Brown v. Brown*, 11th Dist. No. 2006-T-0089, 2007-Ohio-5203, we held that the failure to provide for the cross-examination of the guardian ad litem was not erroneous where "there was no indication that the trial court's decision was based upon the GAL report." Id. at ¶25. Likewise, in *Jackson v. Herron*, 11th Dist. No. 2003-L-145, 2005-Ohio-4046, we rejected the due process argument where the "guardian ad litem did not make any report or recommendation regarding *** custody";

"the guardian contributed nothing to the factual record"; and "there [wa]s no indication that the trial court's decision was affected in any way by the guardian's involvement." Id. at ¶21. In contrast with *Bates-Brown* and *Jackson*, the magistrate in the present case expressly relied upon and cited to the guardian ad litem's written report.

{¶39} Finally, support for the application of *Hoffman* outside of the termination of parental rights context can be found in the *Hoffman* decision. While acknowledging that "the issue of cross-examination of guardians ad litem in permanent custody proceedings is one of first impression in this court," the court cited to many decisions from other states that concluded, in non-terminal custodial contexts, "that due process concerns dictate that parties should be given the opportunity to cross-examine persons who prepare investigative reports for the court's consideration." Id. at ¶18 et seq. *Hoffman*, in turn, has been cited by courts in other jurisdictions in support of the general proposition that due process requires that parties in custodial disputes have the opportunity to cross-examine the guardian ad litem. See *Kelley v. Kelley* (Okla.2007), 175 P.3d 400, 2007 OK 100, at ¶9 ("[t]he overwhelming majority of the states addressing the parental right to cross-examine a guardian *ad litem* have held either expressly, or by necessary implication, that an order or decree awarding or modifying custody must be based on evidence heard in open court in observance of the requirements of due process").

{¶40} Based on the foregoing, the domestic relations court erred and abused its discretion by taking the guardian ad litem's report into consideration without allowing the parties an opportunity to cross-examine the guardian. This error does not, however, require the complete reversal of the lower court's judgment. Rather, on remand, the court/magistrate need only hold a further hearing to allow the parties the opportunity of

cross-examination before entering its judgment. See *In re Kangas*, 11th Dist. No. 2006-A-0010, 2006-Ohio-3433, at ¶38 ("[t]he due process violation *** can be cured by remanding this matter to the trial court to hold an evidentiary hearing on the guardian ad litem's report").

{¶41} Debra's final argument is that the Magistrate's Decision contained an "error evident on the face of the magistrate's decision." Civ.R. 53(D)(4)(c). Debra notes that the support worksheet identifies Kevin's annual income as $32,267, whereas Kevin's testimony at the April 9, 2009 hearing was that he earned approximately $38,000 a year. We disagree. The transcript of the April 9, 2009 hearing indicates that the parties were going to review the tax returns before submitting a worksheet. Those tax returns are not in the record before us and we decline to speculate as to what evidence the magistrate relied upon in determining Kevin's income. Cf. *DiNunzio v. DiNunzio*, 11th Dist. No. 2006-L-106, 2007-Ohio-2578, at ¶18.

{¶42} The judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is reversed for the limited reasons stated above, and this matter is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.