

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

GERALD BAYUS, JR,	:	PER CURIAM OPINION
Plaintiff-Appellant,	:	
- VS -	:	CASE NO. 2011-T-0062
SHARON BAYUS,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 2007 DR 299.

Judgment: Affirmed.

Gerald Bayus, Jr., pro se, 101 Leckrone Way, Cortland, OH 44410 (For Plaintiff-Appellant).

Anthony G. Rossi III, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendant-Appellant).

Kristie M. Weibling, Kristie M. Weibling, L.L.C., 3685 Stutz Drive, Suite 100, Canfield, OH 44060 (For Guardian ad litem).

PER CURIAM.

{¶1} Gerald Bayus, Jr., pro se, appeals from a judgment of the Trumbull County Court of Common Pleas, Division of Domestic Relations, which granted the Guardian ad Litem's request for fees in his legal separation case. For the following reasons, we affirm the judgment.

Substantive Facts and Procedural History

{¶2} The Bayuses were married in 1992. They have one child, born in 1993. The couple became estranged in 2006. On July 30, 2007, Mr. Bayus filed a Complaint for Legal Separation, which incorporated a Shared Parenting Plan. On September 25, 2007, the trial court issued the Final Decree of Legal Separation, approving of the Separation Agreement and the Shared Parenting Plan.

{¶3} On February 20, 2008, however, Mrs. Bayus filed a post-decree motion to terminate shared parenting plan. Attorney Roklyn DePerro Turner was appointed by the trial court as the Guardian ad Litem (“GAL”) for their child. The proceedings were highly contentious, requiring extensive service by the GAL, including interviews, home visits, reviewing of reports, and attendance at numerous hearings. In August 2009, the trial court held a hearing on Mrs. Bayus’ motion, and the parties filed an agreed judgment entry resolving their differences over the terms of the shared parenting plan. The GAL was discharged from her duties on that date.

{¶4} The GAL then filed her motion for additional GAL fees, and, based on its review of a detailed itemization of work the GAL performed for the period from May 6, 2008 to August 7, 2009, the motion was granted. The GAL charged a total of \$2,767.17, based on an hourly rate of \$40 for out-of-court service and \$50 for in-court service. The parties had paid the bulk of the fees, with a balance of \$461.17 due from Mrs. Bayus, which the court ordered her to pay.

{¶5} A year later, Mr. Bayus filed a Motion to Show Cause, alleging violations by Mrs. Bayus of the court order regarding the shared parenting plan. This was followed by Mrs. Bayus’ filing of a second Motion to Terminate Shared Parenting Plan. As a result, the trial court reappointed Attorney Turner as the GAL, ordering each party

to pay her \$250 in deposits. Again, the proceedings were highly contentious, to the point where Mr. Bayus requested both the magistrate and the trial judge recuse themselves and a visiting judge be appointed for this case. The court overruled his request. Mr. Bayus was also unhappy with the GAL's performance and filed a motion to remove the GAL. Additionally, he filed a grievance against the GAL with the Supreme Court of Ohio's Office of Disciplinary Counsel.

{¶6} In April 2011, a hearing took place before the magistrate, during which the magistrate heard Mr. Bayus' concerns over the GAL's performance. The magistrate advised Mr. Bayus the removal of the GAL would delay the matter for a significant period of time, and, after consulting with his counsel, Mr. Bayus withdrew his motion to remove the GAL. No transcript of this hearing was provided to us on appeal.

{¶7} Mr. Bayus subsequently withdrew his Motion to Show Cause, and the court dismissed the motion. Mrs. Bayus then withdrew all pending motions.

{¶8} With all matters before the trial court withdrawn, the GAL filed a Motion for Final Guardian Ad Litem Fees, incorporating an itemized statement of work performed. The detailed statement included rates, dates, time spent, services performed, and a description as to whether a service was performed out of court or in court. The amount of fees submitted totaled \$1,083, based on the same hourly rates. Because Mrs. Bayus had already paid the court-ordered deposit of \$250, she owed \$274.50. Mr. Bayus, who had not paid the deposit, owed \$541.50. The court granted the requested fees by way of a May 12, 2011 judgment entry.

{¶9} Mr. Bayus now appeals from this judgment. He assigns four assignments of error for our review:

{¶10} “[1.] The trial court committed abuse of discretion by granting final Guardian ad Litem fees without conducting a hearing nor giving notice of hearing.

{¶11} “[2.] The trial court committed reversible error by approving the Guardian ad Litem’s motion for additional fees when said fees were in excess of the limit allowed Guardian ad Litem’s [fees] per case.

{¶12} “[3.] The trial court committed reversible error by approving the Guardian ad Litem’s motion for additional fees by not performing due diligence, confirming that the Guardian ad Litem was in compliance with the local rules of court pertaining to continuing legal education credits.

{¶13} “[4.] The trial court committed reversible error by approving the Guardian ad Litem’s motion for additional fees without giving just consideration to a grievance filed against the Guardian ad Litem by Appellant.”

Final Appealable Order

{¶14} Initially, the GAL claims that a judgment ordering parties to pay guardian ad litem fees is not a final appealable order. This court has addressed this issue and held that such a judgment is a final appealable order. *Jackson v. Herron*, 11th Dist. No. 2004-L-045, 2005-Ohio-4039, ¶7-8. Mrs. Bayus also claims the court’s judgment lacks the necessary “no just reason for delay” language from Civ.R.54(B). Civ.R.54(B) is not applicable here because both post-decree motions – Mr. Bayus’ motion to show cause and Mrs. Bayus’ motion to terminate shared parenting plan – have been withdrawn, and, therefore, no claims remained pending before the trial court warranting the Civ.R.54 (B) language.

Standard of Review

{¶15} When evaluating an order for compensation to a guardian ad litem, a reviewing court shall consider whether the trial court abused its discretion. See *Davis v. Davis*, 55 Ohio App.3d 196, 200 (8th Dist.1988).

{¶16} As this court recently stated, the term “abuse of discretion” is one of art, “connoting judgment exercised by a court, which does not comport with reason or the record.” *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11. As Judge Fain explained, when an appellate court is reviewing a pure issue of law, “the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.” *Id.* ¶67.

Whether an Oral Hearing was Required

{¶17} Under the first assignment of error, Mr. Bayus claims the trial court should have held an oral hearing before granting the GAL’s fees.

{¶18} Civ. R. 75 states:

{¶19} “When it is essential to protect the interests of a child, the court may join the child of the parties as a party defendant and appoint a guardian ad litem and legal counsel, if necessary, for the child and tax the costs.”

{¶20} Rule 35 of the Local Rules of the Trumbull County Court of Common Pleas, Division of Domestic Relations and Juvenile Division, governs a GAL’s qualifications, compensation, duties, power, and reports. Loc.R.35(C) provides for a GAL’s compensation. It states, in pertinent part:

{¶21} “A GAL shall be compensated at the rate established by the Ohio Public Defender’s Office. A cap on GAL fees for each case shall be \$1,000.00. Extraordinary fees in excess of \$1,000.00 may be considered by the Court upon the filing of a motion and an affidavit.

{¶22} “At the time of the GAL’s appointment, the Court may order one or both of the parties to pay an initial retainer directly to the GAL, and the Court will designate how additional fees incurred by the GAL will be allocated.

{¶23} “*Upon motion for payment of GAL fees, the Court shall determine* if the fee sought by the GAL is reasonable and necessary and determine the amount each party shall contribute toward the fee.” (Emphasis added.)

{¶24} Contrary to appellant’s assertion, there is no requirement in the local rule for the trial court to conduct an oral hearing prior to awarding the GAL fees. The rule states, plainly, that the court shall determine if the fee sought by the GAL is reasonable and necessary, “upon motion for payment of GAL fees.” We refuse to read a requirement for an oral hearing into the rule.

{¶25} Mr. Bayus cites *Rendina v. Rendina*, 11th Dist. No. 91-L-019, 1992 Ohio App. LEXIS 828 (Feb. 28, 1992), where this court reversed a Lake County Common Pleas Court’s judgment granting the GAL fees. That case, however, applied different local rules. Lake County Common Pleas Court Loc.R. 26, which relates to divorce actions, states:

{¶26} “Motions other than those provided by the next succeeding subsection to be heard by a Referee, and all motions before and after judgment in divorce, alimony and annulment cases, shall proceed as follows:

{¶27} “(1) A motion setting forth the relief sought and the grounds for relief shall be filed and served upon the opposing party together with a notice of the time and place set for hearing. Within ten (10) days after service, the opposing party may file a brief in opposition to the granting of the motion. In absence of such brief, the Court may proceed to rule upon the motion.”

{¶28} Because the rule was not followed by the trial court, this court reversed the judgment the GAL’s motion for fees in *Rendina*. Here, the Trumbull County Court of Common Pleas has promulgated an extensive set of rules governing the GAL. The rule governing a GAL’s compensation does not require an oral hearing before the trial court awards the fees. 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, ¶30. Therefore, it is within the trial court’s discretion to apply its Loc.R.35(C) and award the GAL’s fees without an oral hearing. The first assignment of error is without merit.

Whether Trial Court Abused its Discretion in Granting Fees in Excess of \$1,000

{¶29} Under the second assignment of error, Mr. Bayus claims the trial court improperly awarded fees in excess of the standard GAL's fees per case on both occasions. Mr. Bayus complains the GAL did not submit an affidavit as required by Loc.R.35(C) for such fees.

{¶30} This highly contested legal separation matter spanned a multi-year period from May 2008 to May 2011. The GAL filed numerous reports and conducted extensive document reviews and interviews. In both motions for fees, she submitted an itemization of work performed detailing the day, hours spent, and service performed. The only judgment appealed by Mr. Bayus granted fees in the amount of \$1,083.00, with a de minimus excess of \$83.

{¶31} The provision for extraordinary fees in Loc.R.35(C) is not stated in mandatory terms. Rather, it states "extraordinary fees in excess of \$1,000.00 *may* be considered by the Court upon the filing of a motion and an affidavit." Because it is stated in permissive terms, the trial court should enjoy considerable discretion in the application of this rule. Although the itemized fee statement submitted by the GAL was not in the proper affidavit form, we cannot say the trial court's award of an amount slightly in excess of \$1,000, without requiring an affidavit, constituted a "failure to exercise sound, reasonable, and legal decision-making." The second assignment of error is without merit.

Compliance

{¶32} Under the third assignment of error, Mr. Bayus complains the trial court committed error when it reappointed the GAL and approved her fees without first confirming that she was in compliance with Continuing Legal Education ("CLE") credit

requirements, as provided for in the Loc.R.35(B) and Superintendence R.48(E)(4). Mr. Bayus alleges the GAL was deficient in her CLE hours and GAL training course, while the GAL maintains she is in full compliance with both rules.

{¶33} A cardinal rule of appellate procedure is that “an appellate court will not consider any error which could have been brought to the trial court’s attention, and hence avoided or otherwise corrected.” *Schade v. Carnegie Body Co.*, 70 Ohio St. 2d 207, 210 (1982). It appears this is the first time in the proceedings that Mr. Bayus claims the GAL is not in compliance with her CLE and other training requirement. Therefore, any alleged error is deemed waived. The third assignment of error is without merit.

Whether the Trial Court Should Have Considered Appellant’s Grievance Before Awarding the GAL Fees

{¶34} Finally, under the fourth assignment of error, Mr. Bayus claims the trial court erred in approving the GAL fees without giving due consideration to the grievance he filed against the GAL.

{¶35} Gov.Bar R.V(11)(E) requires that disciplinary complaints remain private until and unless formal proceedings begin before the Board of Commissioners on Grievances and Discipline. *In re Disqualification of Krueger*, 74 Ohio St.3d 1267, 1268 (1995). The grievance matter here was dismissed by the Disciplinary Counsel, and therefore, should remain private. Because Mr. Bayus raises the grievance matter in the last assignment of error, we are compelled to make reference to it; we do so with great reluctance, however.

{¶36} The record reflects a grievance filed by Mr. Bayus with the Supreme Court of Ohio’s Office of Disciplinary Counsel against the GAL, complaining of her

performance in this case. The Disciplinary Counsel advised him that any concerns with a GAL's conduct must be raised instead with the court that appointed the GAL. Mr. Bayus then filed a motion to remove the GAL on April 6, 2011. The court set a hearing for April 13, 2011.

{¶37} On appeal, Mr. Bayus claims he was “ambushed” at this hearing because he thought the hearing would only concern his motion to show cause, yet the magistrate addressed his motion to remove the GAL as well, for which he was not well prepared. He alleges that after being advised by the magistrate that a removal of the GAL would delay the matter by three months, he withdrew his motion remove the GAL.

{¶38} Mr. Bayus did not submit a transcript or App.R.9(C) statement of this hearing for us to review against his allegations. The file, however, contains the magistrate's decision issued on April 22, 2011 after that hearing, which stated: “In reviewing the work of the Guardian ad Litem since her reappointment [the Court] finds that GAL has fully complied with Rule 48. She has not been deficient in methodically doing her job as specified under Rule 48. Plaintiff after consulting with his counsel requests that the motion for the removal of the GAL be withdrawn.”

{¶39} Mr. Bayus fails to submit a transcript of the hearing for our review of any claimed impropriety at the hearing. We remind Mr. Bayus that it is the responsibility of the appellant to prepare the transcript for inclusion in the record. See App.R.9(B); *State ex rel. Montgomery v. R & D Chem. Co.*, 72 Ohio St. 3d 202, 203-204 (1995). Without a transcript of the proceedings, we are unable to review Mr. Bayus' allegations regarding this hearing. Accordingly, we cannot but presume the validity of the lower court's proceedings. See *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980).

{¶40} Additionally, the docket indicates Mr. Bayus had notice of the hearing, and the court file also contains the magistrate's decision reflecting that the magistrate had considered his allegation of the GAL's deficient performance and found it to be untrue. Mr. Bayus ultimately withdrew his motion for removal of the GAL at this hearing, after consulting with his legal counsel. Given this record, we find the last assignment of error meritless.

{¶41} Finally, the record reflects Mr. Bayus was unsatisfied with the GAL's performance in this case, believing her recommendation not to be in the best interest of the child. It appears that he brings this appeal in a continuing effort to express his frustrations with the GAL. However, by withdrawing his motion to remove the GAL, he voluntarily relinquished a full adjudication by the trial court of his complaint against the GAL. An appeal from the court's award of the GAL fees is simply not an appropriate vehicle for voicing grievances he may have regarding the GAL's performance.

{¶42} The judgment of the Trumbull County Court of Common Pleas, Division of Domestic Relations, is affirmed.

TIMOTHY P. CANNON, P.J., MARY JANE TRAPP, J., THOMAS R. WRIGHT, J.,
concur.