[Cite as *Thatcher v. Miller,* 2016-Ohio-435.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

STEPHANIE THATCHER (fka MILLER)	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 2015-CA-19
	:	
v.	:	Trial Court Case No. 13-DR-86
	:	
TODD W. MILLER	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 5th day of February, 2016

. . . . . .

JEREMY M. TOMB, Atty. Reg. No. 0079554, Klein, Tomb & Eberly, LLP, 124 West Main Street, Troy, Ohio 45373
Attorney for Plaintiff-Appellant

MICHAEL J. JUREK, Atty. Reg. No. 0082643, Dungan & LeFevre, 210 West Main Street, Troy, Ohio 45373
Attorney for Defendant-Appellee

. . . . . .

HALL, J.

{¶ 1} Stephanie Thatcher appeals from the trial court's August 10, 2015 decision and entry overruling her objections to a magistrate's decision and ruling on the parties'

competing motions to modify a shared-parenting plan.

{¶ 2} Thatcher advances four assignments of error. First, she contends the trial court erred in failing to independently evaluate the credibility of the witnesses who testified at a hearing on the motions. Second, she claims the trial court erred in adopting the report and recommendation of a guardian ad litem. Third, she asserts that the trial court erred in finding the best interest of the parties' minor children served by approving an amended shared-parenting plan submitted by her former husband, appellee Todd W. Miller. Fourth, she argues that the trial court erred in changing the effective date of a child-support order to make it retroactive.

{¶ 3} The record reflects that Thatcher and Miller were married in 1996. They obtained a dissolution of their marriage in April 2013. (Doc. #15). The dissolution included a shared-parenting plan governing the parties' rights and responsibilities regarding their three children born in 1999, 2001, and 2004. (Doc. #16). In May 2014, Miller moved to modify the shared-parenting plan. (Doc. #19). The following month, Thatcher filed her own competing motion. (Doc. #36). The precipitating event for both motions was Thatcher's remarriage and her relocation to Rutland, Ohio.

{¶ 4} Prior to Thatcher's move, both parties resided in Tipp City, where their children attended school, and they split their parenting time roughly 50-50. Thatcher's relocation to Rutland, about 10 miles from the border of West Virginia, was 2.5 hours away, and made the existing shared-parenting arrangement untenable, particularly during the school year. The matter proceeded to a two-day hearing before a magistrate in December 2014. (Transcripts, Doc. #79-80). Among other things, the issues addressed at the hearing concerned where the children would live during the school year. Based on

the evidence presented, the magistrate filed a March 2015 decision with findings of fact and conclusions of law. With minor changes, the magistrate adopted an amended shared-parenting plan proposed by Miller and used his residence for school-placement purposes, meaning that the children would reside primarily with him during the school year. (Doc. #75 at 10-11 and attachment thereto). Thatcher filed objections to the magistrate's decision. (Doc. #78, 86). The trial court overruled her objections and adopted the magistrate's decision as an order of the court. (Doc. #90). This appeal by Thatcher followed.

{¶ 5} In her first assignment of error, Thatcher contends the trial court failed to independently evaluate the credibility of the witnesses who testified at the hearing. The essence of her argument is that the trial court merely reviewed a hearing transcript and, therefore, could not properly assess witness credibility, which involves things such as the appearance of witnesses on the stand, their demeanor, and their manner of testifying. She reasons that the knowledge gained through observing witnesses cannot be conveyed by a printed record. Thatcher's argument is stated succinctly in her appellate brief as follows:

> Because the trial judge was unable to view the witnesses and observe their demeanor, gestures, and voice inflections, the trial judge could not independently review the credibility of the five trial witnesses.
>
> Because the trial judge could not independently review the credibility of the five trial witnesses, the trial judge could not independently weigh the evidence.
>
> Because the trial judge could not independently weigh the evidence,

the trial judge could not comply with Civ.R. 53(D)(4)(d).

Because the trial judge could not comply with Civ.R. 53(D)(4)(d), appellant could not be afforded due process.

(Appellant's brief at 8).

{¶ 6} In short, Thatcher argues that the trial court was required to conduct an independent, de novo review of the record, including the testimony of the witnesses. She maintains that this review necessarily included an assessment of witness credibility, which cannot be accomplished properly by reviewing a transcript. Therefore, she asks us to remand for a new hearing before the trial court judge, not a magistrate.

{¶ 7} Upon review, we find Thatcher's argument to be unpersuasive. As a threshold matter, the trial court did not fail to comply with Civ.R. 53(D)(4)(d). The Civil Rules provide for a judge to review a written transcript when ruling on objections to a magistrate's decision. Indeed, under Civ.R. 53(D)(3)(b)(iii), fact-based objections to a magistrate's decision must be accompanied by such a transcript if available. Under Civ.R. 53(D)(4)(d), the trial court then must undertake an independent review of the record, which includes a transcript of the hearing before the magistrate, to determine whether the magistrate's decision is correct. Because Civ.R. 53 explicitly contemplates a hearing before a magistrate and the subsequent preparation of a transcript for review by the trial court, we reject Thatcher's argument that "the trial judge could not comply with Civ.R. 53(D)(4)(d)."

{¶ 8} We also reject her argument that the trial court's review of a written transcript violated due-process principles. Because the trial court, not the magistrate, is the official decision-maker, Thatcher reasons that due process compelled the trial court to hear the

evidence personally without reliance on a transcript. We disagree. Due process did not require the trial court to attend or preside over the hearing at which the evidence was presented. Due process can be satisfied when a decision-maker reviews a "hearing transcript in lieu of live testimony[.]" *State ex rel. Owens-Illinois, Inc. v. Indus. Comm.*, 61 Ohio St.3d 456, 457-458, 575 N.E.2d 202 (1991). A party has been sufficiently "heard" for due-process purposes when the decision-maker "in some meaningful manner" considers evidence obtained at a hearing. *Id*. at 458; *see also State ex rel. Ormet Corp. v. Indus. Comm.*, 54 Ohio St.3d 102, 107, 561 N.E.2d 920 (1990) (recognizing that "the decision-maker must, *in some meaningful manner*, consider evidence obtained at a hearing"); *Laughlin v. Public Utilities Comm.*, 6 Ohio St.2d 110, 111-112, 216 N.E.2d 60 (1966) ("Appellants contend they were denied a fair hearing and deprived of due process of law by the commissioner's assignment of an attorney examiner to prepare findings and recommendations, who had not presided at the hearings. This contention is without merit. It is not essential that a person who prepares findings and recommendations in an administrative proceeding hears the evidence, if he reviews and examines the record of the proceeding.").[1] We are persuaded that the trial court satisfied due process when it conducted an independent review of the hearing transcript in accordance with the procedure prescribed by Civ.R. 53. None of the case law cited by Thatcher establishes or persuades us otherwise. The first assignment of error is overruled.

{¶ 9} In her second assignment of error, Thatcher claims the trial court erred in "adopting" the report and recommendation of the guardian ad litem. In support, she first

[1] Although the cases cited above were administrative in nature, we find their due-process discussion equally applicable here with regard to the trial court's ability to rely on a written transcript of evidence presented to a magistrate.

contends the guardian ad litem exhibited bias and failed to conduct a balanced investigation in violation of Sup.R. 48(D)(2), which provides that a "guardian ad litem shall maintain independence, objectivity and fairness as well as the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom * * *." Thatcher then contends the guardian's performance in this case fell short in a number of areas. Specifically, Thatcher complains that the guardian ad litem (1) failed to communicate with her adequately, (2) failed to investigate the type of life she could provide the children in Rutland, (3) failed to investigate her concerns regarding Miller, (4) allowed bias to impact the guardian's decision, and (5) failed to make reasonable efforts to become informed about the pertinent facts by considering the children's wishes and adequately interviewing the maternal grandparents. (Appellant's brief at 10-15).

{¶ 10} Upon review, we find Thatcher's second assignment of error to be without merit. As an initial matter, it is not clear that the magistrate or the trial court "adopted" the guardian ad litem's report. Under its "findings of fact," the magistrate found that the guardian ad litem had made various recommendations and then cited them. The magistrate also quoted what the guardian ad litem said in support of those recommendations. (Doc. #75 at 2-4). For its part, the trial court conducted its own independent review, addressed and rejected the same complaints about the magistrate's performance that Thatcher raises here, and found that the magistrate did not err in "considering the GAL's testimony and report." (Doc. #90 at 2-6, 10).

{¶ 11} In any event, we see no error in the trial court's rejection of Thatcher's objections to the performance of the guardian ad litem. With regard to the guardian's alleged violation of Sup.R. 48(D)(2), this court has recognized that Sup.R. 48(D) is an

administrative directive that lacks the force of law. *Corey v. Corey*, 2d Dist. Greene No. 2013-CA-73, 2014-Ohio-3258, ¶ 9. Even if a guardian ad litem fails to comply fully with Sup.R. 48(D)(2), a trial court retains the discretion to consider the guardian's testimony and report. *Id*. Here we have examined the guardian ad litem's testimony and report. Based on that review, we find that the guardian's performance did not fall so far below minimum acceptable standards as to be unworthy of consideration. Most of Thatcher's complaints involve matters of degree (i.e., the guardian did not investigate enough, interview her witnesses enough, communicate with her enough, become informed enough, consider the children's wishes enough, etc.). In overruling Thatcher's objections, the trial court addressed each of her concerns about the guardian's performance. (Doc. #90 at 2-6). Moreover, Thatcher's attorney was able to cross examine the guardian ad litem about the perceived deficiencies and to present competing evidence on the issues Thatcher cites. Having reviewed the entire hearing transcript, as well as the guardian's report, we believe the trial court acted within its discretion in finding the guardian's report worthy of consideration along with all of the other evidence presented. The second assignment of error is overruled.

{¶ 12} In her third assignment of error, Thatcher asserts that the trial court erred in finding the best interest of the children served by approving the modified shared-parenting plan submitted by Miller. As noted above, the most significant change in the plan is that it designates Miller the residential parent for school purposes, meaning the children live primarily with him during the school year and attend school in Tipp City. Thatcher argues, however, that it would be in the best interest of the children to reside primarily with her and to attend school in Rutland.

{¶ 13} In support of her argument, Thatcher suggests that Miller's primary reason for wanting the children to live with him is a selfish one (he testified that he would "miss them terribly") having nothing to do with their best interest. (Appellant's brief at 16). She also cites various "best-interest" factors that she believes weigh in her favor. Specifically, she argues that the amended shared-parenting plan adopted by the trial court: (1) takes available parenting time away because Miller works full time whereas she can stay home full time if the children live with her, (2) causes the children to lose the benefit of a full-time caregiver and of growing up in a rural setting, (3) disregards her desire to raise the children in a small-town lifestyle, (4) ignores the children's positive relationships and bonds with family and friends in Rutland, (5) overlooks her being more likely to honor and facilitate court-approved parenting time. (*Id*. at 16-19).

{¶ 14} Upon review, we find Thatcher's arguments unpersuasive. The record contains testimony on the foregoing issues, which the trial court addressed in its August 10, 2015 decision and entry. (Doc. #90 at 6-10). With regard to Thatcher's suggestion that Miller primarily wants the children for the selfish reason that he would "miss them terribly," she fails to cite his complete statement. When asked why he did not want the children to move to Rutland, he responded:

> Well the biggest reason is, I mean, living that far away I won't be able to see my children, and you know, I've—I've been with them from day one and I have close relationships with all of them, and I—I would miss them terribly. And you know I would say they're doing really well in school; they've got lots of friends, all three of them. [E]very one of them is doing—doing

> well. They—they've got good friends and they just have good things that happen to them—and they've been involved in this community their whole lives, so you know it's kind of the only life that they—they know.

(Hearing Tr. Day 1 at 117).

{¶ 15} With regard to the other issues Thatcher cites, the trial court simply weighed the competing evidence and the best-interest factors differently than she does. Among other things, the trial court explicitly took into consideration the fact that Thatcher could be a stay-at-home mother if the children resided with her. (Doc. #90 at 6-9). It also considered her desire to raise the children in a small-town, rural lifestyle. (*Id*.) On the other hand, the trial court found that the children were mature enough to be home themselves until Miller got off work. It also found that the children were well adjusted to their Tipp City home, school, and community. In addition, the trial court found that Tipp City's school system was superior to Rutland's school system. (*Id*. at 7). The trial court further noted the children's "strong relationship" with Miller and his extended family in the region around Tipp City. (*Id*. at 8). In the end, the trial court concluded:

> * * * Again as previously indicated, the children are well adjusted to their home, school and community. The parties' dissolution has resulted in an ever-changing landscape for the children. The one ongoing positive constant has been the children's relationship with their home, school, and community in Tipp City, Ohio. The Court agrees with the Magistrate's finding that some block of time for Mother to have the children in the summer would allow for uninterrupted/unscheduled time and foster the ideals mother wants to expose the children to. However, keeping in mind that the children's best

interest is paramount, the Court agrees with the Magistrate that the Mother's interest in uninterrupted/unscheduled parenting time can be accomplished during her summer visitation with the children while not disrupting the current stable environment.

The Magistrate ultimately relied on the holding found in *Chelman v. Chelman*, [2d Dist. Greene No. 2007 CA 79,] 2008-Ohio-4634, [that] "the appropriate consideration is whether the 'harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.' O.R.C. 3109.04(E)(1)(a)(iii)." The Magistrate considered the harm caused by uprooting the minor children from Tipp City—the only hometown they have ever known, as well as the place where they attended school all of their lives, where they were actively involved in extracurricular activities, had friends, were involved in their community and church—is [not] outweighed by the advantages of moving to a small rural community of Rutland, Ohio. Therefore, the Magistrate determined that the harm of removing the children from Tipp City outweighed any advantages of moving to Rutland. Based upon the Court's independent review of the entire record in this case as well as all of the statutory factors set forth in O.R.C. 3109.04 and O.R.C. 3109.051 the Court finds that the Magistrate's Decision was supported by a preponderance of the evidence and therefore this Court adopts the Magistrate's Decision fully. The Magistrate's conclusion of law that Father's shared parenting plan is more conducive to meeting the best interests of the children is well supported by the record

and is consistent with the statutory requirements cited above.

> In a footnote, the Magistrate noted that it appears both Mother and Father are good parents, and that the children are thriving in their community and love each of their parents. The Court is confident that the parties can cooperate and work together to provide a loving stable environment for their children under the terms of Father's Shared Parenting Plan, just as they have in the past.

(*Id*. at 8-10).

{¶ 16} After a thorough review of the record, we see no abuse of discretion in the trial court's ruling. The trial court independently examined and weighed the evidence in light of the appropriate statutory factors. Although Thatcher evaluates the evidence differently, the record contains support for the trial court's best-interest determination. Thatcher's third assignment of error is overruled.

{¶ 17} In her fourth assignment of error, Thatcher contends the trial court erred in changing the effective date of the child-support order.

The record reflects that the magistrate's decision included form DR 16, which was a proposed child-support order attached to the amended shared-parenting plan the magistrate adopted. (Doc. #75 at Proposed Support Order attachment). The proposed form DR 16 designated Thatcher as the child-support obligor. It directed her to pay total child-support of $400 per month, but it did not designate an effective date. The magistrate's decision further provided for counsel to submit a form DR 16 "consistent with the court's ruling herein, for signature and filing[,]" after the trial court's adoption of the magistrate's decision.

{¶ 18} In overruling Thatcher's objections, the trial court subsequently filed its own child-support order. It its August 10, 2015 decision and entry, the trial court stated: "A DR 16, consistent with the court's ruling herein, is filed contemporaneously with this Decision and Entry." (Doc. #90 at 10). The trial court's order imposed a $400 per month child-support obligation retroactive to May 14, 2014, which was the date that Miller moved to modify the shared-parenting plan due to Thatcher's relocation. (Doc. #91 at 1).

{¶ 19} On appeal, Thatcher's entire argument is as follows:

> Nowhere in the judge's Decision is there any reasoning or ruling to support this retroactive effective date and Thatcher was denied any opportunity to object because the Magistrate's Decision failed to address this issue.
>
> Consequently, it was an abuse of discretion for the judge to make such a finding without notice the parties [sic] or afford them an opportunity to be heard.

(Appellant's brief at 20-21).

{¶ 20} Upon review, we reject Thatcher's argument that the trial court abused its discretion in making child support effective May 14, 2014 without prior notice or an opportunity to be heard. We agree with Thatcher that she was unable to file a Civ.R. 53(D) objection to the effective date of the support order because the magistrate's decision did not address the issue. It does not follow, however, that Thatcher was deprived of notice or an opportunity to be heard. Nor does it follow that the trial court could not resolve the issue. The parties' competing requests to modify the prior shared-parenting plan

necessarily implicated child support. In recognition of that fact, the parties stipulated to their respective incomes for child-support purposes at the hearing. (*See*, *e.g*., Hearing Tr. Day 1 at 78-79).Thatcher herself testified that she would be compelled to work if Miller were named the residential parent for school purposes because she would have a child-support obligation. (Hearing Tr. Day 2 at 101). Therefore, the parties plainly knew child support was an issue before the court. A necessary part of establishing a child support obligation, of course, is establishing an effective date. If Thatcher wanted to present evidence on that issue at the hearing before the magistrate, she was free to do so.

{¶ 21} The fact that the magistrate's decision did not set an effective date for child-support certainly excuses Thatcher's failure to "object" pursuant to Civ.R. 53(D). Nevertheless, the effective date of Thatcher's child support remained an issue that needed to be decided below. We see no reason why the trial court, as the ultimate decision-maker in this case, could not establish an effective date in connection with its August 10, 2015 decision and entry from which Thatcher has appealed. The fact that the magistrate did not address the effective date of child support did not preclude the trial court from doing so. If Thatcher believes the trial court erred in choosing the effective date that it did, her recourse is to convince us so on appeal.

{¶ 22} In her appellate brief, however, Thatcher appears to focus more on her professed lack of notice and an opportunity to be heard. On the merits, she notes only that "[n]owhere in the judge's Decision is there any reasoning or ruling to support this retroactive effective date." The date chosen for the effective date of child support is reviewed under an abuse of discretion standard*. In re P.J.H.*, 196 Ohio App.3d 122, 2011-Ohio-5970, 962 N.E.2d 389, ¶ 18 (2d Dist.). The effective date can be the date a motion

is filed or "some other date that coincided with an event of significance in relation to the grounds for child support that was ordered." *Id*. at ¶ 20.

{¶ 23} Here neither party had a child-support obligation before Thatcher relocated to Rutland. At the time of their dissolution, the parties agreed "that child support would be inappropriate * * * because they [were] exercising 50/50 shared parenting time with the minor children." (Doc. #17 at 2). Thatcher moved, however, in May 2014 (Hearing Tr. Day 2 at 8), which was the same month Miller filed his motion to modify the shared-parenting plan and the same month the trial court used to impose a retroactive child-support obligation. Thus, it appears that Thatcher's relocation 2.5 hours away and Miller's corresponding motion were the events of significance that led the trial court to impose child support effective May 14, 2014. Thatcher has not shown any abuse of discretion in the trial court's decision. The fourth assignment of error is overruled.

{¶ 24} The judgment of the Miami County Common Pleas Court is affirmed.

. . . . . .

FAIN, J., and WELBAUM, J., concur.

Copies mailed to:

Jeremy M. Tomb
Michael J. Jurek
Hon. Jeannine N. Pratt