**[Cite as *In re J.L.R.*, 2009-Ohio-5812.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

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| IN THE MATTER OF:<br>J.L.R. AND<br>M.M.R. | : | |
| | : | Case No. 08CA17 |
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| | : | DECISION AND JUDGMENT ENTRY |
| | : | |

APPEARANCES:

COUNSEL FOR APPELLANT: Robin A. Bozian, 427 Second Street, Marietta, Ohio 45750

COUNSEL FOR APPELLEE: Shoshanna M. Brooker, 311 Scammel Street, Marietta, Ohio 45750

CIVIL APPEAL FROM COMMON PLEAS, JUVENILE DIVISION
DATE JOURNALIZED: 10-29-09

PER CURIAM.

**{¶ 1}** This is an appeal from a Washington County Common Pleas Court, Juvenile Division, judgment that: (1) terminated a shared parenting plan between Appellee Michael Ruse and Appellant Pamela Roff; and (2) designated appellee the children's residential parent and legal custodian.

**{¶ 2}** Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION TO

APPELLANT'S PREJUDICE BY USING THE MOTHER'S ATTEMPT TO RELOCATE WITHIN THE STATE TO PURSUE HIGHER EDUCATION AS A GROUND FOR CHANGING CUSTODY."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT REFUSED TO APPOINT LEGAL COUNSEL FOR THE CHILDREN."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW THE MOTHER TO CONDUCT DISCOVERY FROM THE GUARDIAN AD LITEM."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT ALLOWED THE GUARDIAN AD LITEM, WHO WAS NOT AN ATTORNEY, TO PARTICIPATE IN THE TRIAL OF THE CASE BY FILING MOTIONS AND EXAMINING WITNESSES."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY SUSTAINING THE FATHER'S COUNSEL'S OBJECTION TO A LINE OF QUESTIONING DIRECTED TO FATHER ABOUT HIS SOLE REASON FOR SEEKING CUSTODY."

**{¶ 3}** The parties married on July 26, 1992 and had two children. (J.L.R. born May 10, 1994 and M.M.R. born January 15, 1996). On January 4, 1999, the parties divorced and entered into a shared parenting plan that designated appellant the residential parent.[1]

[1] The divorce proceedings originated in the General Division of the Tuscarawas County Common Pleas Court. On June 25, 2002, the General Division issued a judgment that certified the matter to the juvenile court for the following reasons: (1) "These parties, either because of their inability to properly parent these children or in order to 'punish' the other party, have failed, miserably, to protect and safeguard the

**{¶ 4}** On July 14, 2006, appellant filed a notice of intent to relocate to Toledo, Ohio. She planned to pursue an educational opportunity at the University of Toledo.

**{¶ 5}** On August 2, 2006, appellee filed a motion to modify the custody order. On that same date, the court issued a temporary order that restrained the mother from removing the children from Washington County. Appellant apparently did not receive notice of this order until August 20, 2006.

**{¶ 6}** Appellee took the children on vacation from August 10 to August 20, 2006. Upon their return, the children were scheduled to return to appellant's care. While the children vacationed, appellant packed up her home, including the children's belongings, and moved everything to a new residence in Toledo. She enrolled the children in the Toledo area schools and planned to take them to Toledo immediately upon their return from appellee's care. She planned to announce the move as a surprise to the children upon their return from vacation.

**{¶ 7}** The parties had arranged to exchange the children at a McDonald's restaurant during the early evening hours of August 20. Appellee came to the exchange armed with the court order to prevent appellant from removing the children

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mental and emotional health of the minor children"; (2) The undersigned is unable, based on the psychological testing which has been conducted of the children and the parties in this case, to come to a firm resolution as to which party is principally at fault for the emotional/psychological dilemma in which the children are ensnared"; and (3) "The Juvenile Division of this Court has the expertise and the resources necessary to rescue the minor children from this dilemma and property allocate custody as well as regulate child visitation/companionship rights."

On July 24, 2002, the juvenile court accepted jurisdiction of the case. The juvenile court determined that "[t]he best interest of these children requires immediate intervention available only through" the juvenile court.

When appellant and the children moved to Washington County, the case was

from Washington County. When appellant arrived at the exchange site, appellee's attorney served appellant with the court order. Appellee did not return the children to appellant's care.

**{¶ 8}** On August 21, 2006, appellee filed a motion for ex parte temporary custody of the children. The trial court granted appellee temporary custody of the children.

**{¶ 9}** Appellant subsequently filed a motion to obtain discovery and to conduct a deposition of the children's guardian ad litem. The trial court found "that to allow a deposition of and discovery from the Guardian ad Litem would be detrimental to the relationship and trust established between the Guardian ad Litem and the children. The children need to feel free to talk to the Guardian ad Litem without worrying that the information will be disclosed to either parent."

**{¶ 10}** Appellant, appellee, the two children and appellant's boyfriend all underwent psychological evaluations. In discussing her living situation, J.L.R. stated that "it feels weird not to live with my mom. I liked it best when they (mom and dad) lived near each other and I lived with my mom." The psychologist asked J.L.R. about her relationship with the guardian ad litem. The psychologist reported: "[J.L.R.] feels that the Guardian is biased in favor of her father. She remarked that when she tells the Guardian that she would prefer to live with her mom, the Guardian makes remarks back like she would have to change schools and she would lose all of her current friends. 'It's like she's trying to change my mind.' She reported that she was

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transferred to the Washington County Juvenile Court.

concerned that [the guardian] would be mad at her talking about these things. I told her that [the guardian's] role was to be her advocate in the situation, just like mom and dad each have their own attorney. She replied, 'I'm not afraid of [the guardian;] it just seems like she really doesn't understand.'"

**{¶ 11}** On May 2, 2007, the guardian ad litem filed her report. She noted that both parents love the children and that the children share a loving relationship with both parents. She further observed, however, that appellant's "unresolved anger issues with [appellee] adversely affect her decision making when it comes to what is in the best interests of the children." The guardian ad litem recommended that the trial court designate appellee the children's residential parent:

> "It is clear that [appellant] loves the children and can provide for them. It is also clear that the children love their mother and want to be with her. This recommendation is based on all the information that has been gathered since the children have been with [appellee]. Both children are doing better in school. Mason especially has improved not only his grades, but his social behavior in school. The children have enjoyed regular weekly contact with their grandparents in Marietta with whom they have a close relationship. [Appellee] is stable at this time in his living arrangements, and he has arranged his work hours to meet the needs of the children. The children enjoy regular, daily contact with [appellant] using email and telephone * * *. The children have enjoyed extended visitations * * * with [appellant]. [Appellee] has kept [appellant] informed, in writing, of events in the children's lives, and should continue to do so. [Appellee] loves the children and appears to be supportive of them and their relationship with [appellant] and the maternal grandparents. The children love [appellee] and [appellant] and want to be close to both of them."

**{¶ 12}** Appellant subsequently requested the trial court to appoint separate counsel for the children. She alleged that at the least, J.L.R.'s wishes conflicted with the guardian ad litem's recommendation. The court denied appellant's motion and explained:

> "Both the mother and father are represented by counsel. Each party is seeking custody of the two minor children and as such each child's position or point of view can by adequately presented through the parent's case. Additionally, the Court has agreed to interview both children in chambers prior to making its decision. The Court can thus determine the child's wishes without the need for the appointment of an attorney for the child. Further the minor children are not considered parties to a custody case and as such the Court is not required to appoint counsel for the children even if the mother agrees to pay for said representation.

**{¶ 13}** The Court cannot find any case law or any justification that would require the appointment of counsel for children in custody cases simply because the Guardian ad Litem's recommendation differs from the wishes of the child. The role of the Guardian ad Litem is to advise the Court what he/she believes would be in the best interest of the children, which may or may not be the same as the child's wishes."

**{¶ 14}** On July 31, 2007 and August 1, 2007, the trial court held a hearing. The evidence presented at the hearing revealed that appellee is employed full-time with the United States Army Corp of Engineers as a diver and is permanently stationed at the Marietta Branch. Appellant currently is unemployed, but attends the University of Toledo full time where she is working toward a degree in cardiac sonography.[2] She receives social security disability as a result of a brain tumor that was removed in 2001.

**{¶ 15}** Since the parties divorced, children services has investigated appellee on

[2] At various points throughout the record, appellant's educational path is denominated as cardio senography, cardiac stenography (appellant's brief), or cardiac sonography. The University of Toledo website discusses the profession of cardiovascular technology and states that the profession "is a multi-disciplinary science comprised of Diagnostic Cardiac Sonography, Vascular Technology and other

six occasions, but did not substantiate any of the reports. Appellant filed two of the reports and alleged that appellee physically abused M.M.R. by pulling on his ear and that he emotionally abused the child by calling him a "wuss" or "wussie." M.M.R. denied that appellee abused him and children services did not substantiate appellant's reports. In 2000, M.M.R. was diagnosed with Attention Deficit Hyperactivity Disorder and Obsessive Compulsive Disorder. Doctors attempted several medications to control his behavioral issues, including: Strattera, Abilify, Wellbutrin, Desmorpression, Adderall, Risperdal, Fluoxetrine, Topamax, Concerta, and Paxil. In May 2005 and January 2006, mental health professionals notified appellant of their concern that the child was having suicidal thoughts. They recommended that appellant hospitalize the child, but she refused. In 2006, appellant disregarded doctor's orders to keep M.M.R. on medication in an attempt to see if he benefitted from being off medication.

**{¶ 16}** Shortly after M.M.R. began living with appellee, appellee followed the Marietta City Schools' recommendation to have him tested for ADHD. He subsequently was diagnosed with anxiety disorder, bipolar disorder, and ADHD. Doctors prescribed Adderall. M.M.R.'s concentration, behavior, and school performance has since improved.

**{¶ 17}** The children's school performance also significantly improved following their placement with appellee. During the 2005-2006 school year, when J.L.R. lived with appellant, her grades consisted of mostly Bs with a few As and one C. The following year, when living with appellee, her grades improved to mostly As with a few

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emerging fields." http://www.utoledo.edu/hshs/cardiovascular/index/html.

Bs. Additionally, she was inducted into the National Junior Honor Society of Secondary Schools. M.M.R.'s grades likewise improved. During the 2005-2006 school year, his grades improved from mostly Cs and Ds with a few Bs and a couple of Fs to mostly Bs with a few Cs and Ds during the early part of the school year. He even received two As during the final part of the school year. Additionally, M.M.R. received the Most Improved Student Award for both academics and behavior, the Certificate of Award to Phillip's School Finest Citizen, and the Award of Excellence in Music. His fifth grade teacher stated that M.M.R. had a complete turnaround since appellee started him on Adderal for his ADHD.

**{¶ 18}** M.M.R.'s teacher testified that appellee was very involved with the child's schooling. The teacher also explained that appellant chose not to attend one of M.M.R.'s parent-teacher conferences. The teacher stated that when appellant arrived at the conference with her boyfriend, she learned that the guardian ad litem was present, spoke privately with the principal and chose to leave the conference, apparently due to the guardian ad litem's presence.

**{¶ 19}** The trial court found that appellant "has an intense hatred for the father even after being divorced for nine years. This hatred affects her ability to work with the father on issues concerning the children. * * * Mother's hatred and desire to ruin the father's life is illustrated by the fact that the mother tracked down a woman that the father met on a cruise after their divorce. The woman lived in Indiana. She harassed her and scared her to the point where the woman told the father to not call her again."

**{¶ 20}** According to the guardian ad litem, appellee has always attempted to

communicate with appellant concerning the children, but appellant is not willing to work with him. The trial court found: "The father encourages communication and visits between the children and their mother. However, the same cannot be said for the mother. She has repeatedly and consistently over the years denied the father visitation and communication with the children, which has resulted in the filing of the large number of motions dealing with visitation problems. According to the Guardian Ad Litem the father is supportive of the children and is not derogatory toward the mother."

**{¶ 21}** The trial court further found that the parties have an adversarial relationship and that they have not found a way to communicate that is acceptable to both parties and keeps the children out of the middle. The court interviewed both children in chambers and determined that they possess sufficient reasoning ability to express their wishes and concerns regarding the allocation of parental rights and responsibilities. The court observed that J.L.R. loves both parents and appears to be torn. She would like the parties' living arrangements to return to where they were before appellant moved to Toledo, i.e., having both parties living in the same town. She expressed her desire to live with appellant but would like both of her parents to live close to each other so that she could see appellee often. The court observed that J.L.R. informed the guardian ad litem that she was concerned about constantly changing schools when living with appellant.

**{¶ 22}** The court found that M.M.R. is comfortable living with either parent, but enjoys living with appellee because he is able to play sports–something appellant did not allow.

**{¶ 23}** The guardian ad litem recommended changing custody to appellee for the following reasons: (1) "Both children have dramatically improved their grades in school since the grant of temporary custody to the father, and [M.M.R.] has also improved his social behavior at school;" (2) "The father consistently gives [M.M.R.] his medication for his ADHD and is cooperative with the doctors and counselors; and" (3) "The children's lives are finally stabilized with the placement with their father."

**{¶ 24}** Appellant attempted to portray appellee as a violent person, but the trial court discounted her testimony. Moreover, the guardian ad litem stated that the children are not afraid of appellee. The court noted that in February of 2003, appellee had been convicted of two counts of assault and was sentenced to serve thirty days in jail. The court further observed, however, that the assaults did not involve any family members. Appellee stated that the assaults resulted after a night of drinking.

**{¶ 25}** On March 18, 2008, the trial court terminated the shared parenting decree. The court determined that shared parenting is no longer in the children's best interests. In determining that shared parenting was no longer in the children's best interests, the court considered all of the statutory factors and explained:

> "a. The ability of the parents to cooperate and make decisions jointly with respect to the children. These two parents are clearly unable to cooperate and work together in the making of joint decisions concerning the children. A few examples of this would be the mother not including the father in the decisions of stopping the son's medication for his behavior issues including ADHD, the obtaining of braces for the daughter, or the different vaccinations the mother obtained for the children. The mother and father over the years have failed to work together on practically all issues. According to the Guardian ad Litem the mother is not willing to work with the father.
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> b. The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent. The mother as is [sic] unable to encourage the children to love their father.

> She has such hatred for him that she attempts to limit and deny the children's contact with him. According to the psychological evaluation the mother 'does not appear to have an appreciation of the degree to which the children are caught in the middle of her dispute with their father, and she is rather intolerant of any behaviors she perceives as sympathizing or siding with him.'
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> c. Any history of, or potential for child abuse, spouse abuse, other domestic violence or parental kidnapping by either parent. While there is no evidence of child abuse by either parent, the mother alleges a history of physical and verbal abuse during their marriage.
>
> d. The geographic proximity of the parents to each other * * * The mother resides four (4) hours from the father and the children, after moving to the Toledo, Ohio area in August 2006 to pursue her education.
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> e. The recommendation of the guardian ad litem. The Guardian ad Litem in her report filed May 2, 2007 states that 'her (mother's) unresolved anger issues with the father adversely affect her decision making when it comes to what is in the best interest of the children.' Since neither party specifically asked for a termination of the shared parenting decree this issue was not directly addressed by the guardian ad litem. However, it is the court's belief that the guardian ad litem supports a termination of the shared parenting. The guardian ad litem states in her report that 'the relationship between the parents continues to be adversarial. There is a lot of unpleasant history in this relationship. The parents have not found a way to communicate that is acceptable to both parties and keeps the children out of the middle.' The Guardian ad Litem supports changing custody to the father."

The court also considered the following factors:

> "(a) Wishes of the child's parents. Both parents want to have custody of the children.
>
> (b) The wishes of the child. The Court interviewed both children separately in chambers with their Guardian ad Litem present. The children do have sufficient reasoning ability to express their wishes and concerns with regard to the allocation of parental rights and responsibilities. The daughter loves both parents and appears to be torn. She wants things to go back to the way it used to be with both parents living in the same town. She wants to live with her mom but wants both parents in close proximity so that she can see her dad often. Mason is comfortable living with either, but enjoys living with dad because he is able to play sports which the mother stopped him from doing.
>
> (c) Child's interactions and interrelationship with the child's parents, siblings, and others. The children have strong bonds with each other and with both their mother and father. The children's maternal grandparents and some other maternal relatives reside in the Marietta area. The

children are close to the maternal grandparents. The children have no relatives in Toledo. The children have numerous friends in Marietta through school and other activities. The children's contact with children in Toledo is limited due to only visiting in Toledo on the long weekends.

(d) The child's adjustment to their home, school, and community. The children are adjusted to both living in Marietta and attending school here. Both are doing exceptionally well in school and have greatly improved their grades since living with the father. They are both active in extra curricular activities locally. The children are very close to their maternal grandparents who live in Marietta and who exercise visitation with the children through their mother.

The children have no other relatives in Toledo other than the mother. The children have never lived in Toledo and only know it through visiting with the mother.

(e) Mental and physical health of all persons. The father has no mental or physical health issues. The mother, although she has some residual health issues as a result of her past surgery, does not appear to have any physical health issues which would limit her from having custody.

The Court, however, is concerned about the mother's mental health. According to the psychologist evaluation performed by Kathryn Bobbit, PhD, clinical psychologist, the mother's 'configuration of the clinical scales is unusual. It suggests a person with prominent hostility and suspiciousness who is also reporting significant problems in physical functioning.' It also suggests that 'she has very pronounced ideas that others are out to get her.' 'She is quick to feel that she is being treated inequitably and tends to hold grudges against others.' Her 'working relationship with others are likely to be very strained.' 'Ms. Roff sees herself as a victim and is over-reactive to perceived threats to the point of being frankly paranoid at times.'

(f) Parent more likely to honor and facilitate visitation. The mother, over the years, has constantly fought the father over visitation and contact with the children. She has denied him his right to visitation. She was found to be in contempt of court on February 24, 2004, as a result of denying him visitation for three months. She was given a 15 day suspended jail sentence. The father is very accommodating when it comes to providing visitation to the mother. The mother appears to play games with the father's visitation and makes it very difficult for him to see and talk to the children. This stems from her intense hatred of Mr. Ruse.

(g) Child support payment. There was no evidence presented at the hearing in regard to any parent failing to make child support payments.

(h) Criminal convictions resulting in a child being an abused or neglected child. Neither party has been convicted or abusing or neglecting a child. Although the father has two convictions for assault

arising out of an incident in 2003, and a few other criminal violations, none involved children being abused or neglected. His last criminal conviction was in 2003.

(i) Denial of parenting time to the other parent. The mother was found in contempt on February 24, 2004, for her failure to provide the father with visitation for three months. She was given a suspended 15 day jail sentence.

(j) Moving out of state. There was no evidence of either party on relocating out of the State of Ohio. However, the mother did move four hours away and planned on 'surprising' the children with this fact when she picked them up after a week's vacation with the father. During the time with their father, she moved all of the mother's and children's possessions to the Toledo area where she had rented an apartment and had enrolled them in school. The children were unaware of the move until she informed them at the visitation exchange that they would be driving to Toledo that night.

Other non-enumerated factors: The mother moved to the Toledo, Ohio, area to pursue her education in August, 2006. She did so after giving notice on July 14, 2006, to the Court and the father that she intended to move to Toledo. She did not include an actual address. She did not discuss the move with the children but rather wanted to 'surprise' them on August 20, 2006, by telling them that night when she picked them up after a week's vacation with their father that they were driving to Toledo that night to their new home and would be starting school immediately. The mother also did not discuss the move with the father. All parties were surprised by the sudden nature of the move.

The children's grades suffered when living with the mother, compared to now when living with the father. Jessica, while always a good student, greatly improved when she went to live with the father. She went from mostly B's and a few A's to mostly A's and a few B's. The biggest change was with Mason. He went from mostly C's, D's and F's, to A's, B's and 1 C. Additionally, his behavior significantly improved as a result of the father getting him evaluated and placing him on medication. The mother had stopped his medication against doctor's orders which had a negative impact on not only his grades but his behavior.

The mother's long term boyfriend, John Kendall, appears to play a big role in the children's lives despite the mother's denial of this fact. When the mother was asked by the psychologist if she and Mr. Kendall cohabitate, the mother said 'no', but at the same time the daughter who was in the interview with her mother said 'yes'. The child and mother then had a discussion about whether he lived there or not. When the examiner asked the mother whether Mr. Kendall disciplines the children, the mother said 'no', and again at the same time the daughter said 'yes.' The daughter and mother then had another discussion about who was right. The son in talking to the examiner 'strongly implied that Mr. Kendall

has a lot of say in terms of what the children are and are not allowed to do.' It is clear to the court that Mr. Kendall is involved in the children's lives.

The results of the psychological evaluation performed on Mr. Kendall found that 'he holds an extremely negative evaluation of Mr. Ruse' which 'is likely to have an effect on the degree to which the children are able to successfully bond with their father.' In the examiner's opinion 'Mr. Kendall's influence in the family has been, again, to intensify the alienation dynamic, by implanting the idea that Mr. Ruse is a frightening, out-of-control individual with whom they cannot have a safe relationship. Mr. Kendall has his own agenda in the situation which clearly does not coincide with the best interest of the children, and it is doubtful that Ms. Roff will advocate effectively for the children when conflict arises with Mr. Kendall.'

With respect to the mother's move to Toledo the psychologist found as follows:

'Although Ms. Roff expresses extreme distress about the separation from her children, the fact is that she did not make adequate arrangements regarding her move to Toledo. It was unreasonable to expect that children coming back from vacation with their father would be excited to find a house that had been completely packed up and moved as a 'surprise.' Furthermore, rather than staying in town when the conflict regarding residence escalated, she carried on with her plans. She cares very much for her children, and yet is also extremely invested in obtaining her degree, arguably to an extent that has caused harm to her children because their needs and interests have not consistently been her first priority.'

With respect to her fear and hatred of Mr. Ruse, the psychologist affords the following opinion:

'In this writer's opinion, Ms. Roff carries a great deal of unresolved anger and fear stemming from these events, and projects these feelings onto the children any time there is a conflict with Mr. Ruse. She then over-reacts in an attempt to protect them. When the children attempt to downplay the real danger, she tries to persuade them that they are greatly at risk. This creates a dynamic in the family where, in order to stay loyal to mom, the children have to exaggerate problems with dad. Again, the dynamic in the family leads almost inevitably to escalations, rather than de-escalations.'

With respect to Mr. Ruse, the psychologist found 'no evidence that Mr. Ruse has been inappropriately aggressive with the children.'"

The court thus concluded that shared parenting is no longer in the children's best interests.

**{¶ 26}** The trial court then considered which parent should be designated the residential parent and legal custodian. The court determined that designating appellee the residential parent would serve the children's best interests. The court noted that because it terminated the shared parenting plan, rather than modifying it, it did not need to apply the change in circumstance standard contained in R.C. 3109.04(E)(1)(a). The court further determined, however, that even if that standard applied, then based upon the factors it outlined above, a change in circumstance had in fact occurred. The court also determined that the benefits of changing the residential parent outweighed any harm. This appeal followed.[3]

I

**{¶ 27}** In her first assignment of error, appellant asserts that the trial court abused its discretion by determining that her relocation within Ohio to pursue an educational opportunity constituted a change in circumstances sufficient to modify the prior allocation of parental rights and responsibilities. She further complains that the trial court should not have granted appellee's ex parte motion for temporary custody because her intention to relocate did not constitute a valid ground for granting the order.

[3] Appellee did not file an appellate brief. If an appellee fails to file an appellate brief, App.R. 18(C) authorizes us to accept an appellant's statement of facts and issues as correct, and then reverse a trial court's judgment as long as the appellant's brief reasonably appears to sustain such action. See State v. Miller (1996), 110 Ohio App.3d 159, 161-162, 673 N.E.2d 934. In other words, an appellate court may reverse a judgment based solely on a consideration of an appellant's brief. See Helmeci v. Ohio Bur. of Motor Vehicles (1991), 75 Ohio App.3d 172, 174, 598 N.E.2d 1294; Ford Motor Credit Co. v. Potts (1986), 28 Ohio App.3d 93, 96, 502 N.E.2d 255; State v. Grimes (1984), 17 Ohio App.3d 71, 71-72, 477 N.E.2d 1219. In the case at bar, despite appellee's failure to file an appellate brief, we will consider the entire record and will not dispose of this case based solely on consideration of appellant's brief.

She contends that by granting the temporary order, the children then were placed in the father's custody and at the hearing, the court considered evidence regarding the children's adjustment while under appellee's care. Appellant argues that without the improper ex parte grant of temporary custody, the trial court would not have heard evidence regarding the children's adjustment to being in appellee's care.

**{¶ 28}** We first note that appellant's first assignment of error rests upon the presumption that the R.C. 3109.04(E)(1)(a)[4] change in circumstances standard governs the disposition of this appeal. The trial court, however, did not modify a prior allocation of parental rights and responsibilities. Instead, the trial court explicitly stated that it terminated the parties' prior shared parenting plan under R.C. 3109.04(E)(2)(c), which does not require a change in circumstance finding. See Francis v. McDermott, Darke App. No. 1753, 2009-Ohio-4323, at ¶10; Beismann v. Beismann, Montgomery App. No. 22323, 2008-Ohio-984, at ¶8, quoting Goetze v. Goetze (March 27, 1998), Montgomery App. No. 16491 ("'Significantly, nothing in R.C. 3109.04(E)(2)(c) requires the trial court to find a change in circumstances in order to terminate a shared parenting agreement.'"); see, also, Rogers v. Rogers, Huron App. No. H-07-024, 2008-Ohio-1790; Murphy v. Murphy, Greene App. No. 2007CA43, 2007-Ohio-6692.

**{¶ 29}** Second, to the extent appellant seeks to challenge the trial court's ex parte grant of temporary custody to appellee, this particular order does not constitute a final, appealable order. Section 3(B)(2), Article IV of the Ohio Constitution limits this

[4] R.C. 3109.04(E)(1)(a) allows the modification of a custody order when "a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and * * * modification is necessary to serve the best interest of the child."

court's appellate jurisdiction to reviewing a trial court's final judgment. A temporary order allocating custody between parents is not a final judgment, but rather is an interlocutory order. See, e.g., State ex rel. Thompson v. Spon (1998), 83 Ohio St.3d 551, 554, 700 N.E.2d 1281; State ex rel. Wallacy v. Smith (1997), 78 Ohio St.3d 47, 50-51, 676 N.E.2d 109; In re Devlin (1992), 78 Ohio App.3d 543, 605 N.E.2d 467. "In a domestic relations action, interlocutory orders are merged within the final decree, and the right to enforce such interlocutory orders does not extend beyond the decree, unless they have been reduced to a separate judgment or they have been considered by the trial court and specifically referred to within the decree." Colom v. Colom (1979), 58 Ohio St.2d 245, 389 N.E.2d 856. Thus, the court's final order supercedes the temporary orders and corrects any error. Smith v. Quigg, Fairfield App. No.2005-CA-01, 2006-Ohio-1494, at ¶36; see, also, Eichenberger v. Eichenberger (Oct. 29, 1998), Franklin App. No. 97APF12-1599; Wyss v. Wyss (1982), 3 Ohio App.3d 412, 413, 445 N.E.2d 1153. Because the temporary order merged into the final judgment, any possible error contained therein is now moot. See Kimbler v. Kimbler, Scioto App. No. 05CA2994, 2006-Ohio-2695, at ¶26; see, also, Ruby v. Ruby (Aug. 11, 1999), Coshocton App. No. 99-CA-4 ("Temporary orders are merged into the final decree of divorce, and cannot now be claimed as error."); Corrigan v. Corrigan (Dec. 30, 1986), Ross App. No. 1300 (finding issue of whether trial court had authority to enter temporary custody order moot when temporary order merged with final order).

**{¶ 30}** We thus construe appellant's first assignment of error as challenging the trial court's decision to terminate the parties' shared parenting decree and to designate appellee the children's residential parent and legal custodian. An appellate court

reviews a trial court's decision to terminate a shared parenting plan under an abuse of discretion standard. See Masters v. Masters (1994), 69 Ohio St.3d 83, 85, 630 N.E.2d 665; Stanley v. Stanley, Summit App. No. 23427, 2007-Ohio-2740, at ¶7. An abuse of discretion implies that the trial court's decision is arbitrary, unreasonable, or unconscionable. Miller v. Miller (1988), 37 Ohio St.3d 71, 73, 523 N.E.2d 846. Furthermore, when an appellate court applies the abuse of discretion standard, it may not substitute its judgment for that of the trial court. Pons v. Ohio State Med. Bd. (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748.

**{¶ 31}** R.C. 3109.04(E)(2)(c) governs the termination of a shared parenting plan:

> The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interests of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon it own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children.

Thus, a court may terminate a shared parenting plan if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the children's best interests. R.C. 3109.04(E)(2)(c).

**{¶ 32}** R.C. 3109.04(F)(2) sets forth the factors a court must consider in determining whether shared parenting is in the best interest of the children:

> (a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;
> (b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;
> (c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;
> (d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

> (e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem.

If the court terminates a shared parenting order, then "the court shall proceed and issue a modified decree for the allocation of parental rights and responsibilities for the care of the children under the standards applicable under divisions (A), (B), and (C) of this section as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made." R.C. 3109.04(E)(2)(d).

**{¶ 33}** When allocating parental rights and responsibilities, the court must consider the children's best interests. R.C. 3109.04(B)(1). R.C. 3109.04(F)(1) specifies the best interest factors, in addition to all relevant factors, that the court must consider:

> (a) The wishes of the child's parents regarding the child's care;
> (b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;
> (c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;
> (d) The child's adjustment to the child's home, school, and community;
> (e) The mental and physical health of all persons involved in the situation;
> (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;
> (g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;
> * * *
> (i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;
> (j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

**{¶ 34}** In the case at bar, we do not believe that the trial court abused its discretion by terminating the parties' shared parenting plan and by designating appellee the children's residential parent. Here, the court fully considered all of the evidence and the statutory factors. We cannot say that its analysis of the evidence and issues is unreasonable, arbitrary, or capricious. Additionally, we observe that the guardian ad litem explained that she based her recommendation to designate appellee the residential parent not on appellant's relocation, but based upon the children's school performance and M.M.R.'s behavioral improvement due to consistency with his medication. The evidence adduced during the trial court proceeding supports this view. Moreover, appellant's relocation to a distant city would render shared parenting impractical.

**{¶ 35}** Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

**{¶ 36}** In her second assignment of error, appellant contends that the trial court erred by refusing to appoint legal counsel for the children. She asserts that the court should have appointed counsel because the children's interests, or at least J.L.R.'s wishes, conflicted with the guardian ad litem's recommendation that the court designate appellee the residential parent.

**{¶ 37}** Civ.R. 75(B)(2) addresses the appointment of legal counsel for a child in a custody action: "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." The appointment of legal counsel pursuant to Civ.R. 75(B)(2) is a matter reserved to the trial court's sound discretion. See Walton v. Walton, Wood App. No. WD-06-066, 2007-Ohio-4325, citing Pruden-Wilgus v. Wilgus (1988), 46 Ohio App.3d 13, 16, 545 N.E.2d 647. As we previously explained: "An abuse of discretion is more than an error of law or judgment; rather, it is a finding that the court's attitude is unreasonable, arbitrary, or unconscionable. Under this standard of review, an appellate court may not merely substitute its judgment for that of the trial court." Wilburn v. Wilburn, 169 Ohio App.3d 415, 2006-Ohio-5820, 863 N.E.2d 204, at ¶13 (citations omitted).

**{¶ 38}** In the case at bar, the trial court did not join either of the children as a party to the case. Although the court appointed a guardian ad litem for the children, "Civ.R. 75(B)(2) does not state that the appointment of a GAL makes the child a party to the case." Wilburn, at ¶15. Furthermore, a child does not become a party to the case when a court appoints a guardian ad litem under R.C. 3109.04(B)(2)(a). Id. at ¶16. Thus, in the case at bar, because neither child was a party to the case, the trial court had no obligation to appoint counsel for either child. However, although this is a private custody matter between two parents, the Juvenile Court obtained jurisdiction over the matter. As such, the Juvenile Rules of Procedure control resolution of this issue. See Lowry v. Lowry (1988), 48 Ohio App.3d 184, 187-189, 549 N.E.2d 176.

**{¶ 39}** Under the Juvenile Rules, the children are considered parties and as such, "shall have the right to be represented by counsel." Juv.R. 4(A). However, a child's right to counsel in juvenile proceedings is not absolute. See In re Williams, 101

Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 1110, syllabus (stating that a child has a right to counsel in permanent custody proceedings "in certain circumstances"). R.C. 2151.352 limits a child's right to counsel when a juvenile court obtains jurisdiction upon certification from the common pleas court. R.C. 2151.352 states:

> A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2), (3), (9), (10), (11), (12), or (13); (B)(2), (3), (4), (5), or (6); (C); (D); or (F)(1) or (2) of section 2151.23 of the Revised Code. If a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person. The court may continue the case to enable a party to obtain counsel, to be represented by the county public defender or the joint county public defender, or to be appointed counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

The instant case is a civil matter under R.C. 2151.23(D). Under R.C. 2151.352, J.L.R. does not have the right to appointed counsel. Cf. In re M.E.H., Washington App. No. 08CA4, 2008-Ohio-3563 (holding that father was not entitled to counsel in custody action). Moreover, even if the trial court arguably had a duty to appoint separate counsel for the child because her wishes conflicted with the guardian ad litem's recommendation, we would find no error. Again, the trial court heard the evidence and was well-aware of the child's wishes and her conflicted feelings. Because no prejudice resulted from the court's failure to appoint counsel, there is no error. See In re Joshua

B., Sandusky App. Nos. S-02-018, S-02-021, S-02-019, S-02-020, 2003-Ohio-3096, at ¶12.

**{¶ 40}** Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error.

III

**{¶ 41}** In her third assignment of error, appellant asserts that the trial court abused its discretion by refusing to allow her to conduct discovery from the guardian ad litem. She asserts that the trial court should have permitted her to examine the guardian under oath.

**{¶ 42}** Generally, we review a trial court's discovery ruling under the abuse of discretion standard. See Nicewicz v. Nicewicz (June 25, 1995), Franklin App. No. 94APF-06-956 (noting trial court's inherent authority to regulate discovery and concluding trial court did not abuse its discretion by overruling motion to depose guardian ad litem); see, e.g., Tracy v. Merrell Dow Pharmaceuticals (1991), 58 Ohio St.3d 147, 569 N.E.2d 875; Ingram v. Adena Health Sys. 149 Ohio App.3d 447, 2002-Ohio-4878, 777 N.E.2d 901, at ¶10.

**{¶ 43}** In the case sub judice, we do not believe that the trial court abused its discretion by denying appellant's discovery request. Appellant had the opportunity to review the guardian's first report prior to trial and cross-examined her at trial. Moreover, appellant has not specified how the trial court's discovery ordered caused her prejudice. See, generally, In re Adams, Miami App. No. 2002CA45, 2003-Ohio-618; see, also, Sowald and Morganstern, Domestic Relations Law (4th

Ed.2002), Section 15:68 (footnotes omitted) (stating that because "the guardian's function [is] to serve the best interests of the child," requiring the guardian ad litem to testify as a witness "may compromise his or her function when testifying is against the guardian ad litem's better judgment" and that "[t]he trial court, in its authority to control discovery, may grant a protective order to prevent the deposing of the guardian ad litem").

**{¶ 44}** Accordingly, based upon the foregoing reasons, we hereby overrule appellant's third assignment of error.

IV

**{¶ 45}** In her fourth assignment of error, appellant asserts that the trial court erred by permitting the guardian ad litem, who is not an attorney, to participate in the trial by filing motions and examining witnesses.

**{¶ 46}** R.C. 2151.281(I) sets forth the general duties of a guardian ad litem and states that the guardian ad litem: "shall perform whatever functions are necessary to protect the best interest of the child, including, but not limited to, investigation, mediation, monitoring court proceedings, and monitoring the services provided the child by the public children services agency or private child placing agency that has temporary or permanent custody of the child, and shall file any motions and other court papers that are in the best interest of the child."

**{¶ 47}** The Ohio Supreme Court recently adopted Sup.R. 48, effective March 1, 2009, that further outlines a guardian ad litem's responsibilities. As relevant to the

issue of a non-attorney guardian ad litem questioning witnesses and performing other functions traditionally reserved to attorneys, subdivisions (D)(5) and (6) of the rule read:

> (5) A non-attorney guardian ad litem must avoid engaging in conduct that constitutes the unauthorized practice of law, be vigilant in performing the guardian ad litem's duties and request that the court appoint legal counsel, or otherwise employ the services of an attorney, to undertake appropriate legal actions on behalf of the guardian ad litem in the case.
>
> (6) A guardian ad litem who is an attorney may file pleadings, motions and other documents as appropriate under the applicable rules of procedure.

**{¶ 48}** "Gov.Bar R. VII(2)(A) defines the unauthorized practice of law as 'the rendering of legal services for another by any person not admitted to practice in Ohio.'" Cleveland Bar Assn. v. CompManagement, Inc., 111 Ohio St.3d 444, 462, 2006-Ohio-6108, 857 N.E.2d 95, at ¶22. "Any definition of the practice of law inevitably includes representation before a court, as well as the preparation of pleadings and other legal documents, the management of legal actions for clients, all advice related to law, and all actions taken on behalf of clients connected with the law. Id. (citation omitted).

**{¶ 49}** "'[L]imiting the practice of law to licensed attorneys is generally necessary to protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation.'" Id. at ¶23, quoting CompManagement I, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, ¶39-40. However, "representation may not always require the training and experience of an attorney and * * * 'the protective interest' may be 'outweighed by other important considerations.'" Id., quoting CompManagement I, 104 Ohio St.3d 168,

2004-Ohio-6506, 818 N.E.2d 1181, ¶39-40.

**{¶ 50}** Due to the recent enactment of Sup.R. 48, there is no case law interpreting it. We believe, however, that construing the rule along with the Ohio Supreme Court's interpretation of the "unauthorized practice of law" leads to the conclusion that a non-attorney guardian ad litem may not question witnesses or file pleadings, motions or other legal documents in a juvenile court proceeding. Questioning of witnesses during a court proceeding constitutes the practice of law. See Cleveland Bar Assn. v. CompManagement, Inc., 111 Ohio St.3d 444, 462, 2006-Ohio-6108, 857 N.E.2d 95, at ¶67 (stating that "any direct questioning of a witness would indisputably constitute the practice of law"). Moreover, the rule permits a guardian ad litem who is an attorney to file pleadings and motions. Under the doctrine of expressio unius est exclusio alterius,[5] the express inclusion of permitting a guardian ad litem who is an attorney to file pleadings and motion implies the exclusion of a guardian ad litem who is not an attorney from filing pleadings and motions. Sup.R. 48 evinces an intent to prohibit a non-attorney guardian ad litem from acting as legal counsel for the child. Thus, to the extent the trial court permitted the guardian ad litem in the case sub judice, who was not an attorney, to question witness and to file pleadings, motions, or other documents, Sup.R. 48 prohibits these actions.[6] Appellant

[5] "The canon expressio unius est exclusio alterius tells us that the express inclusion of one thing implies the exclusion of the other." Myers v. Toledo, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶24; see, also, O'Toole v. Denihan, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, at ¶57.

[6] To the extent our decision in In Re Curry, Washington App. No. 03CA51, 2004-Ohio-750, conflicts with this holding, we hereby overrule that portion of Curry that addressed the guardian ad litem's questioning of witnesses. We note, however, that

has not, however, established that the error caused her prejudice. Consequently, the error is harmless and does not require us to reverse the trial court's judgment. See Civ.R. 61.

**{¶ 51}** Accordingly, based upon the foregoing reasons, we hereby overrule appellant's fourth assignment of error.

V

**{¶ 52}** In her fifth assignment of error, appellant asserts that the trial court abused its discretion by sustaining appellee's objection to the following question: "So your entire case revolves around moving to Perrysburg, or moving away from here?" She contends that there was nothing improper about the question.

**{¶ 53}** "Decisions regarding the admissibility of evidence are within the broad discretion of the trial court. A decision to admit or exclude evidence will be upheld absent an abuse of discretion. Even in the event of an abuse of discretion, a judgment will not be disturbed unless the abuse affected the substantial rights of the adverse party or is inconsistent with substantial justice." Beard v. Meridia Huron Hosp., 106 Ohio St.3d 237, 2005-Ohio-4787, ¶20 (citations omitted). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219.

**{¶ 54}** In the case sub judice, the trial court did not abuse its discretion by excluding evidence regarding appellee's rationale for seeking custody of the children.

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Curry did not garner a majority of the court.

Moreover, even if the court did abuse its discretion, it did not affect appellant's substantial rights. The trial court did not rely upon one factor, such as appellee's motivation in seeking custody of the children, in deciding to terminate shared parenting and designate appellee the residential parent. Instead, the court relied upon a variety of factors that it outlined in its decision. Thus, the absence of appellee's testimony regarding his motivation in seeking custody of the children did not affect appellant's substantial rights.

**{¶ 55}** Accordingly, based upon the foregoing reasons, we hereby overrule appellant's fifth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J., Abele, J. & McFarland, J.: Concur in Judgment and Opinion

For the Court

BY: _____
Roger L. Kline
Presiding Judge

BY: _____
Peter B. Abele, Judge

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.