[Cite as *Guliano v. Guliano,* 2011-Ohio-6853.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

PATRICK N. GULIANO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2010-T-0031
- vs -	:	
BARBARA R. GULIANO,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2004 DR 404.

Judgment: Affirmed in part; reversed in part and remanded.

William R. Biviano, Biviano Law Firm, 700 Huntington Bank Tower, 108 Main Avenue, S.W., Warren, OH 44481-1089 (For Plaintiff-Appellant).

Debora K. Witten, Witten & De Matteis, 173 West Market Street, Warren, OH 44481 (For Defendant-Appellee).

Robert M. Platt, *Jr.*, Gessner & Platt Co., L.P.A., 212 West Main Street, Cortland, OH 44410 (Guardian ad litem).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Patrick N. Guliano, appeals from the February 4, 2010 judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, overruling his objections and adopting the magistrate's decision denying his motion to either modify or establish a specific visitation schedule and his request for additional counseling.

{¶2} Patrick and appellee, Barbara R. Guliano, married in 1984. Two children were born as issue of the marriage. After being married for about 20 years, Patrick filed for divorce. At the time of filing, the parties' son was 16 years old and their daughter was 10. Barbara subsequently filed an answer. The parties stipulated to Barbara being the residential parent and that Patrick would have companionship rights. Attorney Robert M. Platt, Jr., was ultimately appointed Guardian Ad Litem ("GAL") for the minor children.

{¶3} Prior to the final decree of divorce, the parties' son became emancipated. Patrick exercised his right to visitation with his daughter to the extent it was available throughout the course of the proceedings. Barbara later opposed Patrick's companionship with their daughter.

{¶4} The trial court subsequently granted the parties a divorce. Patrick was not granted the standard order of companionship because his daughter had not visited with him on a regular basis since the filing of the divorce. The trial court fully acknowledged the ongoing problems with visitation during the pendency of the action. In the January 2007 divorce decree, the trial court ordered that companionship be continued with the assistance of the GAL and court mediator or by further order of the court upon the filing of a motion.

{¶5} In light of the fact that after the parties' divorce, the only court ordered visitation consisted of a generalized right of parenting time with the minor child and that in practice Patrick's visitation consisted of nothing more than weekly driveway visits of short duration at the end of Barbara's driveway, Patrick filed a motion to modify or establish a specific visitation schedule. Patrick also requested that his daughter have

additional counseling. Because almost three years had passed since the initial filing of the divorce and Patrick's motion to modify or establish a visitation order, a new GAL was appointed and ordered to investigate the parenting time issue. An in camera interview of the minor child was conducted, however, it was not recorded.

{¶6} A hearing was held before the magistrate. Barbara testified that although her daughter does not want to visit with her father, she encourages her to do so. According to Barbara, Patrick schedules a meeting with their daughter, drives up to the base of Barbara's driveway, and their daughter stands outside of his car for up to 10 minutes at a time. Barbara stated she filed a motion to terminate all contact with Patrick because that is what her daughter has wanted since 2004. Barbara does not believe her daughter has psychological, attitude, or communication problems with respect to her relationship with her father. She is grateful her daughter has grown up to be well adjusted, exceeding both academically and athletically.

{¶7} Patrick testified he used to have a good relationship with his daughter. He stated that since 2004, his visits with his daughter in terms of five minutes or more have been "nonexistent." Prior to the parties' divorce, Patrick had visitation with his daughter at the Solace Center for 45 minutes to one hour. He said his daughter was "nonresponsive" and totally ignored him. Patrick said the minor child was also nonresponsive during sessions with Kim Lydic, a licensed counselor, at Churchill Counseling. He stated that Dr. Sandra Foster, a psychologist, also counseled his daughter but her nonresponsive behavior toward him did not change from 2004 to 2009. Patrick testified that almost every Saturday or Sunday since 2004, he visits with his daughter at the bottom of Barbara's driveway. Since January of 2007, Patrick said the

longest time he spent with his daughter was for one minute, five seconds. Patrick blames Barbara for his lack of visitation with the minor child.

{¶8} The GAL testified the minor child does not want any relationship with her father and is not interested in seeing his family. He opined, however, that the minor child needs to visit with Patrick. The GAL stated that Patrick does not pose any harm to the minor child. The GAL recommended that the continuance of the present companionship arrangements will best serve the parties by permitting at least some contact between Patrick and his daughter, and that perhaps with time, the minor child's relationship with her father will expand much like it has between her older brother and father. The GAL further recommended that it was not in the minor child's best interest to grant Patrick's motion to modify or establish a visitation schedule.

{¶9} Over objection of Patrick's counsel, the GAL read a portion of a July 27, 2005 letter from Kim Lydic to the former guardian ad litem, which said although she encouraged the minor child to visit with Patrick, "forcing her at this time may only cause further psychological damage." That letter was written almost four years before the hearing.

{¶10} The magistrate's decision recommended that Patrick's motion to modify or establish a specific visitation schedule be denied. Patrick filed objections. The trial court overruled Patrick's objections and denied his motion. The trial court determined that the present arrangement of driveway meetings serves the best interest of the minor child, allows at least minimum contact between Patrick and his daughter, and shall continue until further order of the court. The trial court also denied Patrick's request for additional counseling. The trial court reasoned that the minor child has had extensive

counseling throughout the pendency of the case and any additional orders on counseling would not be in the best interest of the minor child. In denying Patrick's request for additional time with his daughter, neither the magistrate nor the court expressly considered his natural right of visitation. Patrick filed a timely appeal, asserting the following assignments of error:

{¶11} "[1.] The trial court erred in allowing portions of the letter of Kim Lydic to be read into the record during the testimony of the GAL as it was clearly hearsay, it was not received by the GAL during his investigation of the 'best interests of the child', and it was not relied upon by the GAL.

{¶12} "[2.] The trial court abused its discretion in finding that the father 'visiting' with the child, at the end of the driveway, one time a week for approximately a minute was reasonable visitation in the absence of any evidence which would justify deviating from the standard visitation order in Trumbull County and essentially denying visitation to the father.

{¶13} "[3.] The trial court erred in adopting the Magistrate's Decision without examining the 'in camera interview' of the minor child by the Magistrate, as the interview was not preserved, transcribed, or otherwise made part of the record.

{¶14} "[4.] The trial court erred in refusing to order a psychological evaluation of the minor child on the grounds that the child had undergone numerous counseling sessions when the final divorce decree failed to establish a visitation schedule and forced the father to seek intervention of the Court's mediator and counselors to obtain visitation.

{¶15} "[5.] The trial court erred in adopting the Magistrate's Decision finding that the mother will follow Court ordered visitation when all the evidence demonstrates that the child has failed to visit with the father and the mother has taken no action to prevent the child's failure to visit."

{¶16} For ease of discussion, we will consider Patrick's assignments of error out of order.

{¶17} In his first assignment of error, Patrick argues the trial court erred in allowing the GAL to read portions of Kim Lydic's letter to the former guardian ad litem into the record. Patrick alleges the letter was hearsay, not received by the GAL during his investigation, and not relied upon by the GAL.

{¶18} "With respect to evidentiary rulings, '"(t)he trial court has broad discretion in the admission and exclusion of evidence."' *State v. Bentley,* 11th Dist. No. 2004-P-0053, 2005-Ohio-4648, at ¶19, citing *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, ***. Thus, '"(a)n appellate court shall not disturb evidentiary rulings absent an abuse of discretion."' Id. *State v. Montie,* 11th Dist. No. 2006-P-0058, 2007-Ohio-2317, at ¶13." *Bates-Brown v. Brown*, 11th Dist. No. 2006-T-0089, 2007-Ohio-5203, at ¶20. (Parallel citation omitted.) An abuse of discretion is the trial court's failure to "'"exercise sound, reasonable, and legal decision-making."'" *Maiden v. Maiden*, 11th Dist. No. 2010-L-076, 2011-Ohio-2841, at ¶22, quoting *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶19} Evid.R. 801(C) defines hearsay as "*** a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "Hearsay is not admissible except as otherwise provided

***." Evid.R. 802; *Green v. Green* (Mar. 31, 1998), 11th Dist. No. 96-L-145, 1998 Ohio App. LEXIS 1434, at *17. A trial judge is presumed to be able to disregard improper testimony. *In re Sims* (1983), 13 Ohio App.3d 37, 41. The admission of hearsay is not prejudicial unless it is shown that such evidence was relied on by the judge in making his decision. *Adorante v. Wright*, 7th Dist. No. 98-BA-56, 2001 Ohio App. LEXIS 1206, at *14-*15, citing *In re Vickers Children* (1983), 14 Ohio App.3d 201, 206.

{¶20} The GAL was questioned about the July 27, 2005 letter from Kim Lydic to the former guardian ad litem. The GAL testified that the letter occurred prior to his involvement in this matter. Patrick's counsel objected to allowing the letter into evidence. The trial court sustained the objection. However, the trial court allowed the GAL to review the letter in order to determine if he was basing part of his recommendation on it and to testify in open court as to some of its content. Specifically, the GAL quoted from a portion of the outdated letter in which Kim Lydic stated that although she "'[c]ontinue[d] to encourage [the minor child] to go visit with her Dad, forcing her at this time may only cause further psychological damage.'" That portion of the letter which was read by the GAL was hearsay and should not have been admitted into evidence. Evid.R. 801(C); Evid.R. 802; *Green*, supra, at *17.

{¶21} However, the GAL testified that he did not rely upon the letter in making any recommendations. Instead, the GAL testified that independent of the Lydic letter, and based on his own investigation, he concluded that the minor child has an "attitude" toward her father. The GAL stated that although there are some underlying issues with respect to the minor child, there is nothing that really shows any serious psychological issues.

{¶22} Although the GAL's recital of Kim Lydic's statement in her letter to the former guardian ad litem that "forcing [the minor child to visit with her father] at this time may only cause further psychological damage" was hearsay and should not have been admitted, its admission was not prejudicial to Patrick. Neither the magistrate's decision nor the trial court's order relied on the GAL's testimony regarding the letter. Rather, the primary basis the magistrate used in rendering his decision were the factors stated in R.C. 3109.051(D)(1)-(16). Therefore, we must presume that only properly admissible evidence was considered by the trial court in reaching its decision. See *In re K.R.*, 11th Dist. No. 2010-T-0050, 2011-Ohio-1454, at ¶76.

{¶23} Although the complained of testimony should not have been admitted, there was no prejudice and therefore, Patrick's first assignment of error is without merit.

{¶24} In his fourth assignment of error, Patrick argues the trial court abused its discretion by refusing to order a psychological evaluation of the minor child.

{¶25} A trial court may order the parents and/or their minor children to submit to medical, psychological, and psychiatric examinations. See *Brown*, supra, at ¶26. However, it is within the trial court's discretion to order a psychological evaluation of a minor child. *Brossia v. Brossia* (1989), 65 Ohio App.3d 211, 215; *White v. White*, 2d Dist. No. 2009 CA 17, 2009-Ohio-4311, at ¶28.

{¶26} In our case, again, the GAL testified the minor child has an "attitude" toward her father. The GAL stated that although there are some underlying issues with respect to the minor child, there is nothing that really shows any serious psychological issues. From the beginning of this matter, despite counseling and mediation sessions, the minor child, as expressed by the testimony of Barbara, Patrick, and the GAL, simply

does not want to visit with her father and remains very resistant to any expansion of parenting time with him. The magistrate recognized these facts and rendered his decision after an evidentiary hearing. The magistrate determined, pursuant to R.C. 3109.051(D)(9), that Barbara, Patrick, and the minor child all appear to be in good physical and mental health. The trial court adopted the magistrate's decision, finding the parties, including the minor child, to be in good physical and mental health.

{¶27} It is abundantly clear that the minor child has not wanted to visit with her father from the outset. In order to address that issue, the minor child underwent significant counseling and mediation sessions to address her unwillingness, all to no avail. Thus, because the minor child has already undergone counseling and mediation and there is nothing that shows that she has any serious psychological issues, the trial court did not abuse its discretion by not ordering the minor child to submit to additional psychological evaluations.

{¶28} Patrick's fourth assignment of error is without merit.

{¶29} In his fifth assignment of error, Patrick alleges the trial court erred in adopting the magistrate's decision, finding that Barbara will follow court ordered visitation. He maintains that all the evidence demonstrates that the minor child has failed to visit with him, and Barbara has taken no action to prevent the child's failure to visit.

{¶30} Barbara testified that although she filed a motion to terminate all contact with Patrick because that is what her daughter has wanted since 2004, she still encourages her daughter to comply with the current order and visit with her father at the end of the driveway.

{¶31} More importantly, Barbara testified that she would follow and not ignore any court order short of physically forcing her daughter to visit with her father. The trial court's conclusion that Barbara will follow court ordered visitation is supported by the evidence.

{¶32} Thus, the trial court did not abuse its discretion by adopting the magistrate's decision, finding that Barbara will follow court ordered visitation.

{¶33} Patrick's fifth assignment of error is without merit.

{¶34} In his third assignment of error, Patrick alleges the trial court erred in adopting the magistrate's decision without examining the in camera interview of the minor child, which was not preserved, transcribed, or otherwise made part of the record.

{¶35} "'(W)hen establishing a specific parenting time or visitation schedule,' the proceedings are governed by R.C. 3109.051. With respect to conducting an in camera interview with the minor, R.C. 3109.04(B)(2)(c) [involving custody] and R.C. 3109.051(C) are substantially the same." *Moline v. Moline,* 11th Dist. No. 2009 A 0013, 2010 Ohio 1799, at ¶43.

{¶36} Trial courts shall make a record of any in camera interview with children involved in custody proceedings, to be kept under seal for review on appeal. *Jackson v. Herron*, 11th Dist. No. 2003-L-145, 2005-Ohio-4046, at ¶16, citing *Donovan v. Donovan* (1996), 110 Ohio App.3d 615, 620. "Although the holding in *Donovan* applied solely to the recordings of in camera interviews with children involved in custody proceedings pursuant to R.C. 3109.04(B), it equally applies to R.C. 3109.051(C), which governs in-chambers interviews of children in visitation matters, and which language is identical to the pertinent language of R.C. 3109.04(B)." *Willis v. Willis*, 149 Ohio App.3d 50, 2002-

Ohio-3716, at ¶20. See, also, *In re Gilliam* (Mar. 30, 1998), 12th Dist. No. CA97-11-020, 1998 Ohio App. LEXIS 1240, at *10.

{¶37} An in camera interview was conducted with the minor child. However, the trial court made no record of that interview. Thus, the minor child's wishes were only expressed through the testimony of her mother, father, and the GAL. Because the trial court was required to make a record of its in camera interview with the minor child, but failed to do so, the trial court committed error. *Donovan*, supra, at 620; *Willis*, supra, at ¶20.

{¶38} However, due to our disposition of the second assignment, which will be addressed next, the failure is nonprejudicial. Therefore, Patrick's third assignment of error is without merit.

{¶39} In his second assignment of error, Patrick contends the trial court abused its discretion in reducing his parenting time and finding that his weekly "visits" with his daughter at the end of Barbara's driveway were reasonable.

{¶40} "We presume the trial court's visitation decision is correct and reverse only upon a showing of an abuse of discretion. *Utz v. Hatton* (Apr. 9, 1999), 2d Dist. No. 17240, 1999 Ohio App. LEXIS 1566, 15, citing *Roach v. Roach* (1992), 79 Ohio App.3d 194, ***." *Clark v. Clark*, 11th Dist. No. 2009-P-0096, 2010-Ohio-3967, at ¶27. (Parallel citation omitted.)

{¶41} R.C. 3109.051(D) outlines 16 factors a magistrate or trial court must take into consideration when determining parenting time, companionship, or visitation rights to the extent they are relevant in a particular case.

{¶42} The magistrate stated the following with respect to the relevant factors at issue:

{¶43} "The minor does not interact with the father or paternal family. This is despite counseling, mediation and extensive conversations with the [GAL]. The minor is steadfast in her resistance to any contact with members of the paternal side of the family. The minor interacts very well with the maternal side of the family and her mother, as well as with friends and her sibling." R.C. 3109.051(D)(1).

{¶44} "*** The child's schedule is very full both scholastically and socially. Parenting time would be effectuated if warranted." R.C. 3109.051(D)(3).

{¶45} "The minor is fifteen (15) years old and the age is not a problem if parenting time is warranted." R.C. 3109.051(D)(4).

{¶46} "The minor appears to be very well adjusted to her current situation with regard to her home, school and community." R.C. 3109.051(D)(5).

{¶47} "The minor is now fifteen (15) years of age and is a freshman in high school and is a 4.0 student. She is very active in school and participates in year round sports and social activity. Throughout this court proceeding she has remained adamant that she does not want to expand parenting time with her father and would prefer not to have a relationship with her father." R.C. 3109.051(D)(6).

{¶48} "The minor per her counselors and physician is in good health. The minor appears to be safe in her present situation." R.C. 3109.051(D)(7).

{¶49} "All the parties appear to be [in] good physical and mental health." R.C. 3109.051(D)(9).

{¶50} "The custodial parent mother will follow the Courts' Ordered Parenting Time. However, the minor child's wishes are not to visit and remains very resistant to any expansion of parenting time with her father. The minor would prefer not to have any relationship with the paternal side of her family." R.C. 3109.051(D)(10).

{¶51} "Neither party has been convicted or plead to any criminal proceedings resulting from abuse or neglect of this minor." R.C. 3109.051(D)(11).

{¶52} "The parties have filed many Motions to Enforce, Modify, Compel and Motions for Contempt. It is apparent from testimony at trial that the father believes that the child should be forced to visit regardless of the child's wishes or feelings. The mother believes the child should visit but on her terms, however the mother said 'she would follow and not ignore any order of court short of physically forcing the child to visit.'" R.C. 3109.051(D)(13).

{¶53} The magistrate determined that R.C. 3109.051(D)(2), (8), (12), (14), (15), and (16) were not issues with respect to the facts of this case. The magistrate considered the factors set forth in R.C. 3109.051(D).

{¶54} However, "[w]e recognize the importance of a father's relationship with his child and of his ability to visit with his child." *Eitutis v. Eitutis*, 11th Dist. No. 2009-L-121, 2011-Ohio-2838, at ¶81. "'A noncustodial parent's right of visitation with his children is a natural right and should be denied only under extraordinary circumstances.'" Id., quoting *Moline,* supra*,* at ¶59, citing *Pettry v. Pettry* (1984), 20 Ohio App.3d 350, paragraph one of the syllabus. Extraordinary circumstances include unfitness of the non-custodial parent or a showing that visitation with the minor child would cause harm. *Ware v. Ware*, 12th Dist. No. CA2001-10-089, 2002 Ohio App. LEXIS 887, at *5.

{¶55} As previously stated, there is no evidence of extraordinary circumstances which would even suggest that Patrick is an unfit parent or that visitation with him would cause harm to the minor child. In fact, the evidence is to the contrary. Patrick does not pose any harm to the minor child. The trial court adopted the magistrate's decision, finding that Patrick is not neglectful or abusive. Additionally, there is no evidence that the minor child would be harmed in any manner as a result of visiting with Patrick. The minor child simply does not want to visit with her father.

{¶56} Patrick's "visitations" with his daughter have been limited for years to once a week for a couple of minutes at the bottom of Barbara's driveway. Visitation at this frequency and duration is tantamount to no visitation at all and a divestiture of Patrick's natural rights.

{¶57} Thus, the trial court abused its discretion by finding that Patrick's weekly driveway "visits," based upon the minor child's desires, was reasonable. On remand, the trial court shall grant Patrick meaningful visitation with his daughter equivalent to its standard order of visitation, taking into account the needed flexibility of the minor child's active schedule as well as the schedules of the parties.

{¶58} Patrick's second assignment of error is with merit.

{¶59} For the foregoing reasons, appellant's first, third, fourth, and fifth assignments of error are not well-taken. Appellant's second assignment of error is well-taken. The judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. On remand, the trial court shall grant appellant meaningful visitation with his daughter equivalent to its standard order of

visitation, taking into account the needed flexibility of the minor child's active schedule as well as the schedules of the parties.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.