[Cite as *Witherow v. Witherow*, 2022-Ohio-3618.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

CRAIG M. WITHEROW,

Plaintiff-Appellee/Cross-Appellant,

v.

JENNIFER R. WITHEROW,

Defendant-Appellant/Cross-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 21 CO 0029

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2018 DR 96

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Silas M. Pisani, One Cascade Plaza, Suite 2210, Akron, Ohio 44308, for Plaintiff-Appellee/Cross-Appellant

Atty. Jennifer Ciccone and *Atty. Elliousa Baier*, 3685 Stutz Drive, Suite 100, Canfield, Ohio 44406, for Defendant-Appellant/Cross-Appellee.

Dated: September 28, 2022

WAITE, J.

{¶1} Appellant Jennifer R. Witherow appeals a July 21, 2021 Columbiana County Common Pleas Court judgment entry denying her motion to terminate a shared parenting agreement where she asserts various arguments related to the performance and objectivity of the guardian ad litem. Appellee Craig M. Witherow raises a cross-appeal regarding the trial court's modification of the agreement arguing that the modification is not based on a changed circumstance. For the reasons provided, Appellant's arguments have merit and the judgment of the trial court is reversed and remanded for a new hearing with instructions to strike the report and recommendations of the guardian ad litem and appoint a new guardian ad litem. As such, Appellee's cross appeal is moot.

Factual and Procedural History

{¶2} The parties were divorced on November 15, 2018. The marriage produced two children, C.M.W. born September 5, 2007, and C.C.W. born February 25, 2009. As part of the divorce decree they entered into a shared parenting agreement concerning their two minor children. While the parties were married, they lived in Columbiana. During the divorce, Appellant remained in Columbiana while Appellee moved to Niles. The commute between the two residences is thirty minutes one-way, making the round trip approximately one hour. Both parties have remained in these locations throughout the divorce and custody proceedings.

{¶3} On June 7, 2019, seven months after the filing of the divorce decree, Appellant filed a motion to terminate the shared parenting agreement. This motion is the basis for the instant appeal. In this motion, Appellant requested to change the

arrangement to a standard agreement during the school year and then resume the current arrangement in the summer.

{¶4} On the same date, Appellant also filed an ex parte motion to suspend Appellee's parenting time based on an incident where he caused physical harm to the older child. The court denied this motion. The trial court held two hearings on the motion to terminate shared parenting, one on July 23, 2020 and one on September 23, 2020. The second hearing was necessary due to the failure of a witness, Dr. Lynn DiMarzio, to appear at the first hearing.

{¶5} The shared parenting agreement called for essentially equal parenting time. The agreement centered on the parties' desire to accommodate Appellee's work schedule. Appellee's schedule changes periodically but he generally works four days on and four days off with occasional overtime. Due to the changing nature of his schedule, the court-approved agreement requires him to provide his work schedules to Appellant in order to determine which days he would have the children.

{¶6} Appellant raised three bases for her motion which she believes constitute changed circumstances in this matter. The first is the increasing level of the children's extracurricular activities and social events. According to Appellant, Appellee does not want to drive the children to their extracurricular activities and social events in Columbiana on his scheduled days, requiring the children to miss these events.

{¶7} The second change is that Appellee has a live-in girlfriend. The girlfriend has three children of her own and has since had a child with Appellee. Appellant claimed that the children often now feel neglected at Appellee's house, as all of his and the girlfriend's attention are focused on the other children.

{¶8} The third change has been Appellee's ongoing failure to ensure that the children have completed their homework, have showered, and have eaten dinner before they return to Appellant's house. Due to the late hour of the exchange between the parties, Appellant claims that the children often have to complete these tasks on their return, leading to later bedtimes and problems waking up for school in the morning.

{¶9} Both parties introduced evidence at the hearing pertaining to various disputes and arguments that have created animosity and have negatively affected the communication between the parties. This evidence is irrelevant to the matter at hand.

{¶10} However, several other issues arose during the proceedings that are relevant. One of these arose during the pendency of the case and concern Dr. Lynn DiMarzio. Apparently, the guardian ad litem ("GAL"), Atty. Robert Hum, asked Dr. DiMarzio to meet with the parties in an attempt to resolve their problems without further court intervention. Dr. DiMarzio met with the parties and both children on separate occasions. Neither the parties nor the children felt comfortable with Dr. DiMarzio and did not attend additional sessions. At hearing, Appellant sought Dr. DiMarzio's records pertaining to the children and, as their legal guardian, signed all relevant HIPPA waivers. When Dr. DiMarzio failed to provide the records, counsel for Appellant filed a subpoena requesting her testimony and also filed a motion for contempt.

{¶11} Although Dr. DiMarzio typically has her own attorney file motions to quash, in this case she apparently made what was characterized as "a damsel in distress call" to the GAL. (Trial Tr., p. 229.) The GAL then took it upon himself to file a motion to quash Dr. DiMarzio's subpoena in this case. Assuming the motion had been granted when she did not hear from the court, Dr. DiMarzio did not appear at the hearing. Appellant filed a

motion for contempt, however, the court instead ordered Dr. DiMarzio to testify at a future date. Dr. DiMarzio did not appear until two months after the scheduled hearing.

{¶12} In addition to the motion to quash, other concerns arose concerning the guardian ad litem's performance and objectivity. When he initially arrived at the parties' respective homes to conduct his interviews, he brought his son with him. He gave Appellee prior notice of his intent to bring his son but did not notify Appellant. He explained that he brings his son to home visits "for protection" and to take photographs for him. He admitted that he did not explain to his son the confidential nature of these visits and did not believe his son had independent knowledge of the confidentiality required.

{¶13} As a result, while at Appellant's house the guardian ad litem's son took photographs of family portraits that were hanging in the basement and posted them to "Snapchat," a social media outlet. He also texted these photographs to his friends. Some of the photographs were of Appellant's older children, as the GAL's son knew them from school. Appellant's older children saw the photographs on social media and informed Appellant. During the hearing, Appellant's counsel questioned the GAL about the photographs and he admitted that he knew of his son's actions. The GAL admitted that he spoke to his son after the incident and informed him that it had caused him "trouble" with the court. The GAL's son apparently was upset by this and contacted Appellant's older children several times to ask why they disclosed that he posted these photographs and to complain about their disclosure of his actions.

{¶14} There were also questions about the work completed, or in some instances, not completed. The GAL admitted he did not obtain updated school records. He

explained that COVID policy updates had made the process challenging. He later conceded that he had hoped the matter would be resolved outside of court through Dr. DiMarzio's counseling and had stopped working on the case. When he learned the matter would proceed to hearing, he was left without enough time to complete his investigation.

{¶15} Additionally, the GAL repeatedly described Appellant at the hearing as "rigid," a "perfectionist," and insinuated that she is controlling. (Trial Tr., p. 243.) Apparently insulted that she testified his office was not tidy, he responded by asserting that her house looks like a "show place." (Trial Tr., p. 189.) He stated that her comments about his office "confirmed my suspicions," an apparent reference to his belief she had a controlling nature. (Trial Tr., p. 243.) He continued to comment on his opinion of Appellant's character to the extent her counsel had to inform the GAL that he was making Appellant very uncomfortable. However, he subsequently stated that Appellee's house was cluttered and untidy but praised him for having a home that "looks like people live in it." (Trial Tr., p. 189.)

{¶16} Appellant filed a motion to remove the GAL prior to his testimony. The magistrate denied the motion based on the fact that Appellant did not request removal until after the GAL filed a report recommending continuing with the shared parenting plan. Despite the troubling behavior of the GAL in this matter, the magistrate admonished Appellant's counsel at the hearing for criticizing the GAL.

{¶17} In addition to the issues with the GAL, there was testimony as to an incident that occurred while the proceedings were pending. Appellant and Appellee were both present at one of the older child's football game in Columbiana. The scrimmage had ended at 6:30 p.m. and Appellant approached Appellee's vehicle to ask him if he planned

to take the children to Niles. Since she was regularly scheduled to pick up the children at 7:30 p.m., she intended to request they exchange the children early. Otherwise, Appellee would take the children to Niles, but could not arrive until 7:00 p.m., only one-half hour before they were to return to Columbiana. Additionally, refusing such an accommodation would require Appellant to remain in Columbiana for an additional half hour, spend an additional half hour to drive to Niles and pick up the children, then make the half hour drive back to Columbiana. The early exchange would also be of benefit to the children, saving them the drive time and allowing them time to complete their homework. However, when Appellant approached Appellee, he rolled up his window and drove away. Appellant testified that in Appellee's haste, he almost hit her with his car. Appellee admitted that he clearly saw Appellant approach and knew she would ask for an early exchange so he drove off. Appellee's only reason for his behavior was that it was "his time." (Trial Tr., p. 325.)

{¶18} On October 20, 2020, the magistrate denied Appellant's motion to terminate the shared parenting plan, but found that the agreement should be amended to place the burden of transporting the children on Appellee. The basis for the amendment was Appellee's behavior at the football game and refusal to even consider Appellant's reasonable request. The magistrate found this to be a changed circumstance because it served to heighten the animosity between the parties. Both parties filed objections to the Magistrate's Decision.

{¶19} On July 21, 2021, the trial court overruled both parties' objections and adopted the Magistrate's Decision. It is from this entry that Appellant timely appeals and Appellee filed his cross-appeal.

General Law

{¶20} If a trial court's decision regarding the custody of a child is supported by competent and credible evidence, it will not be reversed absent an abuse of discretion. *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 550 N.E.2d 178 (1990), syllabus; *Rohrbaugh v. Rohrbaugh*, 136 Ohio App.3d 599, 603, 737 N.E.2d 551 (7th Dist.2000).

{¶21} A trial court has broad discretionary powers in child custody proceedings and a reviewing court provides this discretion with a great deal of respect in light of the gravity of the proceedings and the impact that a custody determination has on the parties involved. *Reynolds v. Goll*, 75 Ohio St.3d 121, 124, 661 N.E.2d 1008 (1996); *Trickey v. Trickey*, 158 Ohio St. 9, 13, 106 N.E.2d 772 (1952). R.C. 3109.04 provides a guide to a trial court's discretion during a custody modification proceeding. *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988).

{¶22} Pursuant to R.C. 3109.04(E)(1)(a):

> The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that 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 that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

* * *

(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

{¶23} When determining a child's best interest, the court shall consider all relevant factors, including:

(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;

(h) Whether either parent or any member of the household of either parent previously has [ever been convicted of certain offenses or had a child adjudicated abused or neglected];

(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.

R.C. 3109.04(F).

ASSIGNMENT OF ERROR NO. 1

THE DOMESTIC RELATIONS COURT ERRED AND ABUSED ITS DISCRETION BY DENYING APPELLANT-MOTHER'S MOTION TO REMOVE THE GUARDIAN AD LITEM AND STRIKE THE GUARDIAN AD LITEM'S REPORT AND RECOMMENDATIONS.

{¶24} Appellant's arguments are, for the most part, rooted in ethical considerations. Appellant contends that the GAL demonstrated questionable behavior in bringing his son to home visits of the family, especially since this resulted in his son taking

photos inside Appellant's house and posting them on social media. Despite knowledge that school issues were at the heart of Appellant's motion, the GAL did not conduct a complete investigation, only obtaining some records that were two years old and making no attempt to obtain more recent records or to further investigate. The GAL took it upon himself to involve Dr. DiMarzio in the parties' dispute and took it upon himself to personally attempt to quash the subpoena of her records involving the parties' children. Finally, the GAL failed to disclose at any time that the children's wishes clearly differed from his recommendation. Based on this, Appellant contends that the trial court should have removed the GAL and struck his report and recommendations.

{¶25} In response, Appellee does not actually contest any of Appellant's arguments. Instead, he argues that requiring a GAL to follow every requirement would not be in the best interests of judicial economy. As to the failure to obtain current reports on the children's schooling, Appellee argues generally that COVID undoubtedly adversely affected the process, although he does not explain why current records in this case could not have been obtained before the hearing. Appellee also emphasized that Appellant did not object to the GAL until after the recommendation was made.

{¶26} Appellee also relies on the arguments in his cross-appeal. Appellee argues that the current parenting plan is working and that it is in the best interest of all parties to continue that plan. Appellee dismisses the children's wishes, explaining that an incident where he used "corporal punishment" and slapped one of the children across the mouth with the back of his hand was a one-time incident. This incident occurred after he attempted to take the child's cell phone from him and the child responded that as his mother pays for the phone, Appellee had no right to take it.

{¶27} R.C. 3109.04(E)(2)(c) provides that "[t]he court may terminate a prior final shared parenting decree that includes a shared parenting plan * * * upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children." Based on this, the Ohio Supreme Court has held that in order to terminate a shared parenting plan, "a trial court is not required to find a change in circumstances, in addition to considering the best interest of the child, before terminating a shared-parenting plan and decree and designating one parent as the residential parent and legal custodian." *Bruns v. Green*, 163 Ohio St.3d 43, 2020-Ohio-4787, 168 N.E.3d 396.

{¶28} In examining whether the GAL adequately performed his job in this case, pursuant to Sup.R. 48.03(D):

> Duties of the Guardian Ad Litem. Unless specifically relieved by the court, the duties of a guardian ad litem shall include, but are not limited to, the following:
>
> (1) Become informed about the facts of the case and contact all relevant persons;
>
> (2) Observe the child with each parent, foster parent, guardian or physical custodian;
>
> (3) Interview the child, if age and developmentally appropriate, where no parent, foster parent, guardian, or physical custodian is present;

(4) Visit the child at the residence or proposed residence of the child in accordance with any standards established by the court;

(5) Ascertain the wishes and concerns of the child;

(6) Interview the parties, foster parents, guardians, physical custodian, and other significant individuals who may have relevant knowledge regarding the issues of the case. The guardian ad litem may require each individual to be interviewed without the presence of others. Upon request of the individual, the attorney for the individual may be present.

(7) Interview relevant school personnel, medical and mental health providers, child protective services workers, and court personnel and obtain copies of relevant records;

(8) Review pleadings and other relevant court documents in the case;

(9) Obtain and review relevant criminal, civil, educational, mental health, medical, and administrative records pertaining to the child and, if appropriate, the family of the child or other parties in the case;

(10) Request that the court order psychological evaluations, mental health substance abuse assessments, or other evaluations or tests of the parties as the guardian ad litem deems necessary or helpful to the court;

> (11) Review any necessary information and interview other persons as necessary to make an informed recommendation regarding the best interest of the child.

{¶29} At the outset, we recognize that failure to strictly comply with each and every requirement of Sup.R. 48.03 in most circumstances does not constitute grounds for reversal. However, as acknowledged by the Tenth District, there are instances where the record reveals a failure so affects the proceeding that it requires reversal. See *In re: A.S.*, 10th Dist. Franklin Nos. 21AP-249, 21AP-259, 2022-Ohio-1861.

{¶30} The record in this matter contains several instances of grave concern regarding the performance and objectivity of the guardian ad litem. The GAL admittedly did not obtain current school records for the children and appears not to have undertaken any other school related investigation, even though he knew that one of the reasons for Appellant's motion involved the fact that the children were not completing their homework on their days with Appellee. The GAL testified that he obtained school records only for the period prior to 2020 and initially blamed the fact that he did not obtain more recent records on COVID restrictions.

{¶31} However, the GAL failed to explain why he did not request the children's current records through alternative means, such as mail, email, or fax. He also stated he could not have in-person conversations with teachers, but did not explain why he did not speak to teachers on the phone or through an online resource such as Zoom. Again, the current school records were highly relevant as they directly pertain to one of the reasons Appellant filed her motion.

{¶32} The GAL also completely failed to obtain the police report relevant to the incident where Appellee's use of corporal punishment caused an injury to one of the children. Sup.R. 48.03(A)(9) requires a guardian ad litem to "[o]btain and review relevant criminal, civil, educational, mental health, medical, and administrative records pertaining to the child and, if appropriate, the family of the child or other parties in the case."

{¶33} Appellant testified that she filed a police report and that she had informed the GAL the report was filed in Trumbull County. Despite this, the GAL searched for a police record in Columbiana County. The GAL complained at hearing that Appellant should have provided him with all of the reports instead of directing him to where they could be found, even though Sup.R. 48.03 places that burden on the GAL. This lackluster effort to investigate an incident where Appellee admittedly caused harm to one of the children is troubling, considering that the GAL stated that he did have some concerns about Appellee's violent tendencies.

{¶34} The GAL testified at hearing that the incident "really bothered me." He also stated that it "substantiated" concerns about Appellee's angry and violent behavior. (Trial Tr., p. 176.) He mentioned an incident (that may have occurred before the divorce) where police were called because Appellee shoved and pushed Appellant during a confrontation about a cell phone bill. Despite his stated high level of concern for Appellee's violent tendencies, which were shared by Dr. DiMarzio, the GAL did not make a genuine attempt to locate the police records. Sup.R. 48.03(D)(9) also requires a GAL to obtain any relevant medical records. The GAL admitted he did not seek or obtain medical records.

{¶35} Significantly, the GAL failed to address the children's wishes. The GAL testified that he did not address the wishes of the children because he did not find them

credible. Whether the GAL found the children to be credible or not when expressing their desires is irrelevant. Sup.R. 48.03(D)(5) clearly requires a guardian ad litem to "[a]scertain the wishes and concerns of the child." The GAL may not simply ignore the stated wishes of the children. If he had a concern that the children were not being entirely truthful for some reason, the appropriate action would be to alert the trial court, which is specifically tasked with determining credibility issues.

{¶36} In admitting that his report contained deficiencies, the GAL defended his performance by claiming he did so in an attempt to save the taxpayers' money. He claims that he ceased investigation altogether when he involved Dr. DiMarzio in an apparent hope that she would resolve the dispute through therapy without court intervention. This record reveals, however, that such resolution was highly unlikely. Once it became clear that attempts at therapy would not end the legal dispute, the GAL admitted he undertook an underwhelming and incomplete investigation, lacking the thoroughness required of an investigation of this nature.

{¶37} This leads directly to discussion of the record as it reflects on the GAL's professionalism. We begin by reviewing his decision to bring his son to the home visits. We again note that the GAL at least extended the courtesy of informing Appellee the GAL's son would be present. Appellant was not so informed. Even if the GAL had alerted both parties, this does not cure the serious problem with this issue. The GAL failed to inform his son of the confidential nature of the visits even though he knew his son would not understand their confidential nature on his own. The GAL left his son alone in Appellant's basement, giving him the opportunity to take photographs of her personal items. The record reflects that his failure to monitor his son under these circumstances

is inexcusable, particularly when his son posted these photos on social media and later used the incident to harangue Appellant's family.

{¶38} Pursuant to Sup.R. 48.03(F):

> A guardian ad litem shall make no disclosures about a case or investigation, except to the parties and their legal counsel, in reports to the court, or as necessary to perform the duties of a guardian ad litem, including as a mandated reporter. The guardian ad litem shall maintain the confidential nature of personal identifiers, as defined in Sup.R. 44, and address where there are allegations of domestic violence or risk to the safety of a party or child. Upon application, the court may order disclosure of or access to the information necessary to challenge the truth of the information received from a confidential source. The court may impose conditions necessary to protect witnesses from potential harm.

{¶39} It is clear from the record that the GAL violated his duty of confidentiality by bringing his son to his home visits. He further erred in failing to monitor his son while at the visits which caused a direct breach of confidentiality and resulted in certain public disclosures related to the case.

{¶40} The GAL also demonstrated serious concerns about his professionalism by personally filing a motion to quash a subpoena on behalf of Dr. DiMarzio. Despite the fact that Dr. DiMarzio did not ask him to represent her and typically has her own attorney file motions to quash, the GAL testified that he was responding to "a damsel in distress

call" and felt responsible for bringing her into the situation. The GAL's actions in this regard are inexplicable, and unquestionably improper.

{¶41} The record contains additional instances that raise questions about the GAL's professionalism in this matter. During her testimony, Appellant mentioned that she did not understand how the GAL worked in his office due to how "messy" and unorganized it was at the time of her visit. When the GAL later testified, he referred to Appellant's remark stating that it "confirmed my suspicions." (Trial Tr., p. 243.) He did not elaborate on what his "suspicions" were, but he then described Appellant as "rigid," a "perfectionist," and described her home as a "show place." (Trial Tr., pp. 189, 243.) None of this was intended as complimentary, and it continued until Appellant's counsel informed the GAL that he was making Appellant uncomfortable.

{¶42} The record reveals the GAL was much less critical of Appellee by contrast. He testified that Appellee's house was cluttered and untidy, commending Appellee for having a house that "looks like people live there." (Trial Tr., p. 189.)

{¶43} This testimony indicates that the GAL took offense to Appellant's testimony about his cluttered office and let it be known at the hearing by means of his own testimony. He took issue with Appellant, constantly criticizing her for keeping her house in a neat manner and for not doing enough to make his job easier by herself obtaining certain records and providing those to him.

{¶44} Despite the failures on the part of the GAL to fulfill his investigatory role and his serious lapses in professionalism in this case, the magistrate and the trial court based the decision to deny Appellant's motion to remove and replace the GAL and to strike his report on the timing of Appellant's motion. The record does show her motion was filed

after the GAL filed his report in this matter. In his report, the GAL recommended Appellant's motion to end shared parenting be denied. Ordinarily, the timing of such a motion would be suspect, and may very well form the basis for its denial. Here, however, the record clearly supports Appellant's motion. While Appellant and all other relevant parties were certainly aware of the GAL's lapses in professionalism due to his conduct in bringing his son with him during his home visits, it was not until some time later that the disastrous effects of this decision were made known. More importantly, it was not until the report was filed that the gaping deficiencies in the GAL's duty to investigate and accurately report were revealed. Thus, the timing of the motion to remove the GAL is actually supported by the report, despite the fact that it was unfavorable to Appellant and such timing would ordinarily be suspect.

{¶45} Based on all of the facts and circumstances of this case, the guardian ad litem's behavior and performance in this matter is so egregious that reliance on his report requires reversal. His actions herein affected the fairness of the proceedings, and the motion seeking his removal as GAL and the motion to strike his report should have been granted. Accordingly, Appellant's first assignment of error has merit and is sustained. This matter is remanded to the trial court for a new hearing in this matter.

ASSIGNMENT OF ERROR NO. 2

THE DOMESTIC RELATIONS COURT ERRED WHEN IT FAILED TO TERMINATE THE PARTIES' SHARED PARENTING PLAN.

{¶46} Appellant's limited argument urges that there is no communication between the parties because of Appellee's behavior. Without communication, Appellant argues

that there can be no shared parenting and the trial court's decision should be reversed on that basis.

{¶47} Based on our resolution of Appellant's first assignment of error, this issue is moot.

Cross-Appeal

CROSS-ASSIGNMENT OF ERROR

> THE DOMESTIC RELATIONS COURT ERRED AND ABUSED ITS DISCRETION BY FINDING A CHANGE IN CIRCUMSTANCES HAD OCCURRED AND THEREFORE MODIFYING THE PARTIES [SIC] SHARED PARENTING PLAN RESTRICTING FATHER'S MIDWEEK VISITATION.

{¶48} In his cross-assignment, Appellee contests the basis for the magistrate's modification of the parties' shared parenting plan. He argues no change in circumstances has occurred to justify modification because it was based on the parties' places of residences, which have remained unchanged since before their divorce. Hence, he argues that the trial court decision to include this modification into the shared parenting plan is reversible error.

{¶49} Based on our resolution of Appellant's first assignment of error, we reverse and remand this matter for an entirely new hearing. Thus, Appellee's cross-appeal is moot.

Conclusion

{¶50} Appellant raises several arguments to demonstrate that the trial court's decision to continue shared parenting (with a modification) is not in the best interests of the children. Among these is the issue that her request to strike the GAL's report and to appoint a replacement GAL should have been granted. As to the cross-appeal, Appellee argues that the modification is not based on a changed circumstance. For the reasons provided, Appellant's arguments have merit. The conduct of the GAL in this matter was so egregious it affected the fairness of the proceedings. Accordingly, the judgment of the trial court is reversed and this matter is hereby remanded to the trial court to conduct a new hearing. The current report of the GAL is stricken from the record and a new GAL must be appointed by the trial court to conduct an investigation pursuant to statute. For these reasons, Appellee's cross-appeal is moot.

Donofrio, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained and her second assignment is moot. Appellee's cross-assignment of error is also rendered moot. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is reversed. We hereby remand this matter to the trial court to strike the report and recommendations of the guardian ad litem, appoint a new guardian ad litem and hold a new hearing on Appellant's motion to end shared parenting according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.