[Cite as *Moline v. Moline*, 2010-Ohio-1799.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

RAENA MOLINE,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-A-0013**
- vs -	:	
ROBERT MOLINE,	:	
Defendant-Appellee.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Juvenile Division, Case No. 01 JH 40.

Judgment: Affirmed

Jason L. Fairchild, Andrews & Pontius, L.L.C., 4817 State Road, #100, P.O. Box 10, Ashtabula, OH 44005 (For Plaintiff-Appellant).

William P. Bobulsky, William P. Bobulsky Co., L.P.A., 1612 East Prospect Road, Ashtabula, OH 44004 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Raena Moline nka Sidbeck, appeals the February 4, 2009 Judgment Entry of the Ashtabula County Court of Common Pleas, Juvenile Division, ordering the minor child, A.C.M., to undergo reunification with defendant-appellee, Robert Moline. For the following reasons, we affirm the decision of the court below.

{¶2} Raena and Robert were married on September 1, 1990 in Ashtabula, Ohio. One child was born of the marriage, A.C.M., on July 22, 1993.

{¶3} On November 10, 1993, Raena filed a Complaint for Divorce in the Ashtabula County Court of Common Pleas.

{¶4} On October 19, 1994, the trial court issued its Judgment Entry: Final Decree of Divorce. As part of the Judgment, the court ordered that "the primary residential and custodial responsibility" of A.C.M. be placed with Raena.

{¶5} On October 5, 1995, the trial court issued a Judgment Entry, restricting Robert's visitation with A.C.M. and ordering him to "undergo psychiatric counseling *** and that he attend and successfully complete a class dealing with parenting skills."

{¶6} On November 13, 1996, Robert filed a Motion to Modify Visitation, on the grounds that he has "completed both psychological counseling and evaluation and completed classroom instruction in parenting skills and that additional visitation is in the best interests of the parties' minor daughter."

{¶7} In December 1996, allegations were made that Robert had molested A.C.M. on four to five occasions during the previous four months. These allegations were neither confirmed nor disproved.

{¶8} On July 9, 1998, Robert filed an Amended Motion to Modify Visitation on essentially the same grounds as his prior Motion.

{¶9} On February 8, 1999, Raena filed a Motion to Suspend Visitation Privileges, as ordered by the trial court's October 5, 1995 Judgment Entry, on the grounds of Robert's alleged sexual abuse of A.C.M..

{¶10} On December 14, 2001, a Magistrate's Order was issued that all parties should undergo a psychological evaluation by Dr. Patricia Gillette. This obligation to undergo an evaluation was repeated in subsequent Magistrate's Orders.

{¶11} On November 22, 2002, Robert filed a Motion to Show Cause and for Other Relief, seeking a ruling that Raena be made to answer why she should not be found in contempt of court for failing to submit herself and A.C.M. to evaluation by Dr. Gillette.

{¶12} On February 20, 2003, on Motion of the Guardian ad Litem, counsel was appointed to represent A.C.M. "as there is a probable conflict between the minor child's wishes and what is in her best interest."

{¶13} On April 8, 2003, the case was assigned to a judge of the Ashtabula County Court of Common Pleas, Juvenile Division.

{¶14} On July 15, 2003, visitation between Robert and A.C.M. was terminated until further order of the court.

{¶15} On March 17, 2004, the trial court issued an Agreed Judgment Entry, whereby the parties and A.C.M. were ordered "to participate in therapy with Dr. Felipe Amunatequi ***, pursuant to his direction and follow any and all recommendations." Dr. Amunatequi developed a treatment plan with the goal of reestablishing a relationship between Robert and A.C.M..

{¶16} On October 6, 2004, the trial court issued another Agreed Judgment Entry, ordering Raena to "participate in therapy with Dr. Amunatequi and follow any and all recommendations."

{¶17} On December 20, 2004, the trial court issued a Judgment Entry in which it recognized that "counseling will require an extensive period of time," and "it is *** recognized by all parties that such counseling is in the best interest of the child." The Entry further ordered the parties to "comply on a prompt and timely basis with the directive of the counselor, Dr. L. Felipe Amunatequi."

{¶18} On July 8, 2005, Robert filed a Motion to Show Cause, seeking a ruling that Raena be made to answer why she should not be found in contempt of court for failing to comply with the directions and recommendation of Dr. Amunatequi.

{¶19} On May 18, 2006, the trial court issued a Judgment Entry, stating that unless Robert notified the court that he desired a hearing on his November 22, 2002 Motion to Show Cause by June 1, 2006, the court would deny the Motion as moot. Robert did not file anything in response to the Judgment Entry.

{¶20} On June 26, 2006, Raena filed a Motion to Compel Production of Discovery, seeking an order to compel Moline to respond to interrogatories and produce discovery.

{¶21} On March 26, 2007, the trial court issued a Judgment Entry, "having been advised that the documents requested in the Motion to Compel Production of Discovery filed by [Raena] on June 26, 2006, have been provided," dismissing the Motion as moot.

{¶22} On May 21, 2007, the trial court issued a Judgment Entry, ordering a "therapeutic reunification process *** to occur." The parties and A.C.M. were ordered to "to follow recommendations made by Anna Tyrrell," and to follow "exactly" the scheduled treatment plan submitted by Tyrrell.

{¶23} On February 22, 2008, Raena filed a Motion to Terminate Counseling, on the grounds that the counseling "has not had the desired effect" and is having "a negative traumatic effect on the minor child."

{¶24} On July 11, 2008, Robert filed a Motion to Show Cause and a Motion for Modification and Imposition of additional Conditions for Counseling and Reunification and for Other Relief. In these Motions, Moline claimed that Raena was in contempt for failing and refusing to comply with Tyrrell's recommendations. Moline further sought orders that Raena be made responsible for all Guardian ad Litem and counseling/reunification fees; that she be enjoined from subjecting A.C.M. to professional or therapeutic evaluation without the express approval of the Guardian ad Litem and the court; that counseling and reunification occur at the juvenile court; and that the power be given to "the Guardian ad Litem, the counselor and other professionals or Court personnel *** to impose therapeutic placement of the minor child outside of [Raena's] household."

{¶25} On July 22, 2008, Robert filed a duplicative Motion to Show Cause and Motion for Modification.

{¶26} On August 7, 2008, A.C.M., through her attorney, filed a Motion for In Camera Interview.

{¶27} On August 8, 2008, the trial court issued a Judgment Entry, ordering Raena to post $1,550 in anticipated Guardian ad Litem fees with the Clerk of the Ashtabula County Juvenile Court.

{¶28} On September 3, 2008, Raena filed a Motion to Reconsider the trial court's August 8, 2008 Judgment Entry ordering her to post anticipated Guardian ad Litem fees.

{¶29} On January 20, 21, and 23, 2009, hearings were held in the trial court on all matters pending before the court. At the conclusion of the hearings, the court conducted an in camera interview with A.C.M.

{¶30} On February 4, 2009, the trial court issued a Judgment Entry in which the following dispositions were made: Robert's November 13, 1996 and July 9, 1998 Motions to Modify Visitation were granted; Raena's Febraury 8, 1999 Motion to Suspend Visitation was denied; Robert's November 22, 2002 and July 8, 2005 Motions to Show Cause were denied; Raena's June 26, 2006 Motion to Compel Production was denied as moot; Raena's February 2, 2008 Motion to Terminate Counseling was denied; Robert's July 11, 2008 and July 22, 2008 Motions to Show Cause and Motions for Modification were granted; and Raena's September 3, 2008 Motion for Reconsideration was denied.

{¶31} The trial court further held that "the parties, as well as the child, *** shall strictly adhere to the reunification plan *** and this plan shall take precedence over all other activities." Raena was found in contempt and sentenced to thirty days in the Ashtabula County Jail, but she could purge herself of the contempt by complying with all court orders.

{¶32} The trial court subsequently issued the following Findings of Fact and Conclusions of Law. Robert testified that he and A.C.M. were in counseling with Tyrrell for about a year and a half. After some initial progress, A.C.M. began to appear at the

sessions, announce her presence, and then leave to sit in the car. Robert "acknowledges that A.C.M. does not want to see him, but he believes that if he just goes away it will send the wrong message to A.C.M., she has to know that there are rules and the rules should have been followed long ago and walking out of his daughter's life is not an option."

{¶33} Raena testified that A.C.M. has been traumatized by the reunification process: that she has nightmares, bites her nails, and cries during sleep.

{¶34} Lauren Carter Moore, a board-certified therapist in trauma, diagnosed A.C.M. with post traumatic stress disorder. She testified that "A.C.M. does not feel safe in sessions, she does not feel safe with Anna Tyrrell and she does not trust Anna Tyrrell."

{¶35} Tyrrell testified that A.C.M. "had no indications of trauma and with support in her life *** could deal with the issues and move on." She testified that Raena has missed and/or cancelled numerous appointments. She further testified that A.C.M. is disrespectful and that Raena encourages A.C.M.'s behavior.

{¶36} The trial court found that all joint counselors involved with this case have recommended, and the parties have agreed to, reunification. Robert is not a risk or a safety factor to A.C.M.. Raena has "made a concerted and continuing effort to delay, stall and sabotage reunification." Neither Raena nor A.C.M. have made a "good faith" effort to participate in the reunification process. Raena's failure to comply with the appointments scheduled by Tyrrell has had an adverse effect on the reunification process. Raena has never made A.C.M. suffer any consequences for failing to have

contact with Robert. A.C.M. mimics Raena's bias toward Robert and the influence of this bias is contrary to A.C.M.'s best interests.

{¶37} On February 23, 2009, Raena filed a Notice of Appeal. On appeal, Raena raises the following assignments of error:

{¶38} "[1.] The trial court abused its discretion when it failed to permit the child's attorney to accompany her in the *in camera* interview."

{¶39} "[2.] The trial court abused its discretion when it failed to consider the child's best interest in determining that she should be reunified with her father against her will."

{¶40} "[3.] The trial court abused its discretion when it permitted into evidence the results of a voice stress analysis where no foundation was laid and no expert support was given."

{¶41} In her first assignment of error, Raena argues that the trial court abused its discretion when it failed to permit A.C.M.'s attorney to accompany her during the in camera interview.

{¶42} Raena relies upon provisions of the Revised Code, applicable in "proceeding[s] pertaining to the allocation of parental rights and responsibilities for the care of a child," that, when a court interviews a child in chambers regarding his or her wishes and concerns, "[t]he interview shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview." R.C. 3109.04(B)(2)(c).

{¶43} Given that the present appeal arises from *motions to modify visitation*, Raena's reliance on R.C. 3109.04(B)(2)(c) is misplaced. "[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) and R.C. 3109.051(C) are substantially the same. "If the court interviews any child concerning the child's wishes and concerns regarding those parenting time or visitation matters, the interview shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview." R.C. 3109.051(C).

{¶44} Under R.C. 3109.051(C), and in contrast to R.C. 3109.04(B)(1), the decision whether to conduct an in camera interview of the child regarding his or her wishes is completely discretionary. *Scheufler v. Scheufler*, 6th Dist. No. L-94-276, 1995 Ohio App. LEXIS 3212, at *6.

{¶45} Raena's argument fails, in the first instance, because she is not the proper party to raise this issue. The minor child in the present case was represented by independent counsel. Raena's alleged error does not pertain to the right of her counsel to be present, but with the right of the minor's counsel to be present. Accordingly, counsel for the minor child would be the proper party to raise this issue.

{¶46} Raena's argument also fails because there was no objection to the minor's counsel not being present during the in camera interview *raised by any party*. The following exchange occurred at the close of the hearing:

{¶47} The Court: No rebuttal. Both the Plaintiff and the Defendant will rest, and do you want to do closing arguments, or do you want me to do the interview?

{¶48} A.C.M.'s Counsel: If we could maybe do [the child] first and then send her on to school.

{¶49} The Court: That's fine.

{¶50} A.C.M.'s Counsel: I will get her.

{¶51} The Court: Give me a minute or two. I am going to look over my notes, and we are going to do it in my chambers with Ms. Denman [the Guardian ad Litem] and I.

{¶52} (At this time the Court conducted an in-camera interview in her chambers in the presence of A.C.M. and the guardian ad litem with the following discussion being held:)

{¶53} The Court: All right. The Court has conducted the in-camera interview with A.C.M. in the presence of the guardian ad litem, and that will conclude the case. All the evidence has been submitted, and are you prepared, counsel, for closing argument?

{¶54} It is well established that the failure to object to an error constitutes a waiver of the issue on appeal since it denies the trial judge the opportunity of correcting the error. Both cases cited in Raena's appellate brief stand for this proposition. *Butland v. Butland*, 10th Dist. No. 95APF09-1151, 1996 Ohio App. LEXIS 2773, at *13-*14; *Brooks v. Brooks*, 10th Dist. No. 95APF03-381, 1995 Ohio App. LEXIS 5488, at *45.

{¶55} Raena also objects to the presence of the Guardian ad Litem during the in camera interview, since the Guardian's participation is not provided for in the statute. Raena further asserts that the purpose of the statute is "to provide an in camera atmosphere free of influence, pressure and anxiety so that, if appropriate, a child can participate in the determination of his or her custody." *Chapman v. Chapman*, 2nd Dist. No. 21652, 2007-Ohio-2968, at ¶28.

{¶56} Again, this argument fails because no objection was raised to the presence of the Guardian ad Litem during the in camera interview. Moreover, it has

been recognized that a Guardian ad Litem may be considered "necessary court personnel" for the purpose of the statute. *Brooks*, 1995 Ohio App. LEXIS 5488, at *44-*45. "[W]hether a guardian *ad litem* constitutes 'necessary court personnel' in any given case is a matter which is within the sound discretion of the trial court." *Butland*, 1996 Ohio App. LEXIS 2773, at *16. Finally, in the present case, the trial court found that A.C.M. was able to make "her wishes perfectly clear" with respect to reunification with her father. As Raena acknowledges, those wishes are evidenced from the record before the court.[1]

{¶57} The first assignment of error is without merit.

{¶58} In the second assignment of error, Raena argues the trial court abused its discretion by failing to consider A.C.M.'s best interests in ordering her to participate in reunification against her will and where no useful purpose is served by the process. Raena notes that A.C.M. does not wish to reunify with Robert and does not trust Tyrrell.

{¶59} "A noncustodial parent's right of visitation with his children is a natural right and should be denied only under extraordinary circumstances, such as unfitness of the noncustodial parent or a showing that visitation with the noncustodial parent would cause harm to the children. The burden of proof in this regard is on the party contesting visitation privileges." *Pettry v. Pettry* (1984), 20 Ohio App.3d 350, at paragraph one of the syllabus; accord *Durso v. Durso*, 11th Dist. No. 3832, 1987 Ohio App. LEXIS 9917, at *3.

1. It is uncertain, from the record before us, whether the in camera interview was recorded. The existence of such a recording and/or transcript, however, is immaterial to the issues raised on appeal. There is no direct evidence that a recording was not made in the record, and Raena has not raised such an argument in her appellate brief. The sole reference to a recording of the interview in the brief is the following: "The court also conducted an *in camera* interview, of which no record has been filed for use in appeal, of the minor child on January 22, 2009." At oral argument, counsel for Raena stated that a stenographer was present during the in camera interview. Accordingly, the absence of a transcript of the in camera interview in the record on appeal has no bearing on the merits of this appeal.

{¶60} "If a child is actually unwilling to see the non-custodial parent and no useful purpose would be served by forcing visitation, visitation privileges may be denied." *Pettry*, 20 Ohio App.3d 350, at paragraph two of the syllabus. "However, if the child's unwillingness to visit the noncustodial parent is the result of influence by the custodial parent, a mere parroting of the custodial parent's wishes, or a result of lack of knowledge or understanding due to the child's age or not having known the noncustodial parent, the child's wishes and fears will be strongly discounted." Id. at 352-353.

{¶61} In the present case, the trial court found that A.C.M.'s unwillingness to visit her father was the result of Raena's influence, specifically noting that "A.C.M.'s verbiage is the same as her Mother's." The Guardian ad Litem and Tyrrell testified that A.C.M. mimics her mother's bias and attitude towards Robert to such an extent that it negatively impacts A.C.M.'s ability to perceive and think independently. There was also testimony that A.C.M. continues to suffer from anxiety on account of Robert and that she views him as a threat, despite the controlled environment in which the therapeutic reunification is to occur. Also noted was the fact that this anxiety was directed toward members of Robert's family, who were never alleged to have abused her.

{¶62} In addition to Raena's negative influence on A.C.M.'s attitude toward the reunification process, the trial court also found that Raena hindered the process by not complying with the recommendations and schedules established by the various therapists involved in this case. The record before the court supports this conclusion.

{¶63} Raena cites several cases for the proposition that "[a]ge must be a central consideration in determining when a minor's reluctance in visiting with the noncustodial

parent is enough to prevent visitation." *Smith v. Smith* (1980), 70 Ohio App.2d 87, 89; *Cherwin v. Cherwin*, 8th Dist. No. 84875, 2005-Ohio-1999, at ¶32. These cases are distinguishable in two respects. First, they involved unsupervised visitation at the noncustodial parent's residence. In the present case, the "visitation" at issue is, in fact, joint counseling in a neutral or controlled environment. A.C.M.'s refusal to participate in reunification is as much a refusal to undergo court-ordered counseling as it is a refusal to visit with Robert. Second, the custodial parent in *Cherwin* was found to have actively encouraged visitation with the noncustodial parent. 2005-Ohio-1999, at ¶32. In *Smith*, by contrast, the court found the custodial parent to have interfered with the noncustodial parent's right of visitation, by exploiting the children's reluctance to visit. 70 Ohio App.2d at 90. In *Smith*, the court of appeals upheld a conviction for criminal contempt against the custodial parent despite the children's unwillingness to visit.

{¶64} The second assignment of error is without merit.

{¶65} In the third assignment of error, Raena argues the trial court abused its discretion by admitting into evidence the results of a voice stress analysis were no foundation was laid and no expert support was given. *State v. Jamison* (1990), 49 Ohio St.3d 182, 190 (the results of a polygraph examination "are admissible only if both the prosecution and defense jointly stipulate that an accused will take a polygraph test and that the results will be admissible").

{¶66} This objection is based on the following from the direct examination of Robert:

{¶67} Robert: I was contacted by Children's Services saying that I was being accused of inappropriate behavior with my daughter.

{¶68} Robert's Counsel: Were you contacted by the Ashtabula Police Department?

{¶69} Robert: Yes, I was.

{¶70} Robert's Counsel: Pursuant to both of those investigations, did you comply with the request to take a polygraph expectation? [sic]

{¶71} Robert: Yes, sir, I did.

{¶72} Raena's Counsel: Objection.

{¶73} The Court: Well, he can say whether he took it. He can't tell me the results unless it is stipulated to.

{¶74} Robert's Counsel: Did you upon being contacted, did you comply with that request?

{¶75} Robert: Yes, I did.

{¶76} Robert's Counsel: Did you share the results of that test with each of those agencies and with your former wife's attorney?

{¶77} Robert: Yes, I did.

{¶78} Raena contends that, although the trial court did not allow Robert to testify to the results of the polygraph, the only possible inference from this testimony is that the result was favorable to Robert.

{¶79} We find no abuse of discretion in the trial court's decision to allow Robert to testify that he took a polygraph examination. When a matter is tried before the court in a bench trial, there is a presumption that the trial judge "considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *State v. White* (1968), 15 Ohio St.2d 146, 151; *Columbus v. Guthmann* (1963), 175 Ohio St. 282, paragraph three of the syllabus. In the present case, the court was clearly aware of the inadmissibility of the results of polygraph examinations. While the court may have been able to infer what the result was, there is

no indication that this fact played any part in the court's resolution of the issues pending before it.

{¶80} The third assignment of error is without merit.

{¶81} For the foregoing reasons, the Judgment of the Ashtabula County Court of Common Pleas, Juvenile Division, ordering A.C.M. to undergo reunification with Robert, is affirmed. Costs to be taxed against the appellant.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶82} I respectfully dissent.

{¶83} In her first assignment of error, appellant argues that the trial court abused its discretion when it failed to permit the minor child's attorney, Attorney Hiener, to accompany her to the January 23, 2009 in camera interview. I agree.

{¶84} An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. Therefore, "abuse of discretion" describes a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶85} R.C. 3109.04(B) addresses in camera interviews. R.C. 3109.04(B)(2)(c) states in pertinent part: "[i]f the court interviews any child pursuant to division (B)(1) of this section *** [t]he interview shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview."

{¶86} Pursuant to R.C. 2151.352, indigent children, parents, custodians, or other persons in loco parentis are entitled to appointed counsel in all juvenile proceedings. See *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 48. "Generally, when an attorney is appointed as guardian *ad litem,* that attorney may also act as counsel for the child, absent a conflict of interest." *In re Janie M.* (1999), 131 Ohio App.3d 637, 639, citing R.C. 2151.281(H); *In re Smith* (1991), 77 Ohio App.3d 1, 14. "The roles of guardian *ad litem* and attorney are different." *In re Janie M.* at 639, citing *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, 232. "Therefore, absent an express dual appointment, courts should not presume a dual appointment when the appointed guardian *ad litem* is also an attorney." *In re Janie M.* at 639, citing *In re Duncan/Walker Children* (1996), 109 Ohio App.3d 841, 844-845; *In re Kenneth R.* (Dec. 4, 1998), 6th Dist. No. L-97-1435, 1998 Ohio App. LEXIS 5669. (Emphasis sic.)

{¶87} "*** [T]he right to counsel in a juvenile case flows to the juvenile through the Due Process Clause of the Fourteenth Amendment ***." *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, at ¶79, citing *In re Gault* (1967), 387 U.S. 1, 41. "A juvenile typically lacks sufficient maturity and good judgment to make good decisions consistently and sufficiently foresee the consequences of his actions." *In re C.S.* at ¶82.

"Thus, '(t)he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether he has a defense and to prepare and submit it.'" Id., quoting *Gault* at 36. "Given the importance of counsel in juvenile proceedings, *** through R.C. 2151.352 the legislature provided a statutory right to appointed counsel that goes beyond constitutional requirements." (Citations omitted). *In re C.S.* at ¶83.

{¶88} In the case at bar, the record establishes a conflict of interest between GAL Denman, who recommended reunification between the minor child and appellee, and the minor child, who desired the opposite. Therefore, the trial court properly appointed the minor child her own attorney, Attorney Hiener. Here, GAL Denman was present during the January 23, 2009 in camera interview. However, the record reflects that although Attorney Hiener was present for the hearing that day, he was not included in the in camera interview, of which we have no record, which took place later that afternoon. Thus, the minor child was not represented by her attorney at the in camera interview.

{¶89} R.C. 3109.04(B)(2)(c) does not expressly list the guardian ad litem as one of the persons allowed to be present during an in camera interview. However, depending on the circumstances, a guardian ad litem may be "necessary court personnel." See *Butland v. Butland* (June 27, 1996), 10th Dist. No. 95APF09-1151, 1996 Ohio App. LEXIS 2773, at 16, citing *Brooks v. Brooks* (Dec. 14, 1995), 10th Dist. No. 95APF03-381, 1995 Ohio App. LEXIS 5488. Nonetheless, whether a guardian ad litem constitutes "necessary court personnel" is a matter within the sound discretion of the trial court. *Butland* at 16.

{¶90} In the present case, as GAL Denman had interviewed the minor child and issued her report by the time the trial court's in camera interview with the minor child took place, the trial court abused its discretion in finding GAL Denman to be "necessary court personnel" under the facts of this case. See *Butland* at 16 (holding that the guardian ad litem, who had interviewed the children and issued his report by the time the trial court's in camera interviews with the children took place, was not "necessary court personnel" pursuant to R.C. 3109.04(B)(2)(c).) Further, the presence of GAL Denman at the in camera interview created an atmosphere that was not "free of influence, pressure and anxiety" due to her conflict with the minor child's interests. See *Chapman v. Chapman*, 2d Dist. No. 21652, 2007-Ohio-2968, at ¶28.

{¶91} R.C. 3109.04(B)(2)(c), on the other hand, does permit a minor child's attorney to be present during an in camera interview. The trial court erred by not including Attorney Hiener in the in camera interview, as the minor child was unrepresented. See *Butland*, supra, at 17-18 (holding that it was reversible error for the trial court to conduct an in camera interview without the minor child being legally represented during the interview.)

{¶92} In addition, as previously indicated, there is no record of the in camera interview. R.C. 3109.04(B)(2)(c) "requires that a court stenographer and/or other record recording device be present in the in-chambers interview of the minor child upon timely request. If the trial court refuses a party's request to make a record of all the proceedings regarding the modification of parental rights and responsibilities, including the in-chambers interview, an appellate court is unable to conduct an effective review of that court's decision. Although an appellate court presumes validity of lower court

proceedings, it is not to say an appellate court is a mere 'rubber stamp' of trial court decisions." *Patton v. Patton* (1993), 87 Ohio App.3d 844, 846.

{¶93} The record before us does not establish whether a request was made. However, we note that R.C. 3109.04(B)(2)(c) contemplates the presence of a court stenographer and/or other record recording device during the in camera interview of the minor child. Therefore, the in camera interview is a matter of record. See *Richardson v. Richardson* (Jan. 19, 2000), 5th Dist. No. 99CA28, 2000 Ohio App. LEXIS 129, at 14-15. Thus, a specific request for a record of an in camera interview is not necessary and an appellant is justified in presuming the trial court would make a record of an in camera interview. Id. Here, the trial court erred in failing to make a record of the in camera interview. Without a record, we have no independent means of reviewing what occurred in that interview. See *Donovan v. Donovan* (1996), 110 Ohio App.3d 615, 620 (holding that a trial court must make a record of any in camera interview with children involved in custody proceedings, to be kept under seal for review on appeal.)

{¶94} I believe appellant's first assignment of error is with merit, thus rendering her second and third assignments of error moot. See App.R. 12(A)(1)(c); *State v. Miller* (1996), 113 Ohio App.3d 606, 610. This writer would reverse the judgment of the trial court and remand the matter for further proceedings.

{¶95} Accordingly, I dissent.