[Cite as *Burnip v. Nickerson*, 2008-Ohio-5052.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DAVID BURNIP,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 07-CO-42
	)	
CHARMAINE NICKERSON,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas, Domestic Relations Division, Columbiana County, Ohio
Case No. 05DR261

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiff-Appellee

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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: September 30, 2008

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DONOFRIO, J.

{¶1} Defendant-appellant, Charmaine Nickerson, appeals from a Columbiana County Common Pleas Court judgment dismissing her motion for a change of custody of the two minor children she shares with plaintiff-appellee, David Burnip.

{¶2} The parties were married on May 21, 2004. By this time, they already had two children together, Leslie (d.o.b 7/16/01) and Ty (d.o.b. 7/27/02). The parties were granted a dissolution on June 14, 2005. Per the parties' incorporated separation agreement, the court designated appellee as the children's residential parent and appellant was granted companionship rights.

{¶3} On August 9, 2006, appellant filed a motion to reallocate parental rights and responsibilities naming her as the children's residential parent, or in the alternative, to establish a shared parenting plan. She alleged that such a change was in the children's best interest due to allegations that the children spend most of their time either in daycare or with their paternal grandparents, that appellee fails to attend any school activities, and that appellee fails to tend to Leslie's allergy issues.

{¶4} In response, appellee filed a motion to dismiss, asserting that appellant could not demonstrate a change in circumstances as required to warrant a change in custody.

{¶5} A magistrate appointed a guardian ad litem (GAL) for the children and set the matter for a hearing.

{¶6} On June 11, 2007, appellant filed a motion for an in-camera interview of the children. Appellee opposed this motion, stating that the children, then ages four and five, were too young to be subjected to an in-camera interview. It appears that the magistrate and the court never directly ruled on this motion. However, neither interviewed the children.

{¶7} The magistrate held a hearing on appellant's motion to reallocate parental rights and responsibilities. The magistrate concluded that while appellant had demonstrated significant changes in her life, she had failed to demonstrate any changes in the lives of appellee or the children since the dissolution. In fact, the

magistrate found that the circumstances of appellee and the children had been "absolutely constant." Thus, the magistrate concluded that appellant's motion should be denied and appellee's motion to dismiss should be granted. The trial court subsequently entered judgment denying appellant's motion and dismissing the action.

{¶8} Appellant filed objections to the magistrate's decision taking issue with numerous factual findings and alleging that she did demonstrate a change in circumstances. The trial court held a hearing on the motion. It subsequently overruled appellant's objections.

{¶9} Appellant filed a timely notice of appeal on November 7, 2007.

{¶10} Appellant raises four assignments of error, the first of which states:

{¶11} "THE TRIAL COURT ERRED BY NOT INTERVIEWING THE MINOR CHILDREN AT THE REQUEST OF DEFENDANT-APPELLANT PURSUANT TO MOTION AND AT TRIAL, ALL PURSUANT TO O.R.C. §3109.04(B)(1)."

{¶12} On June 11, 2007, appellant filed a motion for the court to conduct an in-camera interview with the children, who were four and five years old at the time. Appellee filed a response in opposition. Appellant also brought the matter of her motion to the magistrate's attention at the June 25, 2007 hearing. (Tr. 77-78). There is no indication that the trial court or the magistrate ever ruled on this motion. However, neither the court nor the magistrate interviewed the children. So we may presume that the court overruled appellant's motion. Additionally, in her memorandum in support of her objections to the magistrate's decision, appellant asserted that it was error for the magistrate to dismiss the case without first interviewing the children.

{¶13} Appellant now argues that it was error for the magistrate or the trial court not to interview the children.

{¶14} R.C. 3109.04(B)(1) provides:

{¶15} "When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any

proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children. *In determining the child's best interest* for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for purposes of resolving any issues related to the making of that allocation, the court, in its discretion, may and, *upon the request of either party, shall interview in chambers any or all of the involved children* regarding their wishes and concerns with respect to the allocation." (Emphasis added.)

{¶16} This court has previously held that R.C. 3109.04(B)(1)'s language is mandatory. *Badgett v. Badgett* (1997), 120 Ohio App.3d 448, 450, 698 N.E.2d 84. In fact, we stated: "The plain language of this statute absolutely mandates the trial court judge to interview a child if either party requests the interview. An interview is discretionary only if no party requests it; if a party to the allocation hearing makes the request, the court 'shall' interview the child or children." Id.

{¶17} But R.C. 3109.04 applies when the court is determining the best interests of the children. In this case, the court did not get to the step of determining the best interests of the children. Before the court could even get to a best interest determination, it first had to find that a change in circumstances had occurred.

{¶18} "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." R.C. 3109.04(E)(1)(a).

{¶19} In this case, the court determined that no change in circumstances had occurred. Therefore, the court never moved on to the step of examining the children's best interests. Absent a finding of change in circumstances, there is no reason for the trial court to consider testimony and evidence as to the best interests

of the children. *Venuto v. Pochiro*, 7th Dist. No.02-CA-225, 2004-Ohio-2631, at ¶63. Unless and until the court found a change in circumstances, interviewing the children would have been premature. Here the magistrate, and then the trial court, determined that appellant did not present sufficient evidence to demonstrate a change in circumstances and, therefore, granted appellee's motion to dismiss. This case never proceeded to the point where appellee presented evidence. Presumably, had the court overruled appellee's motion to dismiss, appellee would have then presented evidence and the trial court would also have interviewed the children.

{¶20} Accordingly, appellant's first assignment of error is without merit.

{¶21} Appellant's second assignment of error states:

{¶22} "THE TRIAL COURT ERRED IN NOT FINDING THAT THE DEFENDANT-APPELLANT MET HER BURDEN OF CHANGE OF CIRCUMSTANCES UNDER CURRENT OHIO LAW (O.R.C. §3109.04(E)(1)(a) BY THE EVIDENCE/FACTS PRESENTED AT TRIAL AND THROUGH DEPOSITION TESTIMONY, ALL OF WHICH WARRANTED THAT THE DETERMINATION OF ALLOCATION OF PARENTAL RIGHTS AND RESPONSIBILITIES BE MADE UNDER A BEST INTEREST STANDARD."

{¶23} Appellant argues that the trial court erred in finding that she did not demonstrate a change in circumstances. She points to such things as the children spend a substantial amount of time with their paternal grandparents and at daycare instead of with appellee, appellee's home is not clean or appropriate for the children, the daycare facility that the children attend has dogs and cats present despite Leslie's allergy to animals, Ty is not advancing to kindergarten, the children are not appropriately dressed for school, appellee's smoking may have an adverse affect on the children, and the children are now two years older than when the parties divorced. Appellant argues that these changes, when considered together, constitute the type of change in circumstances contemplated by R.C. 3109.04(E)(1)(a).

{¶24} When reviewing a trial court's decision in domestic relations matters, an appellate court must uphold the decision absent an abuse of discretion. *Booth v.*

Booth (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. Abuse of discretion constitutes 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, 450 N.E.2d 1140. The appellate court should not independently review the weight of the evidence in the majority of cases but rather should be guided by the presumption that the trial court's findings are correct. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846.

{¶25} As discussed above, before moving on to determine the children's best interests, the magistrate and the court first had to determine that a change had occurred in the circumstances of the children or their residential parent, in this case appellee. R.C. 3109.04(E)(1)(a). To determine whether appellant demonstrated a change in circumstances, we must examine the evidence presented.

{¶26} Appellant called four witnesses. The first to testify was appellant's next-door neighbor, Heather Bronstein. Bronstein testified that she sometimes sees the children inappropriately dressed. (Tr. 11). She stated that Leslie is sometimes dressed in boys' clothing, the children's clothes are too small, and the children are not always clean. (Tr. 11). Bronstein stated that she has made these observations when the children have come over straight from their babysitter before appellant has had a chance to bathe them or change their clothes. (Tr. 11-12).

{¶27} Appellant was the next witness. She testified as to numerous issues that she believed constituted a change in circumstances.

{¶28} First, appellant testified regarding the children's daycare provider. The children attend daycare in the home of Tracy Klein. Appellant stated that although the children have been in daycare with Klein since before the dissolution, she believed that the quality of Klein's daycare had declined since that time. (Tr. 20). Appellant stated that Klein had acquired several pets and did not maintain her home as well as she previously had. (Tr. 20). In fact, appellant stated that she called Children's Services and complained because she noticed on one occasion that Klein's home smelled of cat urine and she saw fleas jumping onto her children when

she picked them up. (Tr. 21). Appellant further stated that Leslie suffers from allergies and that she was concerned that the dogs and cats at Klein's home aggravated Leslie's allergies. (Tr. 21-22). However, she also stated that Leslie's doctor simply stated that if Leslie's allergies worsened, then they should consider a new daycare provider. (Tr. 22-23). She further admitted that Leslie suffered from allergies when the parties separated. (Tr. 95).

{¶29} Second, appellant testified that the condition of appellee's home had deteriorated since the parties' dissolution. (Tr. 25). Appellee and the children still reside in the same house the parties shared during the marriage. (Tr. 25). She stated she returned to appellee's house in late 2005 or early 2006 to pick up some of her belongings that she had left behind. (Tr. 26). She observed that the house was messy and that there were animal droppings in the attic. (Tr. 27). She also observed that Leslie had moved to a different room that had an unfinished ceiling. (Tr. 120).

{¶30} Third, appellant testified that appellee's parents spent too much time caring for the children. (Tr. 28). However, she also admitted that the grandparents now had the same role in the children's lives as they did at the time of the dissolution. (Tr. 28).

{¶31} Fourth, appellant testified that recently it was determined that Ty should be held back from advancing to kindergarten. (Tr. 30). She opined that this was a result of appellee's failure to work with Ty. (Tr. 30). Appellant stated that if she were awarded custody, she could spend more time working with Ty on school work. (Tr. 31).

{¶32} Fifth, appellant testified that appellee smokes mini-cigars. (Tr. 47). She stated that she could smell the odor of tobacco in appellee's car when he picked up the children. (Tr. 48). Appellant stated she was concerned that it irritated Leslie's allergies. (Tr. 48, 53). But appellant admitted that appellee smoked at the time of the dissolution too. (Tr. 47).

{¶33} Sixth, appellant testified that she has noticed that the children's clothes and shoes are often too small and that they frequently seem as though they have not bathed in several days. (Tr. 53-54).

{¶34} Finally, appellant testified that when school is in session, the children spend only two or three hours a day with appellee. (Tr. 57).

{¶35} Appellant also spent some time testifying about her home with her new husband, Kurtis Nickerson, and the advantages they could provide to the children.

{¶36} The next witness to testify was Tracy Klein, the certified daycare provider. Klein testified that she has been caring for the parties' children since they were six weeks old. (Tr. 127-28). She further stated that she has been in the same home, where she provides her daycare service, since almost two years before the parties' dissolution. (Tr. 126-27). Klein stated that she has always had pets at her home/daycare facility. (Tr. 129). In fact, she stated that at the time of the parties' dissolution, she had one dog and four cats in her home. (Tr. 130). Now, Klein stated that she has two dogs and five cats. (Tr. 131). As to the children's hygiene, Klein stated that Leslie and Ty always arrive bathed and wearing appropriate clothing. (Tr. 133-34).

{¶37} Appellant's husband, Kurtis Nickerson, was the next witness to testify. He stated that Klein's home had smelled of cat urine, but that the situation had improved. (Tr. 160). He then spent most of his testimony describing the home he shared with appellant and the things they did with the children.

{¶38} The GAL was the last witness to testify. She stated that appellant is a good mother. (Tr. 214, 219). She also acknowledged that appellee and his parents shared this opinion. (Tr. 214). While she admitted that she failed to note any positive aspects of appellant in her report, she stated that this was because she simply focused on the issues of concern that appellant had raised and whether there had been a change in circumstances in this case. (Tr. 218-19). The GAL testified that she inspected appellee's home just prior to the hearing in this case and that she found it to be "well-kept" and "very clean." (Tr. 221). She also stated that Leslie's

bedroom had a finished ceiling. (Tr. 221). The GAL opined that the house was more than adequate to meet the children's needs. (Tr. 252). She did not go into the attic. (Tr. 221). Next, the GAL testified that she looked into appellee's smoking. (Tr. 224). She stated that she did not notice the smell of smoke in appellee's car, on his person, or in his house. (Tr. 224). However, she stated that appellee did admit to occasional smoking but he informed her that he does not smoke in the children's presence. (Tr. 225). After that, the GAL testified that while appellee's parents are actively involved in the children's care, this was also the situation when the parties were married. (Tr. 230). Finally, the GAL testified that she was standing by her recommendation in her report that the children should remain in appellee's custody. (Tr. 255-56).

{¶39} This evidence supports the magistrate's and the trial court's determination that no change in circumstances had occurred in the lives of appellee or the children. While appellant's and her husband's testimony demonstrated that they could provide a good and loving home for the children, this was not the standard that they had to meet. Instead, appellant had to first demonstrate a change in circumstances in the lives of appellee or the children.

{¶40} Many of the factors appellant relies on to demonstrate a change in circumstances existed prior to the parties' dissolution. Appellee and the children still live in the same home. The children still attend the same daycare, which had numerous animals in the house before the dissolution. They also spend a significant amount of time with their paternal grandparents, which was also the case before the dissolution. And appellee smoked prior to the dissolution.

{¶41} The only real changes appellant can point to, other than the passage of time, are that Ty is being held back from kindergarten and that the children are sometimes inappropriately dressed or not bathed. One of these factors was rebutted by Klein, who testified that the children always arrive at daycare properly dressed and bathed. The other factor was not linked to appellee. Appellant testified that she believed that the reason Ty was not advancing to kindergarten was because appellee did not spend enough time working with him and that she could do a better job.

However, this was simply her opinion. No teacher or other person corroborated appellant's opinion.

{¶42} Given this evidence, we cannot conclude that the trial court abused its discretion in finding that no change in circumstances had occurred in the lives of appellee or the children. Accordingly, appellant's second assignment of error is without merit.

{¶43} Appellant's third assignment of error states:

{¶44} "THE TRIAL COURT ERRED IN NOT RECOGNIZING THAT THE GUARDIAN AD LITEM FAILED TO PERFORM NECESSARY DUE DILIGENCE AND/OR COMPETENT OBJECTIVITY, RESULTING IN A GUARDIAN AD LITEM RECOMMENDATION IN STARK CONTRAST TO THE OBJECTIVE FACTS, ALL TO THE PREJUDICE OF DEFENDANT-APPELLANT AND/OR THE MINOR CHILDREN AND IN VIOLATION OF THEIR FUNDAMENTAL RIGHTS TO DUE PROCESS UNDER THE XIV AMENDMENT OF THE U.S. AND OHIO CONSTITUTIONS."

{¶45} Here appellant argues that the GAL failed to properly perform her duties. Appellant takes issue with the fact that the GAL failed to include in her report any positive things regarding appellant. And she points out that the GAL admitted as much at the hearing. (Tr. 218-19). Thus, she concludes that the GAL's report was not objective. Appellant also points out that the GAL submitted an initial report prior to conducting an investigation of the parties' homes. She also takes issue with the fact that the GAL later found appellee's home to be appropriate for the children. Appellant contends that this contradicts the evidence at the hearing that Leslie's bedroom did not have a ceiling, there were rodent droppings in the attic, and the home was in a state of disrepair.

{¶46} The GAL testified regarding the matters that appellant now takes issue with. While the GAL did admit that she failed to include any positive aspects of appellant in her report, she stated that this was not intentional. (Tr. 218-19). Instead, the GAL stated that her report focused on whether there was a change in circumstances, the issues that appellant raised regarding appellee, and whether the

parties were appropriate for shared parenting. (Tr. 219). She also testified that appellant is a good mother and a wonderful person. (Tr. 214, 219). And she testified that both appellant and her husband made a positive impression on her. (Tr. 202). Thus, while the GAL did not state these things in her report, the evidence was nonetheless before the magistrate and the court that the GAL found appellant to be a good mother.

{¶47} Next, the GAL testified as to why her report did not include an investigation of appellee's home. She stated that she tried on several occasions between October 23, 2006 and December 31, 2006 to make an unannounced home visit to appellee, but appellee was never at home. (Tr. 204). She then submitted a report on February 1, 2007, which did not include any home visits. (Tr. 204). Her report indicated that if the parties did not settle this matter, she would need to conduct home visits. (Tr. 204). At a February 17, 2007 pretrial, appellant's counsel asked her not to do any work on the case for the time being. (Tr. 210, 251). She eventually conducted the home studies in the week before the hearing, which is when she was informed that the case was going forward. (Tr. 210). Thus, the home studies were conducted prior to the hearing on this matter. The GAL testified that she did not file a supplemental report after completing the home investigations because she did not find anything during those investigations to change her recommendation. (Tr. 246).

{¶48} Finally, the GAL found appellee's home to be appropriate for the children. (Tr. 252). She found it to be well-kept and clean. (Tr. 221). She did not observe an unfinished ceiling in Leslie's bedroom as appellant had alleged. (Tr. 221). She did not go into the attic, however, so she would have no knowledge whether animal droppings were present there. (Tr. 221). While this testimony contradicted appellant's testimony, appellant's testimony was regarding the condition of appellee's house in late 2005 or early 2006. The GAL inspected the house in mid-2007. Thus, had the conditions existed that appellant described, appellee could have likely remedied them by the time the GAL inspected the house.

{¶49} Based on the above, we do not find that the GAL failed in her duties nor do we find that the GAL was biased against appellant, as appellant suggests. Thus, appellant's Fourteenth Amendment rights were not violated. Accordingly, appellant's third assignment of error is without merit.

{¶50} Appellant's fourth assignment of error states:

{¶51} "THE TRIAL COURT ERRED IN IMPOSING AN UNREASONABLE, UNCONSTITUTIONAL BURDEN ON DEFENDANT-APPELLANT IN ESTABLISHING 'CHANGE OF CIRCUMSTANCES' UNDER HER INSTANT FACTS, AND RULING AGAINST HER BASED ON THE EVIDENCE PRESENTED BOTH AT TRIAL AND IN THE DEPOSITIONAL TESTIMONY, VIOLATING HER FUNDAMENTAL DUE PROCESS RIGHTS AS GUARANTEED UNDER THE XIV AMENDMENT OF THE U.S. AND/OR OHIO CONSTITUTIONS."

{¶52} Here appellant argues that R.C. 3109.04(E)(1)(a), which requires a change in circumstances before a court can grant a change in custody, is unconstitutional. She argues that the fact that the statute requires a non-residential parent to demonstrate a change in circumstances in order for the court to modify custody before the court will consider the children's best interests violates due process. She contends that such a standard places an unreasonable burden on the non-residential parent who seeks a change in custody.

{¶53} R.C. 3109.04(E)(1)(a) provides:

{¶54} "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:

{¶55} "(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

{¶56} "(ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.

{¶57} "(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."

{¶58} Appellee argues that appellant failed to properly raise this constitutional challenge in the trial court and therefore, waived it on appeal. However, whether appellant waived this issue is immaterial in light of the Ohio Supreme Court's ruling in *In re Brayden James*, 113 Ohio St.3d 420, 866 N.E.2d 467, 2007-Ohio-2335. The Ohio Supreme Court specifically found R.C. 3109.04(E)(1)(a) to be constitutional: "The provisions of R.C. 3109.04(E)(1)(a) promote stability in the development of children and are not unconstitutional as applied where a noncustodial parent has not evidenced that a change has occurred in the circumstances of the child." Id. at paragraph two of the syllabus. We need not reanalyze the constitutionality of a statute that the Supreme Court has already determined to pass constitutional muster.

{¶59} Accordingly, appellant's fourth assignment of error is without merit.

{¶60} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.
DeGenaro, J., concurs with separate concurring opinion.

DeGenaro, J., concurring, with separate concurring opinion.

{¶61} I agree with my colleague's analysis and disposition with regard to appellant's first, second and fourth assignments of error. I write separately because the majority has failed to address the due process issue raised by appellant.

{¶62} In her third assignment of error, appellant asserts that she and her

children were denied due process by being denied the benefit of a diligent guardian ad litem. Appellant argues that the GAL's "biased" report so tainted the proceedings that a fair trial was rendered impossible. Appellant does not provide any case law or statutory authority to support her claim of due process violation. App.R.16(A)(7).

{¶63} The majority opinion engages in a factual analysis to reach the conclusion that the guardian ad litem ("GAL") did not shirk her duties or act in a biased manner against appellant, and thus did not create a due process problem for appellant. However, the issue can be resolved without reaching an analysis of the GAL's performance.

{¶64} A GAL is appointed to investigate the custody situation in order to make a recommendation to the court regarding the child's best interest. R.C. 3109.04(C); *Ferrell v. Ferrell*, 7th Dist. No. 01AP0763, 2002-Ohio-3019, at ¶43, citing *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, 232, 479 N.E.2d 257. A GAL advocates for the best interests of the child, which is different than being a legal advocate for the child or the parent as an individual. *Matter of Duncan/Walker Children* (1996), 109 Ohio App.3d 841, 844-45, 673 N.E.2d 217. A GAL only becomes a direct advocate for the child upon express dual appointment by the court. Id.; *In re Williams*, 101 Ohio St.3d 398, 805 N.E.2d 1110, 2004-Ohio-1500, at ¶18. Thus, within the meaning of R.C. 3109.04(C), the GAL is only an investigator, and the recommendation provided by the GAL is considered along with all other evidence presented to a court. *Webb v. Lane* (Mar. 15, 2000), 4th Dist. No. 99CA12, at 2; *In re Sherman*, 3d Dist. No.05-04-47, 05-04-48, 05-04-49, 2005-Ohio-5888, at ¶28.

{¶65} The magistrate, as the trier of fact, is presumed to be capable of both weighing the credibility of the GAL and disregarding any inadmissible findings in the report. *In re Sypher*, 7th Dist. No. 01BA36, 2002-Ohio-1026; *In re Stephens*, 7th Dist. No. 2001CO56, 2002-Ohio-3057 at ¶48. The court's consideration of a GAL's report does not violate any party's due process rights as long as the party had an opportunity to cross-examine the GAL on issues raised in the report. *In re Hoffman*,

97 Ohio St.3d 92, 776 N.E.2d 485, 2002-Ohio-5368, at ¶25; *Roach v. Roach* (1992), 79 Ohio App.3d 194, 202-03, 607 N.E.2d 35.

{¶66} In this case, Tolson was appointed as the GAL for the children and was not dually appointed as their attorney. Tolson submitted a report to the magistrate, was available for examination at the June 25, 2007 hearing, and was in fact cross-examined by Nickerson. Nothing in the record reflects that the GAL held an inappropriate sway on the decision of the magistrate. The magistrate was free to consider the information provided by the GAL, as well as the testimony elicited from the examination and cross-examination of the GAL. The magistrate issued written findings and fully considered all evidence and testimony presented. Thus Nickerson's due process rights in relation to the GAL's report were not violated, and we should defer to the magistrate's judgment.

{¶67} For the foregoing reasons I respectfully concur in judgment only as to the third assignment of error.