IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HEATHER A. DIALS NEILL,

Petitioner/Appellant,

vs.

Case No. 31,867

Lower Case No. D-307-DM-200800495

STUART A. NEILL

Respondent/Appellee,

PETITIONER-APPELLANT'S BRIEF IN CHIEF

Appeal from the Honorable James T. Martin

Third Judicial District Court

Dona Ana County

Geer, Wissel & Levy, P.A.
Jane C. Levy
P.O. Box 7549
Albuquerque, NM 87194
(505) 243-1733

Leslie Becker
1000 Lomas Blvd. NW
Albuquerque, NM 87102-1945
(505) 222-3120

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Statement Regarding Audio Recordings

The hearings were recorded digitally and/or electronically on compact disks. The hearing of May 19, 2011 recorded digitally and/or electronically on two compact disks and each disk contains multiple audio tracks. References to the record of May 19, 2011 are by Disk #, Track # and elapsed time from the start of referenced track, Pursuant to NMRA 12-213(A)(1).

The hearing of October 18, 2011, from which this appeal arises, was recorded digitally and/or electronically on a single compact disk using proprietary software provided by "ForTheRecord®." The audio file on this disk can only be accessed using proprietary software named "TheRecord Player™," provided by "ForTheRecord®" and downloadable, at no charge, from their website at http://www.fortherecord.com/products/therecordplayer. References to the October 18, 2011, hearing conform to the "actual time of day" format used by "TheRecord Player™." The audio file commences at 8:34 am and 8 seconds (08:34:08 AM) and the audio concludes at 3:53 pm and 17 seconds (15:53:17 PM).

II. Summary of Proceedings

A. Course of Proceedings and Disposition in the Court Below

Heather Dials (hereinafter "Mother") and Stuart Neill (hereinafter "Father") were married in Pennsylvania on February 18, 1999 and divorced in Pennsylvania on February 14, 2003. The parties are the natural parents of the minor child, Kamryn Neill (hereinafter "Kamryn" or "minor child"), born July, 1999.

In 2002, Mother and Kamryn moved to Albuquerque, New Mexico. After this relocation, jurisdiction over the child support and child custody matters between the parties was transferred to the Second Judicial District Court of New Mexico. [RP 60].

On May 31, 2007, the Second Judicial District Court of New Mexico awarded Mother sole legal and physical custody of Kamryn [RP 1215], according Mother the "authority and responsibility to make major decisions in a child's best interests in the areas of residence, medical and dental treatment, education or child care, religion and recreation." NMSA 1978, § 40-4-9 (1977).

In April of 2008, jurisdiction was transferred to the Third Judicial District Court of New Mexico after Mother and Kamryn moved to Las Cruces. [RP 1460]. On October 28, 2009, the Third Judicial District Court (hereinafter "District Court") entered an Omnibus Order, constituting a compilation of the prior rulings made in the Second Judicial District regarding timesharing, communication and other issues relating to the parties and the minor child. [RP 1675] Prior to the Omnibus Order, in 2008, the Court appointed John Kutinac as the Parenting Coordinator (hereinafter "PC"). [RP 1591]. The *Order Appointing A Parenting Coordinator*, entered October 29, 2008, (hereinafter "*PC Order*") states that the PC was a quasi judicial arm of the court [RP 1591] and granted the PC the ability to make decisions regarding the best interest of the minor child. [RP 1597]. The *PC*

Order also states, inter alia, that "[t]he Parenting Coordinator shall act as an arm of this Court, and any written decision or requests of the Parenting Coordinator shall be followed by the parties, and any failure of such, will be treated as a failure to abide by the Order of the Court, and may constitute and be punishable as, Contempt of Court." [RP 1591].

On March 5, 2009, the District Court appointed Stephen Hubert as Guardian *ad litem* (hereinafter "GAL") for Kamryn. [RP 1620]. The *Order Appointing Guardian Ad Litem* (hereinafter "*GAL Order*") did not include the duration of the appointment, in violation of Rule 1-053.3 NMRA and Form 4-402 NMRA [RP 1620-1622]. The *GAL Order* did provide, however, that the GAL was to petition the District Court for a hearing when his fees reached $10,000. [RP 1622]. The GAL never petitioned the District Court for such a review despite the fact that his fees exceeded $10,000. [RP 1850].

After the PC and GAL were appointed, both began making decisions regarding the best interests of Kamryn and interfering in Mother's attempts to make parenting decisions for Kamryn. [CD 1, Tr. 1, 5-19-11, 00:10:48]. The PC also engaged in ex parte communication with the Court. [CD 1, 10-18-11, 8:19:20].

In response to the actions of the GAL and PC, on March 10, 2011, Mother filed *Petitioner's Verified Motion to Remove the Parenting Coordinator and the Guardian ad Litem and/or to Avoid Inappropriate Delegation of Power and Request to Review the Guardian ad Litem and Parenting Coordinator Fees and Costs* (hereinafter "*Petitioner's Verified Motion*"), which requested, *inter alia*, that the PC be removed; the GAL be removed; or their powers be curtailed, and that the Court review the fees for both the PC and the GAL. [RP 1838]. The Court held a hearing on *Petitioner's Verified Motion* lasting two days, May 19, 2011 and October 18, 2011.

Immediately prior to the beginning of the May 19, 2011 hearing, the GAL filed his *Report and Recommendations* in the District Court but he did not supply the parties with written recommendations prior to filing them. [RP 1860-70]. The GAL had previously filed a motion requesting the District Court review the status of the case and award the parties joint legal custody. [RP 1855]. That motion was also set for hearing on May 19, 2011. [RP 1859]. The *Report and Recommendations* recommended, among other things, that the parties be awarded joint legal custody. [RP 1869]. As a result, Mother's counsel called the GAL to testify regarding the basis of all of his recommendations. [CD 2, Tr. 2, 5-19-11, 00:24:03]. The GAL objected and the Court sustained that objection. [CD 2, Tr. 2, 5-19-11, 00:25:33]. The GAL later withdrew the motion to award joint legal custody during the hearing on October 18, 2011 (a continuation of the May 19, 2011, hearing). [CD 1, 10-18-11, 8:36:03]

On November 28, 2011 the Court entered its *Order Regarding Petitioner's Motion to Remove the Parenting Coordinator and the Guardian ad Litem and the Guardian ad Litem's Motion for Judicial Review and for Joint Legal Custody* (hereinafter "*November 28, 2011 Order*"). [RP 1912]. In the *November 28, 2011 Order*, the District Court denied the relief requested in *Petitioner's Verified Motion*. [RP 1912]. The *November 28, 2011 Order* modified the *PC Order*, to state that the Court had the discretion to delegate authority to make decisions to the PC because, although the PC's ruling would stand until reviewed, the District Court was the ultimate decision-maker. [RP 1913]. The *November 28, 2011 Order* also incorporated the now-modified *PC Order*. The District Court also incorporated the *GAL Order* but modified that Order such that the GAL's appointment would be until Kamryn turned 18. [RP 1914]. The *November 28, 2011 Order* also reinstated the District Court's earlier ruling that Kamryn visit her Father over all three-day

holidays. [RP 1913]. On December 21, 2011, Mother filed this appeal of the November 28, 2011 Order. [RP]

B. Nature of the Case and Summary of the Argument

Mother petitions this Court to reverse the District Court's decision to continue the appointment of the PC and the GAL where there is no statutory authority in New Mexico for the appointment of a PC; where the processes to review decisions made by the PC and the GAL, in this case, are insufficient to protect Mother's due process rights; and where the PC and GAL failed to follow the directives of the Orders appointing them.

Additionally, Mother requests this court to reverse the District Court's refusal to allow Petitioner to cross-examine the GAL where the GAL failed to comply with Rule 1-053.3 requiring a report to be provided to the parties and counsel ten days prior to filing with the court, and Mother suffered substantial prejudice for being unable to ascertain the basis for the GAL's recommendations.

Mother also requests that the court review and reverse the decision of the District Court to reinstitute three-day weekend visitations between the minor child (hereinafter "Kamryn") and Respondent, Stuart Neill, where reinstitution of the visitations was contrary to evidence presented at hearings that the three-day weekend visitations were detrimental to the health and academic performance of Kamryn.

B. Summary Of Facts Relevant To The Issues Presented For Review

1. The Role of the PC in the Case at Bar

The PC, John Kutinac, was not appointed as a special master. [CD 1, 10-18-11, 8:41:51]. The PC is not an attorney, he is a therapist. [CD 1, 10-18-11, 8:42:15]. The PC has not held any hearings where all parties are present [CD 1, 10-18-11, 8:42:15]. The PC has not taken any evidence from the parties. [CD 1, 10-18-11, 8:42:26]. The PC has never filed a report with the Court in this case. [see

docket]. But the PC has made decisions regarding the best interests of the parties' minor child, including what amount of visitation Kamryn would have with Father and when the visitations would occur. [CD 1, 10-18-11, 8:43:20]And the parties have been required by the Court to follow those decisions. [RP 1598].

The PC has had ex parte communication with the court. [CD 1, 10-18-11, 8:19:20]. The PC initiated a phone call to the Court on the morning of November 24, 2009, to discuss clarification of the Court order regarding the percentage of the PC's fees that each party is responsible for and if the percentage split is retroactive or not. The PC emailed Petitioner's Counsel the same day as the phone call, informing counsel of the PC's ex parte communication with the Court. [CD 1, 10-18-11, 8:19:20, exhibit 11].

2. The Role of the GAL in the Case at Bar

The *GAL Order*, entered on March 5, 2009, requires the GAL to submit reports with the Court. [RP 1621]. In the 3 years since the GAL was appointed, he has filed two reports with the Court, the first was on December 14, 2009, shortly after he was appointed [RP 1749] and the second was on May 19, 2011 [RP 1866]. The May 19, 2011 report was filed on the same day as the hearing regarding *Petitioner's Verified Motion* and the GAL's own *Motion for Judicial Review and for Joint Legal Custody*.

The GAL is required to first submit to the parties, written reports and copies of recommendations, ten days prior to filing any report with the Court. [RP 1621] *see also* Rule 1-053.3(F)(3) NMRA (1006, as amended through 2007). Prior to filing its May 19, 2011*Report and Recommendations* the GAL did not submit a "report of investigation" to the parties. As a result of the GAL's actions, Mother did not know the basis for the GAL's recommendations. Thus, Mother's counsel called the GAL as a witness to testify. [CD 2, Tr. 2, 5-19-11, 00:24:03]. The GAL objected to taking the stand on the grounds that he is "an attorney…representing

the party in this action, this child." [CD 2, Tr. 2, 5-19-11, 00:24:30]. The Court upheld the GAL's objection and refused to allow the GAL to be called as a witness. [CD 2, Tr. 2, 5-19-11, 00:25:33].

The GAL is required by Rule 1-053.3(F)(3) and by the *GAL Order* Section (6)(d) [RP 1622], to request a review hearing if the GAL fees and costs exceed $10,000. The GAL admitted that his fees charged by "both the predecessor law firm Hubert & Hernandez, LLC and the current law firm Holt Babingon Mynatt Martinez, P.C. are the total sum of $22,395.39. The parties have paid the total sum of $20,590.74, leaving a balance of $1,804.65." [RP 1850] The GAL admits that he did not request a hearing when his fees and expenses exceeded $10,000 but took the position that he did not need to request a hearing because it was sufficient that the District Court had previously inquired of the parties if they were paying the GAL fees. [RP 1850-1851].

The GAL, along with Kamryn's Father and Stepmother met teachers at Kamryn's school without consulting Heather Dials. [CD 1, Tr. 1, 5-19-11, 00:10:48]. After this meeting, the GAL decided to remove Kamryn from school for a week to visit her father out of state.[CD 1, Tr. 1, 5-19-11, 00:11:10] Although Mother has sole legal custody and was adamant that Kamryn not miss any more school to travel because Kamryn had a history of falling behind in school after trips, Mother understood that if she did not go along with the GAL's decision, there would be repercussions in court. [CD 1, Tr. 1, 5-19-11, 00:10:10]. The GAL did not submit any reports to the court or parties detailing why it was necessary to make a decision without the Mother's input regarding the education of Kamryn Neill.

Kamryn has learning disabilities that interfere with her school performance. [RP 1867] Kamryn's difficulties in school reached a crisis point in 2010 and she was taken to an educational diagnostician, Cherylee Tombaugh, to determine the

best way to address her academic weaknesses. [CD 1, Tr. 1, 5-19-11 00:15:36]. An educational diagnostic report was submitted to the parties on October 6, 2010. [CD 1, Tr. 2, 5-19-11 00:02:36] Cherylee Tombaugh recommended her sister-in-law, Annette Tombaugh (a/k/a Sitze) to be hired as a tutor for Kamryn. [CD 1, 10-18-11, 8:57:40]. The GAL, PC, and Mother all agreed that Kamryn would begin tutoring with Annette Tombaugh. Mother later learned that Annette Tombough once employed the GAL, Stephen Hubert, as her attorney. [CD1, Tr. 1, 5-19-11, 00:07:12].

Kamryn attended several tutoring sessions with Annette Tombaugh, but when Annette Tombaugh inappropriately began discussing the conflict between Mother and Father with Kamryn, Mother discontinued the tutoring sessions and immediately found another tutor. [CD1, Tr. 2, 5-19-11, 00:08:34]. The new tutor holds a PhD (Annette Tombough holds a Masters) and is also an occupational therapist which is especially helpful to Kamryn , as she was born with Erb's palsy, a birth injury to the nerves in her right arm that interferes with her ability to study. [CD 1, 10-18-11, 9:02:01]. After Petitioner exercised her right as sole legal custodian to hire a new, more qualified tutor, the GAL and the PC demanded that Petitioner and Kamryn come to a meeting with them to review the decision. Despite the new tutors qualifications, Petitioner stated that the GAL, Stephen Hubert, became "belligerent and angry that [she] would have the nerve to . . . fire this tutor," in reference to Ms. Tombaugh. [CD1, Tr. 2, 5-19-11, 00:10:02].

3. The Three-Day Weekend Visits to Father

On January 26, 2010, the District Court ordered that Kamryn spend all three-day holiday weekends with Father as long as he was in the United States and that those visits did not have to take place in Las Cruces. [RP 1756]. Kamryn had to fly from El Paso, Texas to Miami, Florida and back for these trips which meant she

spent a good portion of the weekend traveling. [CD 2, Track 2, 05-19-11, 00:06:50].

The educational diagnostic report found that Kamryn suffered academically from taking the three-day weekend trips to see her father and that the trips were causing her stress and fatigue. [CD 1, 10-18-11, 9:05:40]. After reading the report the PC decided that it was not in the best interest of Kamryn to take three-day weekend trips to visit Respondent and that the weekend trips would be discontinued. [CD 1, 10-18-11, 9:04:09]. The PC, testified on October 18, 2011, that it was recommended to him that "long weekends in Miami" should be discontinued because they were "difficult on the child, and she had to focus more on school." [CD 1, 10-18-11, 08:53:18]. Mother also testified that the three-day weekends were harmful for Kamryn's school work and her health. [CD 2, Track 2, 05-19-11, 00:07:32] There was no evidence offered for the proposition that the three-day weekends were in Kamryn's best interests. Despite the lack of evidence, the District Court ruled that it was in the best interest of Kamryn to visit Father during every three-day holiday and reinstated those visits. [RP 1913].

The cost of the three-day trips is to be paid one-half by either party. [RP 1756] Currently, Mother is unemployed but is seeking employment as a massage therapist, once she becomes licensed. [CD 1, 10-18-11, 03:45:30]. She has completed the necessary schooling for the license. The Court imputed $30,000/year to Mother for purposes of calculating child support. [RP 1791]. After deductions for reasonable business expenses, Stuart Neill's income was calculated at $142,692 per year for child support purposes during the hearings of November 2009. [RP 1791] Stuart Neill has failed to provide evidence of his income for 2009, 2010, and 2011to Mother, despite numerous requests. Mother must also pay for one-half of all international travel expenses, which are significant as Father often works overseas. [RP 1756, 1914].

III. Argument

A. The trial court erred by denying the Petitioner/Appellant's Motion to Remove the Parenting Coordinator where (1) mother has sole custody of the child; (2) there is no statutory or common law authority authorizing the existence of a Parenting Coordinator; (3) the delegation of judicial authority or authorization of arbitration authority to an extra-judicial individual without written consent of both parties is restricted by statute; and (4) where the Parenting Coordinator failed to follow the directives of the Order appointing him.

Standard of Review

The decision to appoint a Parenting Coordinator without any statutory basis presents an issue of law, reviewed *de novo*. *See, Santa Fe Pub. V. Romero, 2001-NMCA-103, ¶ 10, 131 N.M. 383, 37 P.3d 100, 102* (stating that the Court of Appeals interprets statutes de novo with the principle objective of determining intent of the legislature). The Parental Coordinator's failure to follow the directives of the orders appointing him are issues of fact, which may be overturned for a lack of substantial evidence or a clear abuse of discretion. *See, Schaab v. Schaab*, 87 N.M. 220, 222, 531 P.2d 954, 956 (1974) ("Substantial evidence means such relevant evidence as a reasonable mind might find adequate to support a conclusion.") (internal citations and quotation marks omitted).

Preservation of the Issue

This issue was preserved for appeal by the Appellant's objection to the *November 28, 2011 Order* and through *Petitioner's Verified Motion*, filed March 10, 2011 as well as objections made on the record during the hearing held on Petitioner's *Verified Motion* and the GAL's *Motion for Judicial Review and for Joint Legal Custody*.

1. The Appointment of a PC is Unnecessary Because Mother has Sole Legal Custody.

Both the law of New Mexico and the Guidelines drafted by the AFCC Task Force on Parenting Coordination make clear that the appointment of a PC is not necessary when one party has sole legal custody of the minor child. *See,* The AFCC Task force on Parenting Coordination, May 2005, *Guidelines for Parenting Coordination*, 44 Fam. Ct. Rev. 164, 165 (2006), *see also*, NMSA 1978, § 40-4-9.1(B)(8) (1999) (providing that an inability to communicate or cooperate is a factor for awarding sole legal custody).

When one parent has sole custody of a minor child, that parent has been granted by the court the sole "authority and responsibility to make major decisions in a child's best interests in the areas of residence, medical and dental treatment, education or child care, religion and recreation." *See* NMSA 1978, § 40-4-9.1(L)(2) (1999). Thus, as the sole legal custodian, Mother is able to make decisions without having to seek and obtain the agreement of Father.

In New Mexico, joint legal custody is presumed to be in the best interests of the child. *See* NMSA 1978, § 40-4-9.1(A). But there are conditions in which joint legal custody is not in the best interests of the child and one factor in determining whether to award joint legal custody is the, "willingness or ability of the parents to communicate, cooperate or agree on issues regarding the child's needs". *Section* 40-4-9.1(B)(8). Thus, New Mexico law contemplates scenarios where parents do not cooperate and resolves the issue by granting one parent the ability to make decisions thereby reducing conflict and avoiding the need for a PC. *Id.*

The *PC Order* provides that the PC, has the duty "[t]o follow the *Guidelines for Parenting Coordination* as developed by AFCC Task Force on Parenting Coordination in May of 2005." [RP 1597]. However, the Guidelines make clear that the appointment of a PC is "reserved for those high conflict parents who have

demonstrated their longer term inability or unwillingness to make parenting decisions on their own." *Guidelines for Parenting Coordination*, 44 Fam. Ct. Rev. at 165. Because Mother has been awarded sole legal custody of Kamryn, there are no joint parenting decisions to be made and thus the conflict between Mother and Father regarding parenting decisions is irrelevant.

2. The Appointment of a Parenting Coordinator with the Authority to Arbitrate Disputes Between the Parties' Regarding "parenting issues, the Parenting Plan, custody, visitation or timesharing" is Beyond the Authority of the Court.

The *PC Order* states that the "Parenting Coordinator is being appointed in a quasi judicial role to act as an arm of the Court..." [RP 1591] and that the parties are to "[a]bide by any other written and oral directed and decisions of the Parenting Coordinator regarding parenting issues, the Parenting Plan, custody, visitation or timesharing, unless modified by the Court." [RP 1598]. Thus, the District Court delegated its authority to make decisions about Kamryn's best interests and to interpret and enforce its own orders. Interpreting and enforcing a court order is the purview of the courts and cannot be delegated to a third-party except as provided by statute or rule. *Aquilar v. City Commission of the City of Hobbs*, 1997-NMCA-45, ¶ 12, 123 N.M. 333, 335, 940 P.2d 181, 184 (finding that judicial power is conferred by the legislature and the legislature can and does delegate that authority by statute). *People v. Nat'l Auto. & Cas. Ins. Co.*, 82 Cal. App. 4th 120, 125, 97 Cal. Rptr. 2d 858 (2000) (*National Automobile*) (stating that the court derives its jurisdictional power to dictate and enforce orders upon parties before it from "constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*.")

The New Mexico State legislature has placed specific limitations on the ability of a court to order parties to participate in arbitration in the context of child

custody. "A court may not order a party to participate in arbitration except to the extent a party *has agreed to participate* pursuant to a written arbitration agreement." NMSA 1978 § 40-4-7.2(B) (1999) (emphasis added). Rule 1-124(B) NMRA (2010) states "[i]f the parties have not filed a parenting plan, the parties may *agree* to submit issues involving custody or visitation to binding arbitration pursuant to Section 40-4-7.2 NMSA 1978." (emphasis added).

The parties did not stipulate to the appointment of the PC, nor did they agree to grant him any decision-making authority. [RP 1591]. Instead, the Court entered its own order granting the arbitration power to the PC. [RP 1591].

There are circumstances wherein the court can appoint a special master, pursuant to Rule 1-053 NMRA (2011), to make decisions regarding a child's life in the context of child custody cases but only when the parties share joint legal custody and the decision involves "major changes in a child's life". NMSA 1978 § 40-4-9.1 (J)(5). As stated, Mother has sole legal custody and the PC was appointed to arbitrate regarding all issues that involved "parenting issues, the Parenting Plan, custody, visitation or timesharing", not just major decisions. [RP 1596]. Further, the PC was not appointed pursuant to Rule 1-053 NMRA.

The PC, John Kutinac, was not appointed as a special master. [CD 1, 10-18-11, 8:41:51]. The PC has not held any meetings where all parties and their counsel are present [CD 1, 10-18-11, 8:42:15]. Special masters are required to hold a meeting within twenty days of appointment with all attorneys and parties. Rule 1-053(D)(1) NMRA. The PC has not taken any evidence from the parties or held hearings. [CD 1, 10-18-11, 8:42:26]. *See*, *Id* at (C) (delegating the authority for a special master to hold hearings). The PC has never filed a report with the District Court in this case. [see docket] A special master is required to file a report with the court *See*, *Id* at (E)(1).

Rule 1-053.3 NMRA provides the only other circumstance where a court can delegate decision making authority to a third-party. It allows the court to appoint a GAL. *Id.* However, Rule 1-053.3(C) requires that the GAL be a lawyer. The PC is not a lawyer, he is a therapist. [CD 1, 10-18-11, 8:42:15]. Rule 1-053.3(D) also strictly prohibits the GAL from having arbitration authority over decisions regarding the minor child's best interests, unless the parties have agreed to submit to binding arbitration, pursuant to Section 40-4-7.2 NMSA 1978. And Section 40-4-7.2(D)(1) requires any arbitrator appointed by the court to be a lawyer.

There is no statutory authority for the appointment of a PC. [RP 1913]. Without such authority, a court cannot delegate its authority to make decisions to a third party. *See, National Automobile* 82 Cal. App. 4th at 125, 97 Cal. Rptr. 2d at 861 (internal citations omitted) ("Speaking generally, any acts which exceed the defined power of the court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in excess of jurisdiction...."). A California appellate court held that an order "authorizing [a third party] to alter the visitation schedule in any way she deemed reasonable and necessary constituted an improper delegation of judicial power to a subordinate court attaché." *In re Marriage of Matthews*, 101 Cal.App. 811, 817, 161 Cal. Rptr. 879, 882 (Ct.App.1980).

There is precedent in New Mexico for limiting a trial courts authority in proceedings regarding children to the jurisdictional authority granted by statute. *See, In re Jacinta M.*, 107 N.M. 769, 771, 764 P.2d 1327, 1329 (Ct. App. 1988), (stating that "the [Children's Code] authorizes the Children's Court to order that legal custody of a child remain with the [Department of Human Services]... it does not grant the court the power to dictate to the Department where the child should be placed." (internal citations omitted); *see also, Dillard v. Dillard*, 104 N.M. 763,

765, 727 P.2d 71, 73 (Ct. App. 1986) (holding that the trial court exceeded its statutory authority in ordering the establishment of a trust to provide for the parties' children's post-minority education.).

In both *In re Jacinta M.* and *Dillard*, the relevant statutes outlined the authority that the court had to make decisions and in both cases the court acted outside of that authority *In re Jacinta M.*, 107 N.M. at 771, 764 P.2d at 1329; *Dillard*, 104 N.M. at 765, 727 P.2d at 73. In *In re Jacinta M.*, the court exercised authority beyond that specifically granted by the Children's Code. This court held that once the trial court exercised its statutory authority by granting custody of a child to the Human Services Department, the court no longer had any authority to determine where the child could be placed because the Children's Code did not extend that power to the court. *Id.* 107 N.M. at 771, 764 P.2d at 1329.

In *Dillard*, the trial court ordered that funds be placed into an educational trust by the respondent to provide for the children's education after they reached the age of majority. 104 N.M. at 764, 727 P.2d at 72. At the time the governing statute stated that "[i]f any of the property decreed or funds created for the maintenance and education of the children shall remain on hand and be undisposed of at the time the minor children reach the age of majority, the same may be disposed of by the court as it may deem just and proper." NMSA 1978 § 40-4-7(C) (Repl. Pamp. 1986). This court held that the trial court's jurisdiction did not extend to the creation of an educational trust because "[t]he statutory language encompasses funds that 'remain' in the sense of the residuum of funds that have been applied to the children's needs, not funds that the trial court ordered accumulated and which never reached the children ordered to be supported." *Id.* 104 N.M. at 766, 727 P.2d at 74.

Just as in *In re Jacinta M.*, and *Dillard*, the District Court's authority is limited to the language in the governing law. The District Court has no statutory

authority to impose a third party decision maker on a parent with sole custody. A court can refer parties to a special master, but only if those parties share joint legal custody. NMSA 1978, Section 40-4-9.1(J)(5). There is no other instance where a statute or rule provides for the court to delegate decision-making authority to a third party decision maker without the parties specifically agreeing to that delegation.

Even in states where there is statutory authority for the appointment of parenting coordinators, a court cannot act in excess of that authority by granting a PC powers beyond the statutory limit. *See, Haulsaden v. Knoche*, 235 P.3d 339, 403 (Idaho 2010), (holding that the statutory "language was not intended to give parenting coordinators judicial powers of decision-making"), *see also, In re Marriage of Dauwe*, 148 P.3d 282, 285 (Colo. Ct. App. 2006). In *Dauwe* the court held that despite the Colorado statute granting the court authority to appoint a PC, the court had no authority to delegate arbitration authority to the PC without the consent of the parties pursuant to the terms of Colorado statutory law. *Id.* The *Dauwe* court held that its statute did "not permit the parenting coordinator to make decisions or resolve disputes that the parents are unable to resolve." *Id at* 285. In an earlier case, the Colorado Court of Appeals compared the law governing a PC's appointment to that of the law regarding GALs, stating "The statutory scheme requires that the trial court itself make decisions regarding parenting time, and it may not delegate this function to third parties such as a guardian ad litem." *In re D.R.V-A.*, 976 P.2d 881, 884 (Colo. Ct. App. 1999) (internal citations omitted). Similar to Colorado, New Mexico's law governing a GAL appointment does not allow the court to delegate decision making authority regarding a child's best interests to a GAL without assent by the parties. Rule 1-053.3(D), NMRA. Thus, if the New Mexico legislature chose to enact a statute authorizing the appointment of

PC's, it would not grant the court the power to unilaterally decide to delegate decision-making authority to a PC.

3. The District Court Does Not Have Authority to Grant the PC Decision-Making Authority Even Though the District Court Retains Authority to Review Those Decisions

In the *November 28, 2011 Order*, the District Court held that while "there is no specific rule governing the appointment of a Parenting Coordinator... the Court believes that it is within the sound discretion of the Court to exercise its powers in appointing a Parenting Coordinator under the terms and conditions set forth in the [*PC Order*]." [RP 1913]. The District Court held that it had discretion to appoint the PC and delegate decision-making authority because the District Court found it was the ultimate decision maker, able to review any decision made by the PC. The District Court modified the *PC Order* in the *November 28, 2011 Order* by stating that "...[t]he Court has not delegated the ultimate decision making capacity , which is reserved at all times to the Court" and "[a]ll decisions of the Parenting Coordinator are subject to review by the Court upon Motion of either party or the Guardian ad Litem." [RP 1913]. However, this reservation of ultimate decision-making authority does not change the fact that the District Court has wrongfully delegated its authority.

The District Court erred in believing that it was within its discretion to delegate authority to a PC pursuant to the terms of the *PC Order*. In the *PC Order*, it states that the PC is to act "as arbitrator on interpretation of the terms of the controlling Court Order of Parenting Plan on visitation and timesharing." As described above, the District Court cannot delegate arbitration authority regarding interpretation of the terms of its orders, including regarding visitation and timesharing. NMRA 1978 § 40-4-7.2(B). The *PC Order* also states that the PC's duties include making "temporary or minor modifications to the visitation and

timesharing provision of the controlling Court Order and/or Parenting Plan, including the authority to change the minor child's primary residence or terminate visitation of either parent... ." [RP 1596]. Such changes may be eventually reviewable by the District Court, but the *PC Order* requires the parties to follow the directives and decisions of the PC immediately [RP 1594] and that requirement was not modified by the November 28, 2011 Order. [RP 1913].Therefore, visitation could be ended or Kamryn could be required to relocate to Florida immediately based on the decision of the PC and, while that change would be eventually reviewed by the District Court, the effect of the change would be irreversible. *Alpers v. Alpers*, 111 N.M. 467, 470, 806 P.2d 1057, 1060 (Ct.App.1990) (finding that relocating children significantly impacts the children such that undoing a relocation decision is likely to cause harm to those children); *see also Guidelines for Parenting Coordination*, 44 Fam. Ct. Rev. at 172, (stating that a PC "shall refrain from making decisions that would change legal custody and physical custody from one parent to the other or substantially change the parenting plan. Such major decisions are more properly within the scope of judicial authority."). Thus, the District Court's belief that its position as the final decision-maker legitimizes the delegation of its authority to the PC is an error.

4. The Parenting Coordinator Failed to Follow the Directives of the Order Appointing Him

The *PC Order* states that "[t]he Parenting Coordinator shall have no ex parte communications with the court unless otherwise ordered..." [RP 1594] and the PC is "[t]o follow the guidelines for Parenting Coordination as developed by AFCC Task Force on Parenting Coordination in May of 2005." [RP 1597]The Guidelines also forbid a PC from engaging in ex parte communications with the judge." *Guidelines for Parenting Coordination*, 44 Fam. Ct. Rev. at 171.

Despite the prohibition on such communications, the PC called Judge Martin on the phone on November 24, 2009, to ask whether the Court's Order, requiring his bill to be paid pro rata by the parties, was retroactive or not. [CD 1, 10-18-11, 09:19:20] The Court clarified its order to the PC, over the phone, and the PC sent an email to counsel with the answer. [CD 1, 10-18-11, 09:19:36].

In 2009, ex parte communication with a judge was governed by Rule 21-300 (1991) NMRA. While Rule 21-300 (1991) is directed at the judge, not at a PC, it clearly forbids ex parte communication between a presiding judge and a party or witness to a case. There are exceptions to the ban on ex parte communication, but only for situations such as when parties consent to the communication in order to promote settlement, or "[w]here circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with *substantive matters* or *issues on the merits* are authorized; provided..." Rule 21-300(B)(7) (1991) (emphasis added). The interpretation of an order regarding whether a provision in the order is retroactive or not is clearly an issue on the merits, not an administrative matter or an emergency, as a decision either way will affect the financial affairs of both parties.

It is possible that the PC did not believe his call was an ex parte communication. The AFCC *Guidelines for Parenting Coordination* contemplate the chance that those who serve as Parenting Coordinators may not understand the legal term "ex parte communication." *Guidelines for Parenting Coordination*, 44 Fam. Ct. Rev. at 176.The *Guidelines* provide modules that outline the various areas in which those serving as PCs should receive training, including "[l]egal concepts as they relate to the parenting coordination process including... law of due process [and] law of *ex parte* communication." *Id.* at app. A, module 4(D)(3) at 176. Because there is no statute or rule governing the appointment of PCs, there are no required educational components for a PC to follow, no trainings, and no

continuing education systems required to assure that PCs in New Mexico understand the scope of their appointment and the requirements of the order appointing them. *See*, Allison Glade Behjani, *Delegation of Judicial Authority to Experts: Professional and Constitutional Implications of Special Masters in Child-Custody Prooceedings*, 2007 Utah L. Rev. 823 (2007). (noting that a lack of professional and educational guidelines for PC's can cause problems for parties and the court system). The AFCC *Guidelines for Parenting Coordination* recommends that any, "jurisdiction implementing a parenting coordination program adopt and adhere to guidelines for [PC] practice and programs." 44 Fam. Ct. Rev. at 165. Based on that recommendation, Oregon courts, for example, have adopted guidelines that require all PC's to have specific education, licensure, training and be supervised. State Family Law Advisory Committee, *2010 Guidelines: Qualifications for Appointment and Training of Parenting Coordinators, Custody Evaluators, and Parenting Time Supervisors*, http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/familylaw/2010 Guidelines.pdf, page 2.

Whether inadvertent or not, the PC should be removed as PC as he has violated the order appointing him.

B. The Court violated Petitioner's due process rights under Article II, Section 18 of the New Mexico Constitution and the Due Process Clause of the 14th Amendment to the United States constitution by delegating judicial decision making authority to a Parenting Coordinator where the Petitioner did not stipulate to the delegation of judicial authority, where there is no statutory basis for such delegation, and where there is no meaningful review of the delegated authority.

Standard of Review

Violation of due process rights is a pure issue of law reviewed de novo. *See, State ex rel. Children, Youth & Families Dept. v. Ruth Anne E.*, 1999-NMCA-035, 126 N.M. 670, 974 P.2d 164, 170. ("in passing upon claims that the procedure

utilized below resulted in a denial of procedural due process, we review such issues de novo.").

Preservation of the Issue

This issue was preserved for appeal by the Appellant's objection to the *November 28, 2011 Order* and through *Petitioner's Verified Motion*, filed March 10, 2011 as well as objections made on the record during the hearing held on Petitioner's *Verified Motion* and the GAL's *Motion for Judicial Review and for Joint Legal Custody*.

Argument

The appointment of the PC as a "quasi judicial" "arm of the Court" that can make decisions "regarding parenting issues, the Parenting Plan, custody, visitation, or timesharing" that must be followed "until the Court rules otherwise" [RP 1591] denies Mother her due process right to have decisions regarding her child be decided by the Court. Both the State Constitution and Federal Constitution guarantee procedural due process. U.S. Const. amend XIV, § 1 ("No State shall... deprive any person of life, liberty or property, without due process of law..."); N.M. Const. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law...").

Due process, under the federal constitution includes the ability to make decisions regarding "the care custody and control of [parents'] children". *See, Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000) (finding, "we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *see also, State v. Lefevre*, 2005-NMCA-101, ¶12, 138 N.M. 174, 177, 117 P.3d 980, 983 ("The United States Supreme Court has included with the Fourteenth Amendment's liberty interest a parent's right to direct his child's upbringing.")(internal citations

omitted). A court cannot, then, delegate to a third party its decision-making authority regarding the care, custody, and control of a party's child when that party has sole legal custody. Such a delegation is a violation of that party's--in this case, Mother's--right to due process.

Pursuant to New Mexico law, a sole legal custodian can make decisions regarding her child. NMSA 1978, § 40-4-9.1(L)(1999). The Court, if it has jurisdiction over the parties and the subject matter, can also make decisions regarding that minor child. NMSA 1978, ' 40-4-9.1(J)(5)(g). But the Court "cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers." *Kimberly v. Arms*, 129 U.S. 512, 524, 9 S. Ct. 355, 359, 32 L. Ed. 764 (1889) (where the court held that decisions made in a special master's report regarding the dissolution of a mining partnership were to be afforded appropriate weight because both parties had agreed to the reference of the special master).

In delegating judicial decision-making authority to a third party, the District Court denied Mother her right to have any decisions that are not made by her, made by the District Court, which has been granted statutory authority to make decisions regarding her child. *See* Section 40-4-9.1(J)(5)(g). In accordance with a party's due process rights, if a parent has legal custody of a child, New Mexico law does not allow the delegation of decision-making regarding the best interests of that child to anyone without the parties' agreeing to that delegation. *See*, Rule 1-053.3(D) (stating that "[i]n no event shall the court delegate the ultimate determination of the child's best interests, unless the parties have agreed to arbitrate such issues..."); *see also*, NMSA 1978 § 40-4-7.2 (Parents must agree to submit to binding arbitration regarding custody and timesharing).

Rule 1-053(E)(1) NMRA does allow the court to appoint a special master to make recommendations in a joint custody case, the special master's

recommendations are not allowed to be implemented immediately if a party objects to them. The court must hold an evidentiary hearing on those objections. *Id.* When a court delegates its authority to make determinations regarding the child's best interests to a PC, it violates the "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 65, 120 S. Ct. at 2059.

Due process is violated even though the District Court retained jurisdiction to review the PC's decision and act as the ultimate decision maker because the parties are still required to follow the PC's decision until the District Court is able to review it. The *November 28, 2011 Order* stated that the District Court was retaining its "ultimate decision making capacity." [RP 1913]. However, the District Court, when it incorporated the *PC Order* into the *November 28, 2011 Order*, did not modify the requirement that the parties follow the PC's directives and orders until such time as the court was able to review the decisions. Thus, the PC could make Mother change the child's school, modify the visitation with Father, or even change the primary residence of Kamryn and the parties would be bound to follow such a decision until such time as their objections could be heard by the Court. *See* [RP 1596, RP 1597].

Due process requires meaningful review of any decision made by the PC that inhibits Mother's fundamental right as sole legal custodian to make decisions regarding her child. *See, State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004–NMCA–083, ¶ 24, 136 N.M. 53, 94 P.3d 796. (stating that, "process is due when a proceeding affects or interferes with the parent-child relationship."). *Maria C.* involved termination of parental rights, while the case at bar involves only partial deprivation of parental rights instead of the permanent deprivation of parental rights. *Id.* However, even partial deprivation requires due process. *See, Connecticut v. Doehr*, 501 U.S. 1, 11, 111 S. Ct. 2105, 2112, 115 L. Ed. 2d 1

(1991) (holding that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.").

However, [d]ue process is a flexible right and the amount of process due depends on the particular circumstances of each case," *State of N.M. ex rel. CYFD v. Kathleen D.C.*, 2007-NMSC-018 ¶ 14, 141 N.M. 535, 539, 157 P.3d 714, 718 (so stating). To determine the amount of process due to Mother, the applicable balancing test is the test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *See, Kathleen D.C.*, 2007-NMSC-018 (where the court employed the *Mathews* balancing test to parental rights termination proceeding). Application of the *Mathews* test "requires the consideration and balancing of three factors: (1) the private interest at stake; (2) the government's interest; and (3) whether the procedures used by the trial court increased the risk of an erroneous deprivation of the private interest, and the probable value, if any, of additional or substitute procedural safeguards." *Kathleen D.C.*, 2007-NMSC-018 ¶ 14.

The private interests at stake is Mother's "authority and responsibility to make major decisions in a child's best interests in the areas of residence, medical and dental treatment, education or child care, religion and recreation," as appropriate for a parent with sole legal custody. NMSA 1978, § 40-4-9.1(L)(2). Weighed against Mother's interest is the state's interest in "protecting the welfare of children." *State ex rel. Children, Youth & Families Dept. v. Mafin M.*, 2003-NMSC-015 ¶ 20, 133 N.M. 827, 832, 70 P.3d 1266, 1271 (where state sought termination of mother's parental rights due to abuse and endangerment of minor children). Although, the governmental interest in protecting the welfare of children is strong, there are no allegations of abuse in the instant case, unlike in *Mafin M. Id.* Furthermore, the state has already ceded a portion of its interest by granting "sole custody" to Mother and by doing so the state presumes that her decisions are

in the best interest of the child. *Jaramillo v. Jaramillo*, 113 N.M. 57, 61, 823 P.2d 299, 303 (1991). Because the state presumes that Mother's decisions are always in the best interest of the child, Mother's interest in protecting her parental rights outweighs the states interest.

The third attribute of the *Mathews* test addresses whether there is high risk of erroneous deprivation of Mother's parental rights. *Kathleen D.C.*, 2007-NMSC-018 ¶ 14. This Court held that "[w]henever a proceeding affects or interferes with the parent-child relationship courts must be careful to afford constitutional due process." *State ex rel. Children, Youth and Families Dep't v. Stella P.*, 1999–NMCA–100, ¶ 14, 127 N.M. 699, 986 P.2d 495, (so stating). There is undoubtedly a high risk of erroneous deprivation of Mother's parental rights, even if temporary. Because the PC is not a judge and he does not have the same mandate to protect the constitutional rights of Mother, there is inherent risk of erroneous deprivation. Further, there is no option to stay the decision made by the PC.

Decisions made by the PC take effect immediately. The Court's eventual review of that decision may occur weeks or months after the effects of the decision under review are felt and some of those effects may result in irreversible harm. The example given, if Kamryn were required to relocate to Florida to live primarily with Father, could result in irreversible harm. In *Alpers*, 111 N.M. 467, 806 P.2d 1057, this Court held that a stay of an order of relocation, while the Court of Appeals considered the mother's appeal of the relocation decision was necessary because once the relocation occurred, the reversing of that decision could cause substantial harm. 111 N.M. at 472, 806 P.2d at 1062. In *Alpers* the parties had access to a court to review whether a stay of the relocation decision was appropriate. *Id.* In the case at bar, the PC's decision must be followed and there is no opportunity to obtain a stay while the parties wait for the District Court to review the decision. Further, the *Alpers* court stated that, "[w]ithout any indication

that the health or safety of the minor children is in jeopardy, a presumption exists that keeping the status quo during the pendency of an appeal is in a child's best interest." *Id.* 111 N.M. at 470, 806 P.2d at 1060. Presumably, then, the same is true regarding a PC's decision that a party or the GAL objects to. Thus, the *Mathews* test weighs heavily in favor of protecting the interests of Petitioner.

Ultimately, "the determinative factor [as to whether due process is sufficient] is whether the procedures used by the trial court increased the risk of an erroneous deprivation of the parent's interest, and whether additional or substitute safeguards would eliminate or lower that risk." *State of N.M. ex rel. CYFD v. Kathleen D.C.*, 2007-NMSC-018 ¶ 14, 141 N.M. 535, 539-40, 157 P.3d 714, 718-19 (internal citations omitted). Therefore, if there are substitute procedures available that afford less risk to the constitutional rights of Mother, then the District Court is obligated to follow those procedures. The substitute procedure available is for the District Court to make decisions itself or follow the procedure required by Rule 1-053.3 regarding GAL recommendations. In other words, have the PC file recommendations and if the parties agree with the recommendations, they can follow them and if they do not, a hearing can be held to review the recommendations before they are enacted. Thus, pursuant to state and federal law, Mother's due process rights were violated by the District Court when it directed that the parties immediately follow the PC's decisions.

C. The trial court erred by denying Petitioner/Appellant's Motion to Remove the Guardian ad Litem where a court cannot delegate the ultimate determination of the child's best interest to a Guardian ad Litem unless the parents agree to allow the Guardian ad Litem to have arbitration authority and where the Guardian ad Litem in this case had violated Rule 1-053.3 and the directions of the Order appointing him.

Standard of Review

This issue presents mixed issues of law and fact. The decision to appoint a Guardian ad Litem who makes decisions for the parties without the parties stipulating to arbitration authority presents an issue of law, reviewed *de novo*. *See, Santa Fe Pub. Sch* , 2001-NMCA-103 at ¶ 10, 131 N.M. at 385, 37 P.3d at 102 (stating that the Court of Appeals interprets statutes *de novo* with the principle objective of determining the intent of the legislature). The issue of the Guardian ad Litem's failure to follow to follow the directives of the orders appointing him is an issue of fact, which may be overturned for a lack of substantial evidence or a clear abuse of discretion. *Schaab*, 87 N.M. at 222, 531 P.2d at 956 ("Substantial evidence means such relevant evidence as a reasonable mind might find adequate to support a conclusion.") (internal citations omitted). "It is well settled in New Mexico that the appellate court will not substitute its judgment for that of the trial court in weighing the evidence. If the trial court's findings are supported by substantial evidence, they must be affirmed." *Id.* (quoting *Tome Land & Improvement Co. v. Silva*, 83 N.M. 549, 552, 494 P.2d 962, 965 (1972)).

Preservation of the Issue

This issue was preserved for appeal by the Appellant's objection to the *November 28, 2011 Order* and through *Petitioner's Verified Motion*, filed March 10, 2011 as well as objections made on the record during the hearing held on Petitioner's *Verified Motion* and the GAL's *Motion for Judicial Review and for Joint Legal Custody*.

Argument

A GAL must adhere to Rule 1-053.3 NMRA and to the specific court order appointing the GAL. 1-053.3(F) (providing that the GAL follow the duties listed in the Rule as well as those duties listed in the order of appointment).

The GAL has a duty to supply all parties with a, "a written report of investigation and separate written recommendations... at least ten (10) days before the recommendations are filed with the court." Rule 1-053.3(F)(3) NMRA. The GAL in this case has failed to abide by that requirement. Instead, he failed to provide the parties with any written report prior to filing his *Report and Recommendations*, which he filed immediately prior to the hearing regarding *Petitioner's Verified Motion*. Further, the GAL has been involved in this case for over three years, yet he has only filed recommendations with the District Court on two occasions. Rule 1-053.3(F)(4) lists filing recommendations with the court as a duty of the GAL. The GAL filed his first report on December 14, 2009, shortly after being appointed [RP 1749], and the second was, as described, on May 19, 2011[RP 1866].

While the GAL has not filed recommendations, he has remained involved in the case, working with the PC to craft requirements for the parties to follow.[RP 1860-70]. For instance, he made the decision to remove Kamryn from school for a week to visit Father when Kamryn had been struggling in school. [CD 1, Tr. 1, 5-19-11, 00:10:48]. The GAL also objected to Mother's change of tutors for Kamryn, going so far as to accuse her of bad acts because she made this parenting decision without first obtaining his permission. [CD1, Tr. 2, 5-19-11, 00:10:02]. Thus, the GAL has made decisions and inserted himself into the parenting decisions made by Mother without adhering to proper procedure by submitting recommendations to the District Court and then allowing the District Court to enter such recommendations as orders of the District Court after sufficient review. In so doing, the GAL overstepped the limited grant of authority delegated to him by Rule 1-053.3. *See*, 1-053.3(D) (prohibiting the delegation of decision-making regarding the child's best interests unless both parties have stipulated to the grant of that authority); *see also*, 1-053.3(G) (creating procedures for adoption of the GAL's

recommendations, if they are agreed to by the parties after being reviewed, or if they objected to, providing for a court hearing to review the recommendations).

Additionally, *GAL Order* states "The GAL shall request a review hearing if the GAL fees and expenses exceed $10,000" in accordance with NMRA Form 4-402(7)(d). [RP 1622]. "The words 'shall' and 'must' generally indicate that the provision of a statute are mandatory and not discretionary." *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1997) (interpreting the language of a statute) (citations omitted). Although the Order states that the GAL "shall" request a review hearing, no request has been submitted to the Court since the GAL's fees have exceeded $10,000. Mother's income is limited. She is unemployed [RP 1790], pays for half of Kamryn's school [RP 1867], and is required to pay for half of all of Kamryn's airfare to visit Father, whether in the U.S. or overseas [RP 1756]. Thus, the opportunity to review the GAL's fees is of significant import to Mother.

It is proper for the GAL to be removed as Guardian ad Litem in this case because he has failed to abide by the *GAL Order* and Rule 1-053.3.

D. The court erred in refusing to allow Petitioner/Appellant to cross-examine the Guardian ad Litem where the GAL failed to comply with Rule 1-053.3 NMRA, requiring copies of GAL's report to be provided to the parties and counsel ten days prior to filing the report with the court and Petitioner/Appellant suffered substantial prejudice for being unable to ascertain the basis for the Guardian ad Litem's recommendations.

Standard of Review

This issue presents a pure issue of law, reviewed de novo. *See, Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd.*, 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991) ("When a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts, viewing them in a manner most favorable to the prevailing party.")

Preservation of the Issue

This issue was preserved for appeal by the Appellant's objection to the *November 28, 2011 Order* and through *Petitioner's Verified Motion*, filed March 10, 2011 as well as objections made on the record during the hearing held on Petitioner's *Verified Motion* and the GAL's *Motion for Judicial Review and for Joint Legal Custody*.

Argument

Rule 1-053.3(C) NMRA states "The Guardian ad Litem appointed under this rule is a 'best interest attorney' who shall provide independent services to protect the child's best interests without being bound by the child's or either party's directive or objectives and who shall make findings and recommendations." However, when the GAL failed to supply a written report ten days prior to filing his recommendations, as required by Rule 1-053.3.(F)(3), and filed his Recommendations immediately prior to the beginning of the hearing on May 19, 2011, Mother did not have an opportunity to review or understand the basis of the GAL's recommendations.

Rule 1-053.3(F)(3) NMRA, outlines the process that protects the rights of parties who are subject to the recommendations made by a GAL to a court. When a GAL does not abide by the requirement to submit their recommendations to the parties before filing those recommendations with the Court, the affected parties are not given the opportunity to agree or object to the recommendations as outlined by Rule 1-053.3(G) and thus "be heard" by the Court. *State ex rel. Children, Youth & Families Dept. v. Maria C.*, 2004-NMCA-083, ¶ 26, 136 N.M. 53, 62, 94 P.3d 796, 805. (stating that "the essence of due process is notice and an opportunity to be heard at a meaningful time and in a meaningful manner.").

Because the GAL in this case did not properly distribute an "investigative report" and copies of his recommendations to the parties prior to the hearing of

May 19, 2011, Mother's due process rights were jeopardized. To remedy the situation, Mother's counsel called the GAL to testify in an attempt to ascertain the basis of his Recommendations. [CD 2, Tr. 2, 5-19-11, 00:24:03]. The GAL objected based on his position as a lawyer for a party in the case, Kamryn. The Court sustained the GAL's objection. [CD 2, Tr. 2, 5-19-11, 00:25:33].

The role of a GAL is unlike an attorney advocating for a client, New Mexico courts contemplate a GAL testifying in court. *See, Thomas v. Thomas*, 1999-NMCA-135, ¶ 11, 128 N.M. 177, 181, 991 P.2d 7, 11, (holding that the *GAL's testimony, at a hearing*, stating that parents' interactions over custody negatively affected the children, established a change in circumstances sufficient to warrant modifying custody) (emphasis added).

It is true that in most circumstances, pursuant to Rule 16-307(A) NMRA (2008), a lawyer may not testify in a case where they are also acting as an advocate for a client. However, the New Mexico Supreme Court made clear that a GAL may testify and that Rule 16-307(A) does not apply to a GAL. *State v. Joanna V.*, 2004-NMSC-024, ¶ 14, 136 N.M. 40, 44, 94 P.3d 783, 787. The *Joanna* Court held that "[t]he [GAL] provides … a voice that is sometimes best heard on the witness stand testifying on behalf of the child instead of being confined to legal argument and the role of an attorney." *Id.* While the GAL in *Joanna* was testifying in an abuse and neglect case, pursuant to the Children's Code, and therefore not a GAL pursuant to Rule 1-053.3, the need for a GAL to testify as to what is in the best interest of a child is substantially similar and therefore, *Joanna* should be read to state that a GAL is always exempt from Rule 16-307(A).

As a "best interests attorney" Rule 1-053.3 makes clear that a GAL is not the same as an attorney for an adult client. Rule 1-053.3(C). Unlike a normal client, the GAL is not bound to follow the directives of the client, but can disagree and report that disagreement to the Court. Rule 1-053.3(H). The GAL is also unlike a

normal attorney in that he or she is to conduct an investigation and then use that investigation to inform the recommendations. Rule 1-053.3(F). Thus, the basis for those recommendations are allegedly based on evidence gathered by the GAL. *See, Guardian ad Litem's Report and Recommendations* [RP 1886 - 1870] (wherein the GAL discusses interviews he conducted with Kamryn's teachers, Kamryn, documents reviewed by him and his conclusions based on this information). As an arm of the court, the GAL assists the court in discerning what the court should decide. *See, Thomas*, 1999-NMCA-135 at ¶ 11, 128 N.M. at 181, 991 P.2d at 11 (wherein the GAL's testimony provided substantial evidence of the child's best interest and therefore sufficient grounds for the court's decision). Since the court is bound to make decisions based on substantial evidence, a GAL's report as to its investigation will be considered part of that evidence. *Id.* Thus the parties should be allowed to ascertain the basis of that evidence and therefore help the trial court discern how much weight to give the recommendations of the GAL. *See, Maria C.*, 2004-NMCA-083 at ¶ 26, 136 N.M. at 62, 94 P.3d at 805 ("The opportunity to be heard in a 'meaningful manner,' generally includes an opportunity to review and present evidence, confront and cross examine witnesses, and consult with counsel, either by way of an informal or formal hearing.") Therefore, a GAL should be required to testify as to the basis of their recommendations especially in a case where the GAL failed to file a report to the parties prior to filing the recommendations.

Many other jurisdictions have reached the conclusion that GAL's can and should be subject to cross examination; "The annotation... indicate[s] that a majority of jurisdictions recognizes that there exists a right to be informed of and to cross-examine any court-appointed impartial investigator, agency, medical expert or guardian ad litem in a custody proceeding. The cases generally hold that the litigants are entitled to know and have an opportunity to rebut the factual bases

upon which the guardian or investigator makes his recommendation." *Collins v. Collins*, 324 S.E.2d 82, 85 (S.C. Ct. App. 1984) (citing Annot., 59 A.L.R.3d 1337 (1974); *Bass v. Bass*, 437 P.2d 324 (Alaska 1968); *Moody v. Gilbert*, 69 S.E.2d 874 (Ga. 1952); *Yearsley v. Yearsley*, 496 P.2d 666 (Idaho 1972); *Aylor v. Aylor*, 478 P.2d 302 (Colo. 1970); *Rohrbaugh v. Rohrbaugh*, 68 S.E.2d 361 (W. Va. 1951), overruled on other grounds, *J.B. v. A.B.*, 242 S.E.2d 248 (W. Va. 1978)). In New Mexico a GAL can be called as a witness therefore parties cannot be deprived of the right to cross examine "to test the credibility of a witness" *Empire W. Companies, Inc. v. Albuquerque Testing Lab., Inc.*, 110 N.M. 790, 792, 800 P.2d 725, 727 (1990).

The GAL's failure to properly disburse recommendation to the parties ten days prior to filing those recommendations with the Court created the situation where it was necessary for him to submit to cross-examination so that the parties could inquire as to the basis for those recommendations.

E. The Court Erred in Reversing the Modification to the Parties' Parenting Plan such that Kamryn is Required to Spend Every Three-Day Weekend with Father where the Evidence Presented to the District Court Established that Such Trips were not in the Best Interests of Kamryn

Standard of Review

The District Court's decision to reinstate three-day weekend trips is an issue of fact, which may be overturned for abuse of discretion or lack of substantial evidence. "Substantial evidence means such relevant evidence as a reasonable mind might find adequate to support a conclusion." *Schaab*, 87 N.M. at 222, 531 P.2d at 956 (internal citations omitted). "It is well settled in New Mexico that the appellate court will not substitute its judgment for that of the trial court in weighing the evidence. If the trial court's findings are supported by substantial

evidence, they must be affirmed." *Id.* (quoting, *Tome Land & Improvement Co.*, 83 N.M. at 552, 494 P.2d at 965).

Preservation of the Issue

This issue was preserved for appeal by the Appellant's objection to the *November 28, 2011 Order* and through *Petitioner's Verified Motion*, filed March 10, 2011 as well as objections made on the record during the hearing held on Petitioner's *Verified Motion* and the GAL's *Motion for Judicial Review and for Joint Legal Custody*.

Argument

On January 26, 2010, the District Court ordered that Kamryn spend all three-day weekend holidays with her Father in Florida. [RP 1756]. However, Kamryn's grades were not good and she was clearly struggling in school. [CD 1, 10-18-11, 9:05:40]. After the educational diagnostic report of Kamryn found that the three-day trips were interfering with Kamryn's schooling as well as causing her stress and fatigue, the PC testified that he ended the three-day weekend trips. [CD 1, 10-18-11, 9:05:40]. Mother also testified that the trips were stressful for Kamryn and often resulted in her returning exhausted and sick. [CD 2, Track 2, 5-19-11, 00:07:30]. The trips involved Kamryn flying for most of a day between El Paso, Texas and Miami, Florida and back. [CD 2, Track 2, 5-19-11, 00:06:40]. Thus, reducing the time she had to see Father during these trips. Mother also testified that the tutors for Kamryn recommended that the three-day visits end. [CD 1, 10-18-11, 9:04:09].There was no evidence presented to the Court that it would be in the best interest of Kamryn to fly to see her father during every three-day weekend. Despite the lack of evidence, the District Court held that it was reinstating the requirement that Kamryn spend every three-day holiday weekend during the school year with Father. [RP 1913].

The court has broad discretion to determine what is in the best interests of the child when determining visitation and time sharing. *Sanders v. Rosenberg*, 1997–NMSC–002, ¶ 1, 122 N.M. 692, 639, 930 P.2d 1144, 1145 (holding that the trial court has broad discretion to determine what is in the best interests of a child). But, in order to make a proper determination, the Court must rely on evidence presented during a hearing on the matter. *Fitzsimmons v. Fitzsimmons*, 104 N.M. 420, 423, 722, 722 P.2d 671, 674 (Ct. App. 1986). "While the trial court is accorded great leeway in custodial decisions, the court's ruling must be supported by appropriate findings and the court's findings must be supported by the evidence adduced at the hearing." *Id.* at 423.

The only evidence submitted to the District Court during both days of the hearing were that the three-day long visits were not in the best interest of Kamryn. Since there was no evidence submitted to the District Court to support recommencing the three-day visits to Father, the District Court's decision is clearly not supported by substantial evidence and as such must be reversed as an abuse of discretion. *See, Boone v. Boone*, 90 N.M. 466, 467-68, 565 P.2d 337, 338-39 (1977) (If the appellate court cannot find substantial evidence to support the findings of the trial court, it will reverse the trial court's ruling as an abuse of discretion.).

CONCLUSION

Mother respectfully requests this Court reverse the lower court's ruling to retain the PC and the GAL. The retention of the PC was an error as there is no New Mexico constitutional provision, statute, or rule granting the court authority to appoint a Parenting Coordinator and the Court acted contrary to New Mexico law by delegating judicial decision making and arbitration authority to a PC without the consent of the parties, further, the PC failed to follow the order appointing him.

The lower court's decision to retain the GAL was also an error as he has made decisions regarding the best interests of the child without the authority to do so and has failed to follow the requirements of Rule 1-053.3 and the order appointing him.

Mother also respectfully requests that this court reverse the decision of the trial court to sustain the GAL's objection to testifying. A GAL should testify as to the basis of his recommendations, especially when he failed to provide the parties his written recommendations prior to the hearing where they were at issue.

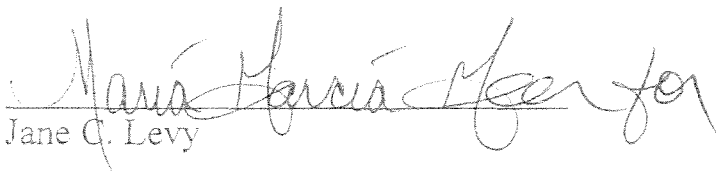
Finally, Mother respectfully requests that this court reverse the trial court's decision to recommence the three-day holiday weekend visitation with Father. All the evidence submitted to the District Court demonstrated that it was not in the best interests of Kamryn to have to fly to Florida and back every three-day weekend during the school year. The District Court's decision to reinstitute these visitations was not supported by substantial evidence and was a clear abuse of discretion.

Respectfully Submitted:

Jane C. Levy
Geer, Wissel & Levy, P.A.
Attorney for Appellant
P.O. Box 7549
Albuquerque, NM 87194
(505) 243-1733

Leslie Becker
Attorney for Appellant
1000 Lomas Blvd. NW
Albuquerque, NM 87102-1945
(505) 222-3120

I hereby certify that a true and correct copy of the foregoing was mailed to the opposing counsel this 9th day of July, 2012.



Jane C. Levy