

[Cite as *Meeker v. Howard*, 2017-Ohio-9410.]

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

RANDY LEE MEEKER,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 17 JE 0013
V.	)	
	)	OPINION
KELLIE ANN HOWARD,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas, Domestic Relations Department of Jefferson County, Ohio Case No. 06 DR 280
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JUDGMENT:	Affirmed
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APPEARANCES:	
For Plaintiff-Appellee	Attorney Francesca T. Carinci Suite 904-911 Sinclair Building Steubenville, Ohio 43952

For Defendant-Appellant	Attorney David A. Vukelic 500 Market Street, Suite 2 Steubenville, Ohio 43952
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JUDGES:

Hon. Gene Donofrio
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 27, 2017

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DONOFRIO, J.

{¶1} Defendant-appellant, Kellie Howard, appeals from a Jefferson County Common Pleas Court judgment granting plaintiff-appellee, Randy Meeker's, motion to reallocate parental rights and responsibilities of the parties' son to him.

{¶2} The parties were married on December 21, 2002. They share three children, H.H. (d.o.b. 7/30/02), R.H. (d.o.b. 8/11/04), and A.H. (d.o.b. 11/9/05).

{¶3} On January 29, 2007, the parties were granted a decree of divorce. Appellant was named the residential parent of all three children and appellee was granted standard visitation.

{¶4} In April 2015, H.H., with appellant's permission, began residing with appellee and his new wife. On May 23, 2016, appellee filed a motion for reallocation of parental rights and responsibilities as to H.H. The trial court granted appellee's motion. It also ordered appellant not to interfere with appellee's parenting time with the other two children, which issue had also been brought out at the hearing. Appellant did not appeal from this decision.

{¶5} On September 21, 2016, appellee filed a motion for reallocation of parental rights and responsibilities as to R.H. In this motion, appellee also sought to have appellant held in contempt of court. He alleged appellant had denied him his visitation with R.H. in violation of the court's order.

{¶6} A magistrate held a hearing on appellee's motion. The magistrate subsequently issued a decision granting both branches of appellee's motion.

{¶7} The magistrate first referred to the previous order where the court reallocated parental rights and responsibilities as to H.H. The magistrate noted the court had previously made a finding that appellant deliberately interfered with appellee's parenting time as to R.H. and A.H. And the magistrate noted the court specifically ordered appellant not to interfere with visitation and that the children were to commence parenting time with appellee immediately.

{¶8} Next, the magistrate made findings from the evidence offered. He found the testimony indicated that appellant has interfered with visitation and has alienated the children from appellee. As an example the magistrate pointed to an

incident where appellee's wife and H.H. went to pick R.H. up for his summer visitation. When R.H. attempted to get in the car, appellant grabbed him by his shirt and told appellee's wife, "F*** you. Take me to court." The magistrate also pointed to testimony that appellant has not allowed appellee to talk to the children on the telephone and has not permitted him to visit for close to two years. The magistrate also found that R.H. suffers from an extreme learning disability and found that it did not appear that appellant worked with him or secured a private tutor.

{¶9} The magistrate found appellant in contempt for violating the court's prior order regarding not interfering with visitation. Specifically, the magistrate found that appellant had not permitted appellee to have telephone contact with the children and had not allowed visitation for almost two years.

{¶10} The magistrate also granted appellee's motion for reallocation of parental rights and responsibilities. In so doing, the magistrate found that a change in circumstances had occurred because appellant had alienated R.H. from appellee, which causes a great deal of stress on him. Appellant's actions indicated she had no concern for the stress caused to her children or the lasting impacts of parental alienation. Instead, appellant was only interested in using the children to spite appellee. The magistrate further found it was in R.H.'s best interest that the court designate appellee as the residential parent. The magistrate noted that appellant had no intention of facilitating visitation. And the harm caused to R.H. by the change in circumstances was outweighed by the advantages of the change of environment.

{¶11} Appellant filed a timely objection to the magistrate's decision. The objection, however, did not contain any specific arguments or objections to particular findings of fact or conclusions of law.

{¶12} In response, appellee filed a motion to strike appellant's objection. He argued that the objection was vague and did not actually state an objection. He also argued that he could not fashion a response without knowing what appellant was objecting to.

{¶13} The trial court held a hearing on appellee's motion to strike appellant's

objection. It subsequently granted appellee's motion and struck appellant's objection as "insufficient." The court also noted that appellant never filed a request for the transcript of the hearing before the magistrate. The court then granted judgment in accordance with the magistrate's decision, finding appellant in contempt of court and granting appellee's motion to reallocate parental rights and responsibilities as to R.H.

{¶14} Appellant filed a timely notice of appeal on June 8, 2017. She now raises two assignments of error.

{¶15} Appellant states that her two assignments of error are directly related to each other and, therefore, she addresses them together. Appellant's assignments of error state, respectively:

THE MAGISTRATE COURT FOUND INCORRECTLY, THERE WAS A CHANGE OF CIRCUMSTANCES AND THEREFORE A REALLOCATION OF CUSTODY FROM MOTHER TO FATHER WHEN IN FACT, ALL OF THE EVIDENCE SUGGESTED THAT OTHER THAN VISITATION ISSUE BETWEEN THE PARTIES SUCH ALONE IS INSUFFICIENT TO CHANGE ALLOCATION OF PARENTAL RIGHTS OF A 14 YEAR OLD MENTALLY HANDICAPPED CHILD WHO HAS RESIDED HIS ENTIRE LIFE WITH THE MOTHER.

THE MAGISTRATE COURT ABUSED ITS DISCRETION WHEN [it] INCORRECTLY APPLIED THE LAW OF THE STATE OF OHIO.

{¶16} Appellant contends the trial court erred in basing its finding of a change in circumstances solely on parental alienation. She further argues that the trial court failed to take into consideration R.H.'s best interest. She claims the evidence demonstrated that it would be in R.H.'s best interest to retain her as his residential parent. She points to evidence that she works with R.H. at home on his school work and R.H. currently has an IEP tutor. And she points to evidence that R.H. is comfortable at home with her and his sister.

{¶17} Any party objecting to a magistrate's decision must meet three

requirements in order to properly file objections: (1) timeliness, (2) specificity, and (3) filing transcripts. *Tewalt v. Peacock*, 3d Dist. No. 17-10-18, 2011-Ohio-1726, ¶ 20.

{¶18} Any party may file written objections to the magistrate's decision within 14 days of the filing of the decision. Civ.R. 53(D)(3)(b)(i). Pursuant to Civ.R. 53(D)(3)(b)(ii), addressing specificity of the objections, “[a]n objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.” Additionally, an objection to a finding of fact, “shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available.” Civ.R. 53(D)(3)(b)(iii).

{¶19} A party shall not assign as error on appeal the trial court's adoption of any factual finding or legal conclusion, unless the party objected to that finding or conclusion as required by the Civil Rules, absent plain error. Civ.R. 53(D)(3)(b)(iv).

{¶20} In this case, although appellant filed a timely objection to the magistrate's decision, she failed meet the specificity requirement of Civ.R. 53(D)(3)(b)(ii). Appellant's objection, in its entirety states:

Kellie A. Meeker n/k/a Howard, Defendant in the above styled matter, hereby objects to the Magistrate's Decision of April 6, 2017.

MEMORANDUM

Furthermore, Defendant, Kellie A. Meeker n/k/a Howard does hereby reserve the right to file a Memorandum in support of Defendant's Objection to Magistrate's Decision of the hearing conducted on April 4, 2017.

Defendant, Kellie A. Meeker n/k/a Howard shall file said Memorandum in support, upon receipt of the requested transcripts of said hearing.

Appellant never filed a memorandum in support as she suggested she would.

{¶21} Additionally, appellant failed to meet the transcript requirement. She never filed a request in the trial court for the transcript of the magistrate's hearing.

Thus, the trial court did not have a copy of the transcript to review.

{¶22} Appellant did file a transcript of the magistrate's hearing with this court. But we cannot consider it. "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978); App.R. 12(A)(1)(b). When a party fails to file a transcript of a magistrate's hearing with the trial court for its consideration but then files the transcript with this court, we may not consider that transcript because an appellate court may only consider the record as it existed before the trial court.

{¶23} When a party has failed to file proper objections to a magistrate's decision, the court of appeals may only exercise a plain error review. *Hanak v. Bush*, 7th Dist. No. 16 MA 0196, 2017-Ohio-4282, ¶ 7; Civ.R. 53(D)(3)(b)(iv). "In applying the doctrine of plain error to a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Id.*

{¶24} Appellant has not alleged plain error in this case. Her argument is fraught with citations to the transcript and references to the evidence, which we cannot consider. She argues that the trial court abused its discretion in this case and did not reach the correct conclusion regarding R.H.'s best interests.

{¶25} The only legal question appellant raises is to argue that parental alienation or interference with visitation cannot be a sufficient change in circumstances to warrant a change in custody. This argument lacks merit, however.

{¶26} Pursuant to R.C. 3109.04(E)(1)(a), in order for a trial court to reallocate parental rights and responsibilities, the court is required to find that: (1) a change in circumstances has occurred since the prior custody order; (2) the custody change is in the child's best interests; and (3) the benefits of the change in custody outweigh

the harm caused by the change. *Amero v. Amero*, 7th Dist. No. 12 MA 142, 2013-Ohio-5636, ¶ 19.

{¶27} As to the change in circumstances requirement, courts have held:

“It is well settled that a custodial parent's interference with visitation by a noncustodial parent *may be considered a ‘change of circumstances’* which would allow for a modification of custody. See *Holm v. Smilowitz* (1992), 83 Ohio App.3d 757 [615 N.E.2d 1047] and the cases cited therein.” (Emphasis added.)

Mitchell v. Mitchell, 126 Ohio App.3d 500, 505, 710 N.E.2d 793 (2d Dist.1998). Accord *In re P.A.R.*, 4th Dist. No. 13CA3550, 2014-Ohio-802, ¶ 22; *Eatherton v. Behringer*, 3d Dist. No. 13-12-23, 2012-Ohio-5229, ¶ 42.

{¶28} Thus, appellant's argument on this point lacks merit.

{¶29} Appellant's failure to file specific objections and failure to file a transcript in the trial court have limited this court's review. And appellant's sole legal argument is meritless.

{¶30} Accordingly, appellant's first and second assignments of error are without merit and are overruled.

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

DeGenaro, J., concurs.

Robb, P.J., concurs.