

[Cite as *Neu v. Neu*, 2015-Ohio-1466.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

NITA R. NEU,	:	APPEAL NO. C-140170
	:	TRIAL NO. DR0103299
Plaintiff-Appellant,	:	
vs.	:	<i>OPINION.</i>
ROBERT W. NEU, JR.,	:	
Defendant-Appellee.	:	

Appeal From: Hamilton County Court of Common Pleas, Domestic Relations
Division

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: April 17, 2015

Joshua L. Goode, for Plaintiff-Appellant,

Rollman & Handorf LLC and *Jacqueline M. Handorf-Rugani*, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Presiding Judge.

{¶1} Plaintiff-appellant Nita R. Neu (“Nita”), appeals from the trial court’s modification of her ex-husband defendant-appellee Robert W. Neu’s child-support obligation. On appeal, she argues that the trial court erred as a matter of law when it adopted the magistrate’s decision, which stated that Robert’s child-support obligation terminated when their sons turned 19. Because Nita failed to object to the magistrate’s conclusion, she has waived all but plain error. Finding no plain error, we affirm the trial court’s judgment.

Trial Court Proceedings

{¶2} Nita and Robert were married on April 20, 1991. During the marriage, they had two sons, Robert Charles Neu (“Chase”) and Robert Mitchell Neu (“Mitch”). Both boys were born on May 1, 1996, approximately 16 weeks prematurely. Chase has been diagnosed with periventricular leukomalacia, which manifests itself as spastic quadriplegia, and moderate to severe autism. Mitch has been diagnosed with Asperger’s syndrome.

{¶3} On November 30, 2001, when the boys were five and a half years old, Nita filed a complaint for divorce. Nita and Robert, through the assistance of counsel, reached an agreement on all issues, including custody and support of the boys. In September 2003, their agreements were reduced to writing and incorporated into a separation agreement that they voluntarily executed. A decree of divorce, with their fully executed separation agreement attached, was entered on December 9, 2003. The decree designated Nita as the residential parent and legal custodian of Mitch and Chase, and set forth an allocation of parenting time. The decree also contained an order of spousal support of \$5,000 a month.

{¶4} Based on the payment of spousal support and the parties' agreement to share unreimbursed medical expenses, the parties agreed that Robert would pay no child support and his child support would be deviated to \$0. They further "agreed[d] [that] prior to April 2008 Nita [would] not seek an order for child support except in the event of a catastrophic or additional disabling injury or illness to either or both of the minor children during their minority not in existence today."

{¶5} On May 23, 2012, Robert filed a motion to modify his spousal-and child-support obligations based upon a change in circumstances. In January 2013, Robert filed a motion for a change of custody and a restraining order to prohibit Nita from withdrawing their minor sons from enrollment in the Forest Hills School District. Chase and Mitch were 16 and a half years old at the time. The trial court granted Robert's request for the restraining order.

{¶6} A magistrate held hearings on Robert's motions for child-support and change of custody on May 3, 2013, and June 11, 2013. Nita and Robert testified at the hearings, as well as a representative from the Forest Hills School District where Chase and Mitch were enrolled, an in-home caregiver for Chase and Mitch, and a representative of the Hamilton County Disability Services.

{¶7} Robert and Nita filed written closing arguments with proposed findings of fact and conclusions of law. Robert's proposed findings stated,

Finally, it is clear from the Decree of Divorce and Separation agreement that the parties were well aware of Chase's disabilities.

There are multiple references including a specific reference to a (sic) handicap equipment for Mother's van. The parties made no agreement that support should continue beyond Chase's eighteenth birthday.

{¶8} On October 3, 2013, the magistrate entered a decision with findings of fact and conclusions of law, along with an interim order signed by the trial court. In the decision, the magistrate modified parenting time, terminated Robert's spousal-support obligation, and modified his child-support obligation. At issue in this appeal is paragraph 36 of the magistrate's decision, which provides:

As father contends, the parties made no agreement to continue support beyond the age of majority or until age 19 if still in school at that point, but there was no support cut off in the decree citing to the statutory language. R.C. 3119.86 is determinative on this issue. Child support is payable to age 19 if the children are still in school, or until age 18 and graduated from high school.

{¶9} Nita, who was represented by counsel, filed ten timely and specific objections to the magistrate's decision. With respect to the magistrate's determination regarding child support, she filed the following objection:

The magistrate made erroneous findings regarding the appropriate level and terms of support, failed to consider all of Father's income and financial resources, and improperly determined that Mother is voluntarily unemployed. He also improperly determined that Mother is able to secure full time employment due to the level of care provided in her home.

{¶10} On January 30, 2014, the trial court heard argument on Nita's objections. At no point during the hearing on the objections, did Nita, who appeared pro se, refer to Chase or Mitch as a "Castle" child, or ask the court to continue child support under R.C. 3119.86(A)(1)(a). *See Castle v. Castle*, 15 Ohio St.3d 279, 473 N.E.2d 803 (1984). Instead, Nita's entire argument tracked her written objections

and focused only upon the level of father's income with respect to the child-support award.

{¶11} On February 20, 2014, the trial court overruled nine of Nita's objections, including her objection regarding child support. It sustained in part her tenth objection, which was to the magistrate's finding of fact relative to the extent of Robert's involvement with the medical and behavioral treatment provided to Chase. That finding, however, did not impact the magistrate's decision with respect to child support. The trial court adopted the magistrate's decision in all other respects.

Civ.R. 53 and Waiver

{¶12} In a single assignment of error, Nita argues that "the trial court erred by determining that child support for her two disabled children must terminate at the age of 19 under Ohio law."

{¶13} Nita argues the trial court erred as a matter of law when it adopted the legal conclusion in paragraph 36 of the magistrate's decision. She argues the trial court failed to consider that under *Castle*, 15 Ohio St.3d 279, 473 N.E.2d 803, as codified by R.C. 3119.86(A)(1)(a), child support may continue beyond the age of 19 for children who are disabled. She further asserts that such finding is contrary to the evidence in the record of Chase's and Mitch's disabilities.

{¶14} Robert argues that Nita did not properly preserve this issue for appellate review. He points to Civ.R. 53(D)(3)(b)(iv), which provides that in a matter referred to a magistrate "[e]xcept for claim of plain error, a party shall not assign as error on appeal the court's adoption of any finding of fact or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53 (D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." He argues that because Nita did not specifically

object to the language in paragraph 36 of the magistrate's decision, Civ.R. 53(D)(3)(b)(iv) precludes her from objecting to that language for the first time on appeal.

{¶15} Although not raised in her brief, Nita maintained at oral argument that no waiver had occurred because the magistrate's decision was facially defective. She argued that the magistrate's decision did not include the mandatory waiver language required by Civ.R. 53(D)(3)(a)(iii), which provides:

A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii) unless the party timely and specifically objects to that finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

{¶16} Nita asserts that the magistrate's failure to include the notification language in his decision precludes the application of the waiver rule therein and permits her to raise for the first time on appeal the argument that Chase and Mitch are *Castle* children. She cited a number of cases to support her position. However, we find these cases to be factually distinguishable. In each of these cases, the trial court's failure to comply with Civ.R. 53 constituted grounds for reversal because the appellant had shown that the alleged error had worked to the prejudice of the appellant. *See, e.g., Ulrich v. Mercedes Benz*, 9th Dist. Summit No. 23550, 2007-

Ohio-5034, ¶ 13; *In re Estate of Hughes*, 94 Ohio App.3d 551, 554, 641 N.E.2d 248, (9th Dist.1994), citing *Erb. v. Erb.*, 65 Ohio App.3d 507, 510, 584 N.E.2d 807 (9th Dist.1989); *see also* Civ.R. 61 (which permits Ohio courts to disregard any error or defect in the proceedings that does not affect the substantial rights of the parties).

{¶17} For example, in *Dan v. Joint Venture III, L.P. v. Armstrong*, 11th Dist. Lake No. 2006-L-089, 2007-Ohio-898, ¶ 22, the Eleventh Appellate District addressed an appellant's assignment of error relating to the statute of limitations where the magistrate's decisions had failed to "conspicuously" indicate that the parties had 14 days to file objections and had failed to include a notification that the appellant was required to object or waive its challenge save plain error. In that case, however, the failure to provide the required notification had prejudiced the appellant, because the appellant had filed its objections late, which the trial court had not addressed on the merits but overruled as untimely. *Id.* at ¶ 17, 23.

{¶18} Likewise, in *Keller v. Keller*, 9th Dist. Summit No. 25967, 2012-Ohio-4029, ¶ 8, the Ninth Appellate District reversed and remanded for an appellant to file objections to a civil protection order, where the appellant had failed to file objections to the magistrate's decision that had been adopted by the trial court. The Ninth District held that because the magistrate's decision had failed to comply with the notice requirements of Civ.R. 53(D)(3)(a)(iii) in that it had failed to carry a designation as a magistrate's decision in the case caption and it had failed to give the parties conspicuous notice of the consequences of failing to object within 14 days, the appellant had been prejudiced because she had not been provided with the opportunity to file timely objections to the magistrate's decision. *Id.* at ¶ 6-7.

{¶19} Here, the magistrate's decision contained the following notice:

Copies of this Decision have been mailed to the parties or their counsel. Objections to this Magistrate's Decision must be filed within fourteen (14) days of the filing date of the Magistrate's Decision with a copy served on the opposing side.

{¶20} While we agree with Nita that the magistrate's decision failed to include the waiver language in Civ.R. 53(D)(3)(a)(iii), we cannot conclude that the absence of the warning prejudiced her. Here, Nita not only had the opportunity to file objections to the magistrate's decision, but she did so. Nita filed ten *timely detailed objections* to the magistrate's decision. See *Mix v. Mix*, 11th Dist. Portage No. 2003-P-0124, 2005-Ohio-4207, ¶20-21 (noting that the amended language had been adopted by the Rules Advisory Committee upon learning that litigants were often surprised by the waiver rule, particularly when the trial court had adopted the magistrate's decision prior to the expiration of the 14-day period required for filing objections); *In re A.W.C.*, 4th Dist. Washington No. 09CA31, 2010-Ohio-3625, ¶ 18 (noting the purpose of Civ.R. 53(D)(3)(a)(iii) is to inform a party of "the time-limited procedures for preserving objections to the magistrate's decision").

{¶21} Nita's objections, however, focused on the terms that are factors in the calculation of child support, such as the "appropriate level of support," Robert's "income and financial resources" and the magistrate's determination that she was "voluntarily underemployed." Furthermore, at the hearing on the objections before the judge, Nita had yet another opportunity to raise the issue of the children's disabilities and argue that they were "Castle" children, yet at no point during the hearing did she raise or present the issue. Instead, Nita's entire argument tracked her written objections and focused only upon the level of father's income with respect to the child-support award.

{¶22} Because Nita filed timely, detailed objections to the magistrate's decision, she cannot demonstrate any prejudice from the magistrate's failure to include the waiver language. *See Palmer v. Abraham*, 6th Dist. Ottawa No. OT-12-029, 2013-Ohio-3062, ¶ 7-8 (holding magistrate's failure to include the Civ.R. 53(D)(3)(a)(iii) advisement did not prejudice an appellant who had filed timely objections); App.R.12(B). Nita's failure to object to the finding has waived all but plain error on appeal.

{¶23} In *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997), the Ohio Supreme Court stated that:

In applying the doctrine of plain error in 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.

{¶24} Based upon our review of the record, we cannot conclude the finding was plain error. *See McBroom v. Loveridge*, 6th Dist. Lucas No. L-05-1391, 2006-Ohio-5908, ¶ 14-17. We, therefore, overrule Nita's sole assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

DEWINE and MOCK, JJ., concur.

Please note:

The court has recorded its own entry this date.