

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of:	:	
D.H. et al.,	:	No. 11AP-761
(M.H.,	:	(C.P.C. No. 10JU-12-16652)
Appellant).	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on May 22, 2012

M.H., pro se.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

SADLER, J.

{¶ 1} Appellant, M.H., appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, designating petitioners, D.D. and T.D., the legal custodians of appellant's two minor children. For the reasons that follow, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} This matter originated with the filing of petitioners' complaint on December 6, 2010, seeking legal custody of D.H., date of birth February 14, 2003, and D.H., date of birth September 25, 2007, hereinafter referred to as "the children." The complaint alleged the children's mother was deceased and the children's father, appellant, was incarcerated. According to petitioners' parenting proceeding affidavit filed

subsequent to the complaint, the children lived with L.D. from August 2009 until December 10, 2010, at which time the children began residing with petitioners. The record reflects L.D. was the children's guardian until the guardianship was terminated on February 4, 2011, and thereafter, petitioners' custody request was scheduled for a hearing on April 6, 2011. In response to the complaint, appellant filed several pro se motions, including a motion to dismiss the complaint and a motion for writ of habeas corpus ad testificandum.

{¶ 3} In attendance at the April 6, 2011 hearing were petitioners, who appeared pro se. Though signing a waiver of service of summons and notice of hearing, L.D. did not attend the hearing. In the decision rendered April 19, 2011, the magistrate concluded that because of appellant's incarceration, he was currently an unsuitable parent and that it would be in the children's best interest to have petitioners designated as their legal custodian. The trial court adopted the magistrate's decision the same day. Thereafter, appellant filed a request for findings of fact and conclusions of law.

{¶ 4} An amended magistrate's decision with findings of fact and conclusions of law was filed on August 5, 2011. "Having considered the testimony, the fact that the father is not capable of caring for the minor children at this time, and the best interest factors set forth in R.C. 3109.04," the magistrate found it would be in the best interest of the children to designate petitioners as their custodian. (Aug. 5, 2011 Decision, 3.) In conclusion, the magistrate denied appellant's motions and designated petitioners as the legal custodians of the children. The magistrate ordered petitioners to obtain and maintain health insurance for the minor children and to pay the uncovered medical, dental, and other healthcare expenses of the children. Because appellant is incarcerated, the magistrate did not grant parenting time to appellant. The trial court adopted the magistrate's decision on the same day. No parties filed objections to the magistrate's decision.

II. ASSIGNMENTS OF ERROR

{¶ 5} This appeal followed and appellant brings the following two assignments of error for our review:

1. The Juvenile Court's numerous errors committed while conducting the allocation/custody proceedings, denying the

appellant and his children of the guarantees to due process and equal protection of the law, are a clear abuse of discretion, demonstration of bias and prejudice, and plain error.

2. The Judgment entered by the Juvenile Court in this case involving allocation of parental rights and custody is against the manifest weight of the evidence.

III. DISCUSSION

A. Applicable Law and Standard of Review

{¶ 6} Before addressing appellant's arguments, we must address two issues. First, we note appellant failed to file objections to the magistrate's decision. Pursuant to Civ.R. 53(D)(3)(b)(iv), "[e]xcept for a claim of plain error, 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 has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." The doctrine of plain error is limited to exceptionally rare cases in which the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself. *McLellan v. McLellan*, 10th Dist. No. 10AP-1105, 2011-Ohio-2418, ¶ 7, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122 (1997). As recognized in *McLellan*, the Supreme Court of Ohio has firmly adhered to this procedural mandate. In *State ex rel. Findlay Industries v. Indus. Comm.*, 121 Ohio St.3d 517, 2009-Ohio-1674, the court dismissed an appeal from a magistrate's decision and affirmed the lower court's judgment, finding "[a]ppellant's arguments derive directly from the conclusions of law provided in the magistrate's decision. Appellant, however, did not object to those conclusions as Civ.R. 53(D)(3)(b) requires. Thus, * * * we can proceed no further." *Id.* at ¶ 3. Because in the matter herein appellant failed to object to the magistrate's decision, he has waived all but plain error on appeal with respect to this matter.

{¶ 7} Secondly, and more problematic, is that appellant has not filed a transcript of the proceedings before the magistrate. "Upon appeal of an adverse judgment, it is the duty of the appellant to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review."

Rose Chevrolet, Inc. v. Adams, 36 Ohio St.3d 17, 19 (1988) (citations omitted). This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980), citing *State v. Skaggs*, 53 Ohio St.2d 162 (1978). When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon, and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings and affirm. *Id.* This principle is recognized in App.R. 9(B), which requires the appellant to include in the appellate record a transcript of all evidence relevant to the findings or conclusion if the appellant intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence.

{¶ 8} With these limitations in mind, we will attempt to address appellant's arguments as fully as possible. This case concerns a grant of legal custody of appellant's two minor children to petitioners. "Legal custody" is defined by R.C. 2151.011(B)(21) as "a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities." In contrast, "permanent custody" is defined as "a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations." R.C. 2151.011(B)(32). Thus, unlike permanent custody, when a parent loses legal custody of a child, he or she retains certain residual parental rights and also retains the right to request return of legal custody in the future. *T.M. v. J.H.*, 6th Dist. No. L-10-1014, 2011-Ohio-283, ¶ 79, citing *In re Nice*, 141 Ohio App.3d 445, 455 (7th Dist.2001).¹

¹ This distinction is of particular significance in this matter because the majority of appellant's assertions and legal citations in support thereof concern principles pertaining to permanent custody proceedings rather than proceedings pertaining to legal custody.

{¶ 9} Because legal custody where parental rights are not terminated is not as drastic a remedy as permanent custody, the trial court's standard of review in a legal custody proceeding is not clear and convincing evidence as it is in permanent custody proceedings, but is merely preponderance of the evidence. *In re D.P.*, 10th Dist. No. 05AP-117, 2005-Ohio-5097, ¶ 52 (citations omitted). "Preponderance of the evidence" means "evidence that's more probable, more persuasive or of greater probative value." *Id.*, quoting *State v. Finkes*, 10th Dist. No. 01AP-310, 2002-Ohio-1439. On appeal, we will not reverse an award of legal custody absent an abuse of discretion. *In re Gales*, 10th Dist. No. 03AP-445, 2003-Ohio-6309; *Nice*. Abuse of discretion connotes more than an error of law or judgment. Rather, it implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 10} As held by the Supreme Court of Ohio, in a child custody proceeding between a parent and nonparent, not arising from an abuse, neglect or dependency determination, a court may not award custody to the nonparent "without first making a finding of parental unsuitability -- that is, without first determining that a preponderance of the evidence shows that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child." *In re Perales*, 52 Ohio St.2d 89 (1977), syllabus; *In re Hockstock*, 98 Ohio St.3d 238, 2002-Ohio-7208, ¶ 17.

B. First Assignment of Error

{¶ 11} In his first assignment of error, appellant contends (1) due to his indigency he is entitled to a transcript of the proceedings at no cost; (2) he was denied the right to appointed counsel; (3) the trial court failed to consider the requisite statutory factors; (4) the trial court did not appropriately issue findings of fact and conclusions of law; and (5) the trial court erred in not granting parenting time.

{¶ 12} Regarding appellant's declaration that he is entitled to both counsel and transcripts at state expense, we note again the within matter does not pertain to permanent custody, but, rather, concerns a proceeding for legal custody of children who are not wards of any court in the state pursuant to R.C. 2151.23(A)(2). As such, it is

considered a civil matter, "excepted from any entitlement to appointed counsel for an indigent party as might be the case in other juvenile court proceedings." *T.M.* at ¶ 80. Likewise, "a party to such a proceeding is no more entitled to transcripts, copies or other items at the expense of the state than would a party to a civil proceeding." *Id.* (parent to a legal custody proceeding entitled to neither appointed counsel nor transcript at state expense).

{¶ 13} In the third contention under his first assignment of error, appellant contends the trial court failed to consider the requisite statutory factors. Specifically, appellant contends that when determining the best interest of the children, the trial court failed to consider the factors of R.C. 3109.04(F). Not only is appellant unable to establish plain error with respect to this contention, but also the trial court's decision clearly refutes this argument as the decision states that after considering "the best interest factors set forth in R.C. 3109.04," it would be in the minor children's best interest to designate petitioners as the custodians of the minor children. (Aug. 5, 2011 Decision, 3.)

{¶ 14} In his fourth contention, appellant contends the trial court failed to provide specific findings of fact and conclusions of law. Again, not only has appellant failed to establish plain error, but also the magistrate filed an amended decision "with Findings of Fact and Conclusions of Law" on August 5, 2011, and it is from the adoption of this amended decision that appellant has appealed.

{¶ 15} Lastly under this assigned error, appellant contends the trial court erred in not establishing parenting time. In support, appellant cites a number of cases standing for the proposition that a noncustodial parent's right of visitation with his children is a matter of natural right and should be denied only under extraordinary circumstances. *See, e.g., Pettry v. Pettry*, 20 Ohio App.3d 350, 352 (8th Dist.1984).

{¶ 16} Initially, we note the trial court did not deny a request for visitation, but rather "passe[d] on parenting time for Respondent/Father at this time since he is currently incarcerated." (Aug. 5, 2011 Decision, 4.) Nonetheless, we are without a transcript and, therefore, unable to determine if appellant presented any evidence that visitation with him during his incarceration is in the children's best interest. Because a transcript is necessary for resolution of this argument, we are unable to address it.

{¶ 17} For the foregoing reasons, we overrule appellant's first assignment of error.

C. Second Assignment of Error

{¶ 18} In his second assignment of error, appellant contends the trial court's judgment is against the manifest weight of the evidence. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *In re Vest*, 10th Dist. No. 00AP-1150 (Mar. 13, 2001), citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 281 (1978).

{¶ 19} Under this assigned error, appellant does not dispute that he is currently incarcerated, but instead contends it was error for the magistrate to make an unsuitability determination based solely on this fact. Appellant's incarceration has rendered him "totally incapable of supporting or caring for" the children at this time. *Hockstock; Perales* (being totally incapable of supporting or caring for a child renders a parent unsuitable for purposes of determining whether custody should be granted to a nonparent).

{¶ 20} Further, as noted previously, appellant did not provide the trial court or this court with a transcript of the proceedings before the magistrate. Therefore, "the appellate court must accept the magistrate's findings of fact as established and appellant may not attack those findings on appeal. * * * As a result, [our] review is limited to * * * determining if the trial court abused its discretion in applying the applicable law to the magistrate's findings of fact." *Vest*, quoting *Jones v. Davenport*, 2d Dist. No. 18162 (Jan. 26, 2001).

{¶ 21} The magistrate's decision indicates the children's mother is deceased and the children's father is incarcerated. Despite being noticed of the hearing, the children's prior guardian did not attend, and petitioners were the only persons to appear at the custody hearing. After the hearing and after applying the applicable law, the magistrate concluded appellant is currently an unsuitable parent and that granting legal custody to petitioners is in the best interest of the children. Upon review, we find the trial court did not abuse its discretion in applying the applicable law to the magistrate's findings. *Vest; Jones*.

{¶ 22} Accordingly, we overrule appellant's second assignment of error.

IV. CONCLUSION

{¶ 23} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is hereby affirmed.

Judgment affirmed.

BROWN, P.J., and FRENCH, J., concur.
