

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

IN THE MATTER OF:	:	
	:	
C.P., et al.	:	CASE NO. CA2010-12-025
	:	
	:	<u>OPINION</u>
	:	9/12/2011
	:	
	:	

APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case Nos. 2010 3053, -3054

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Christine Tailer, P.O. Box 14, Georgetown, Ohio 45121, guardian ad litem

PIPER, J.

{¶1} Appellant, A.P. (Mother), appeals the decision of the Brown County Court of Common Pleas, Juvenile Division, granting legal custody of her sons A.C. to his paternal grandmother (Grandmother)¹, and C.P. to his biological father (Father). We affirm the

1. A.C.'s biological father is currently serving a prison sentence, and is not the father of Mother's second child, C.P.

decision of the trial court.

{¶2} On June 21, 2010, Brown County Department of Job and Family Services (the Agency) received a report that C.P. might have possible head trauma and that Mother refused to take the child for medical treatment. The reporter also stated that C.P. ingested one of Mother's prescription narcotic pills, and that Mother was a frequent crack cocaine user who lacks stable housing for the children. The reporter did not know where the children were staying, due to Mother's lack of housing.

{¶3} On June 22, 2010, the reporter called back with two possible addresses for the children, and the Agency also received a call from a medical provider stating that C.P. was being transported to Cincinnati Children's Hospital. The medical provider reported that C.P. had bruises on his forehead and a bite mark on his right forearm, and that Mother had a facial laceration and bruise on her chest that she attributed to her live-in boyfriend, Jeff Peters. An investigator for the Agency went to the hospital with another worker, and located Mother there with C.P.

{¶4} Mother informed the Agency that she took C.P. to the hospital because he was not acting "normal." When advised of the allegations against her, Mother claimed that the bruises on C.P. occurred when he was with his father, or were otherwise age-appropriate bruises. The Agency asked Mother and Peters to submit to a drug screen. Peters' test came back positive for THC, morphine/opiates, and cocaine. Mother's sample was not tested because the worker who administered the test witnessed Mother dipping the cup into the toilet water in an attempt to dilute the test sample. When confronted, Mother stated that she must have dropped the cup, and that she was unable to produce a sample that day. Workers from the Agency came the next day and gave Mother another test, which was positive for cocaine and a drug masking agent. Mother disputed the results, and was given a second test, which produced the same results. After Mother disputed the results again, an

Agency worker offered to have the test sent to a lab for confirmation, but Mother refused to provide any further samples and became belligerent and non-cooperative. C.P. was then removed from Mother's custody and placed in the Agency's temporary custody.

{¶15} Mother reported to the Agency on June 24, 2010 and submitted to another drug screen, this time testing positive for cocaine, THC, and benzodiazepine. Mother admitted to using THC and to taking a pill not prescribed to her, but denied using cocaine. A.C. accompanied Mother on her visit to the Agency, and was removed from her custody and placed in the temporary custody of the Agency. The Agency then moved the court to find the children abused, neglected, and dependent.

{¶16} The trial court held a shelter care hearing, during which Mother and Father were in attendance. The trial court heard testimony from an Agency worker regarding the above-stated facts, and granted the Agency temporary custody. The trial court also appointed a guardian ad litem (GAL) to represent the children. The Agency determined that Grandmother and Father were suitable custodians and placed A.C. with Grandmother and C.P. with Father.

{¶17} The Agency compiled a case plan, which primarily required Mother and Peters to attend parenting classes and for both to submit clean drug screens. While Mother and Peters complied with the case plan regarding parenting classes, both tested positive for drugs in several subsequent screenings. The children's GAL submitted her report to the trial court, recommending that the children remain in their placements, and not be returned to Mother.

{¶18} On August 31, 2010, the trial court held an adjudication hearing, during which Mother was in attendance. Mother agreed to stipulate that the children were dependent, and the Agency dismissed the neglect and abuse allegations. A.C. and C.P. remained in the custody of Grandmother and Father, respectively.

{¶9} On October 6, 2010, the GAL filed an addendum to her original report, updating the trial court on the children's positive experiences in the care of Grandmother and Father. The GAL noted that A.C. was well-adjusted living with Grandmother, and that Grandmother stated that she "loves him dearly and will take care of him forever." Similarly, C.P. was doing well with Father, receiving the necessary medical treatment, and had been accepted into preschool. The GAL also noted that Mother had called her to report that she had tested positive for drugs, and that Mother maintained that the positive screens were inaccurate.

{¶10} The magistrate held a disposition hearing on October 12, 2010, with Mother present. An Agency caseworker testified that since the time of the case plan, Mother and Peters completed the parenting classes, but that there were still problems with drugs. Specifically, the caseworker testified that Mother sought prescription drugs through the emergency room, and also tested positive for oxycontin and cocaine on two different occasions.

{¶11} The caseworker also testified that both children's placements were going "very well" and that the children have "adjusted well during that time." The caseworker then testified that it was the Agency's recommendation that Grandmother be given legal custody of A.C. and that Father be given legal custody of C.P, a recommendation also asserted by the GAL.

{¶12} After the testimony and evidentiary portion of the hearing was completed, the magistrate found that returning the children to Mother would be contrary to their best interest, and that Grandmother should have legal custody of A.C. and Father should have legal custody of C.P. The trial court issued a judgment entry on October 19, 2010 informing the parties that they had 14 days to file objections to the magistrate's decision, and warning that failure to specifically object would result in waiver on appeal.

{¶13} On October 26, 2010, Mother, pro se, filed her objections to the magistrate's

decision. The hand-written objections ask the court to return the children to Mother's care, but do not list any specific objections to the magistrate's decision or any citation to the record. Instead, Mother reiterates some of the facts leading up to the dependency hearing, and highlights the case plan set forth by the Agency. Mother stated that she finished her parenting classes, and was enrolled in a drug treatment program, and that she had "numerous negative drug screens." Mother then went on to state, "I feel in my own heart that the Magistrate made the wrong decision (sic)." However, Mother did not offer any specific objections to the magistrate's decision.

{¶14} The trial court overruled Mother's objections on October 26, 2010, the same day that Mother's objections were filed. On December 6, 2010, Mother filed a request for a transcript, and stated that she needed "a transcript sent with my appeal." No other request for a transcript exists in the file. Mother now appeals the trial court's decision to overrule her objections, raising the following assignments of error.

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED LEGAL CUSTODY OF APPELLANT'S CHILDREN TO OTHERS, THEREBY DENYING APPELLANT HER RIGHT TO DUE PROCESS IN VIOLATION OF THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶17} In Mother's first assignment of error, she asserts that the trial court erred in granting legal custody of the children to Grandmother and Father when those parties had not filed a motion for legal custody. We disagree.

{¶18} According to R.C. 2151.353,"(A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition: (3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed

legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings."

{¶19} Mother argues that the trial court erred in granting custody of her sons to Grandmother and Father because neither party filed a motion requesting legal custody. Regarding Father, this court has held that a natural parent is not required to file a motion for legal custody. *In re Motter* (June 15, 1998), Butler App. No. CA96-12-269, 1998 WL 314362. In that case, we stated, "because a parent has an inherent right to the custody of his or her child, and because R.C. 2151.353 specifically empowers a trial court to grant legal custody of a child to a parent, we hold that a formal motion for legal custody need not be filed by a parent before a trial court may properly consider granting legal custody to that parent. To read R.C. 2135.353 as requiring the contrary would create an additional procedural requirement for a natural parent that this court does not believe was intended by the legislature." *Id.* at 9.

{¶20} Instead, the statute specifically states that the trial court can grant custody to either parent *or* to any other person who files a motion for custody prior to the disposition hearing. However, the requirement that a motion be filed is specific only to "any other person," rather than either parent. *In re B.L.D.*, Fayette App. Nos. CA2010-09-026, CA2010-10-030, 2011-Ohio-3139.

{¶21} Regarding Grandmother, this court has previously held that when the parent who loses custody was given adequate notice that legal custody was a possibility and was given the opportunity to participate in the proceedings, a trial court does not err in granting legal custody, even absent a motion requesting such. *In re Callier*, Brown App. Nos. CA2001-04-006, CA2001-04-007, 2002-Ohio-2406. However, we then released *In re L.R.T.*, Butler App. Nos. CA2005-03-071, CA2005-04-082, 2006-Ohio-207, in which we essentially overruled the *Callier* decision, finding instead, that compliance with R.C. 2151.353 is

mandatory. We became one of several appellate districts that read R.C. 2151.353 as establishing a mandatory requirement that a non-parent file a motion for legal custody. See also *In re C.T.*, Cuyahoga App. No. 84648, 2005-Ohio-887.

{¶22} In *L.R.T.*, we analyzed the statute and found "that 'procedural rules, such as those governing the filing and service of motions in the case sub judice, are designed to ensure orderly procedure in the courts and due process for all the litigants. Under the circumstances, we find the following admonition persuasive from the Ohio Supreme Court, i.e., not to ignore the requirements of such rules in this context: 'However hurried a court may be in its efforts to reach the merits of a controversy, the integrity of the procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment.'" Id. at ¶15, quoting *In re C.T.*, Cuyahoga App. No. 84648, 2005-Ohio-887, ¶15-17, quoting *Miller v. Lint* (1980), 62 Ohio St.2d 209, 215.

{¶23} R.C. 2151.353(A)(3)'s requirement that the motion for legal custody be filed prior to the dispositional hearing should be read in conjunction with Juv.R.19, which requires that "an application to the court for an order shall be by motion." Juv.R. 22(E) further requires that "all prehearing motions shall be filed by the earlier of: (1) seven days prior to the hearing, or (2) ten days after the appearance of counsel." Beyond the importance of formal notice, a filing prior to the dispositional hearing demonstrates a commitment by the party requesting custody to the responsibilities involved in the care and custody of a young child. Last minute, "hallway pressure" is eliminated by the requirement of filing in advance.

{¶24} Although Grandmother was required to file a motion for legal custody, Mother did not object when Grandmother was given legal custody. Grandmother appeared at the disposition hearing ready and willing to take custody of A.C. Mother also appeared at the hearing, and was represented by counsel. However, at no time did Mother question why Grandmother was in attendance, nor did Mother object when the magistrate made its ruling.

Instead, the magistrate specifically addressed each party, and expressly asked Mother's counsel if he had "anything else to come before the court?" Mother's counsel responded, "No." The magistrate then stated, "all right. And [Mother], anything that you would like to say?" Mother responded, "No, Your Honor." Had Mother wished to assert that Grandmother was not a possible party to whom custody could be granted based on Grandmother's failure to file a motion, Mother had the opportunity to express as much to the trial court, but did not.

{¶25} Furthermore, the record reveals that Mother was provided with notice of the possibility of legal custody, was afforded with opportunities to be heard, and actively participated in the proceedings. Therefore, Mother had multiple opportunities to object to the fact that Grandmother did not file a motion for legal custody, but did not do so. Nor did Mother object to the lack of a motion in her objections to the trial court. The trial court specifically warned Mother in its judgment entry on October 19, 2010 that parties had 14 days to file objections to the magistrate's decision, and that failure to specifically object would result in waiver on appeal.

{¶26} By not objecting to Grandmother's failure to file a motion for legal custody, Mother has waived this issue on appeal, and her first assignment of error is overruled.

{¶27} Assignment of Error No. 2:

{¶28} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT FAILED TO COMPLY WITH OHIO RULE OF CIVIL PROCEDURE 53 IN RULING ON APPELLANT'S OBJECTIONS, THEREBY DENYING APPELLANT HER RIGHT TO DUE PROCESS IN VIOLATION OF THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶29} Mother argues in her second assignment of error that the trial court erred by not ruling on her objections and by not undertaking an independent review before issuing its judgment. This argument lacks merit.

{¶30} According to Civ.R. 53(D)(4)(d), "if one or more objections to a magistrate's

decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." "A party alleging error by the trial court under Civ.R. 53 has an affirmative duty to demonstrate that the trial court failed to conduct an independent review of the magistrate's findings." *In re Taylor G.*, Lucas App. No. L-05-1197, 2006-Ohio-1992, ¶20, citing *Mahlerwein v. Mahlerwein*, 160 Ohio App.3d 564, 2005-Ohio-1835. An appellate court generally presumes the regularity in the proceedings below. *In re Taylor G.* at ¶21.

{¶31} Essentially, Mother argues that the trial court failed to conduct an independent review of the magistrate's decision because the trial court overruled her objections on the same day that they were filed and did so without having the transcripts of the proceedings. However, Civ.R. 53(D)(3)(b)(iii) provides that, "an objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), 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. * * * The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections."

{¶32} Mother failed to request transcripts during the time frame stated above, and waited until December 6, 2010 to request transcripts. Even then, Mother's request for a transcript was specific to the appeal currently before this court, and did not request leave of court to file the transcripts out of time specific to her objections. Mother has not pointed to any other information on the record to indicate that the trial court failed to conduct an independent review of the magistrate's findings. As such, she has failed to affirmatively

demonstrate that the trial court failed to conduct an independent review, and this court will presume the regularity of the proceedings below.

{¶33} Even if Mother's objections had been supported by the transcript, Mother failed to file any specific objections to the magistrate's decision. Instead, Mother filed hand-written objections to the magistrate's decision in which she discussed the portion of the case plan she and Peters had successfully completed, and stated that "I feel in my own heart that the Magistrate made the wrong decision (sic)." However, Mother's statements couched as objections do not comport with the rules.

{¶34} Juv.R. 40(D)(3)(b)(iv) provides that "[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 * * * unless the party has objected to that finding as required by Juv.R. 40(D)(3)(b)." "This waiver under the rule embodies the long-recognized principle that the failure to draw the trial court's attention to possible error when the error could have been corrected results in a waiver of the issue for purposes of appeal. The objections made under this rule must be 'specific' and must 'state with particularity all grounds for objection.' Juv.R. 40(D)(3)(b)(ii). The failure to file specific objections is treated the same as the failure to file any objections." *In re B.S.*, Preble App. No. CA2010-05-007, 2011-Ohio-47, ¶22. (Internal citations omitted.)

{¶35} Although Mother filed objections to the magistrate's decision, she challenged the magistrate's decision solely on the basis of her heartfelt feeling that her children should be returned to her, and her statement that she completed part of the case plan. However, Mother did not assert any specific objections regarding granting custody to Father or Grandmother. Further, Mother does not claim plain error here. She is therefore precluded from raising this issue on appeal and from challenging the juvenile court's adoption of the magistrate's finding. Juv.R. 40(D)(3)(b)(ii), (iv). Mother's second assignment of error is

overruled.

{¶36} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur

[Cite as *In re C.P.*, 2011-Ohio-4563.]