[Cite as *In re S.S.*, 2010-Ohio-992.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

IN THE MATTER OF:	:	
	:	Appellate Case No. 09-CA-36
S.S., D.S., L.M.	:	
	:	Trial Court Case Nos. 20730426
	:	20730427
	:	20730428
	:	
	:	(Criminal Appeal from
	:	Common Pleas Court)
	:	

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O P I N I O N

Rendered on the 12th day of March, 2010.

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PER CURIAM:

{¶ 1} Appellant K.C. appeals from an order of the Miami County Juvenile Court terminating her parental rights to her three minor children, S.S., D.S. and L.M. Appellant contends that the trial court erred by denying her motion to extend the time for filing objections to the decision of the magistrate. She further contends that the decision terminating her parental rights is not supported by the record.

{¶ 2} We conclude that the trial court abused its discretion in denying K.C.'s motion to enlarge her time, as a result of which, she lost her right to have the trial court independently review the record and make the factual determinations required for the termination of her parental rights. Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion, which should include the consideration of K.C.'s objections to the magistrate's decision. In view of this disposition, we find it unnecessary, at this time, to review K.C.'s contention that the decision to terminate her parental rights is not supported by evidence in the record.

I

{¶ 3} Miami County Children's Services Board (the Agency) filed a complaint on September 14, 2007, alleging that K.C.'s three minor children were dependent. By Agreed Order, the children were adjudged dependent and the Agency was issued an order for protective supervision, with the children to remain in K.C.'s home. A case plan was approved, which provided that K.C. would obtain counseling for her drug abuse.

{¶ 4} In April 2008, K.C. was arrested on two charges of child endangering, after two of the children were found wandering a block from her residence. The children were aged two and five at the time. K.C. told the police that she had been taking a nap. This was the third time the police had responded to a report that the children were wandering around outside unsupervised. K.C. was convicted and sentenced to community control sanctions.

{¶ 5} The day of her conviction and sentence, the children were removed from K.C.'s home, and the Agency was awarded temporary custody pursuant to an Agreed Order. Another case plan was implemented, which required K.C. to attend Alcoholics Anonymous meetings and to submit to random drug screens.

{¶ 6} K.C. was incarcerated on a drug-related probation violation in November 2008. Upon her release in early December, K.C. submitted to a drug test that was negative. K.C. was evicted from her housing that same month. She tested positive for drug use in January 2009. She was incarcerated in February 2009, due to another drug-related probation violation after a drug screen that was positive for cocaine and "trackable" for opiates.[1] K.C. acknowledged using heroin at that time.

{¶ 7} On March 30, 2009, the Agency filed a motion for permanent custody. On March 31, K.C. was released from jail and moved into a shelter. She had negative drug screens from that time until the hearing on June 10, 2009 – although the tests indicated that some of the tests were "trackable" for amphetamines and opiates. She obtained employment approximately three weeks prior to the hearing.

{¶ 8} Following the hearing, the magistrate issued a decision awarding permanent custody to the Agency. The magistrate's decision was filed on July 6, 2009, and was adopted by the trial court and journalized the same day. K.C. filed objections thereto on July 23, 2009. The Agency filed a motion to dismiss the

[1] According to Andrew Higgins, a Miami County Municipal Court lab technician who testified at the hearing, a trackable result is one that can indicate a trace amount of the drug being tested for, or it can indicate something that "could cross react and make it look like that drug."

objections as untimely. The trial court issued an order on August 18, 2009, finding that K.C. had failed to file her objections within the fourteen-day time limit set forth in Juv.R. 40(D)(3)(b)(I) and dismissing the objections. K.C. appeals from the order awarding permanent custody to the Agency.

II

{¶ 9} K.C.'s First Assignment of Error states as follows:

{¶ 10} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION UNDER JUVENILE RULE 18(B) FOR AN ENLARGEMENT OF TIME TO FILE OBJECTIONS TO THE MAGISTRATE'S DECISION."

{¶ 11} K.C. contends that the trial court should have considered her objections to the magistrate's decision. In support, she claims that the "three-day rule" contained in Juv.R. 18(E) extended the time for filing her objections. Alternately, she argues that if the objections were not timely filed, the trial court should have found that the delay was due to excusable neglect, enlarged the time for filing objections, and considered the objections on their merits.

{¶ 12} Juv.R. 40(D)(3)(b)(I) provides in pertinent part as follows:

{¶ 13} "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period ***."

{¶ 14} Here, the magistrate's decision was filed on July 6, 2009. Any objections thereto were due on July 20. K.C.'s objections were not filed until July 23.

{¶ 15} K.C. contends that the fourteen-day filing period must be extended by the provision of Juv.R. 18(E), which provides as follows:

{¶ 16} "Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon the person and the notice or other paper is served upon the person by mail, three days shall be added to the prescribed period."

{¶ 17} We have not found, and the parties have not cited, any case law directly addressing the applicability of Juv.R. 28(E) to the time for filing objections under Juv.R. 40(D). But we note that the Ohio Supreme Court has indicated that Civ.R. 6(E), which is almost identical to Juv.R. 18(E), does not act to extend the time for filing objections, and a court does not "have to rule on the merits of [the] objection because it [is] not timely filed." *Duganitz v. Ohio Adult Parole Authority*, 92 Ohio St.3d 556, 557, 2001-Ohio-1283. This was because the prescribed time within which to act in that case did not commence upon the service of notice or of a document upon the actor, but, as here, commenced upon the filing of an order in the trial court.

{¶ 18} K.C. also contends that even if the objections were not timely filed, the trial court should nevertheless have considered them. She argues that Juv.R. 18(B) permits the trial court to consider the objections if the late filing was due to "excusable neglect or would result in injustice to a party."

{¶ 19} Attorneys are often confused about the application of the three-day mailing rule in circumstances where a duty to act is triggered by a filing, rather than by service of notice. And this court has frequently reiterated its preference that

cases be decided upon their merits, wherever possible.

{¶ 20} "The rights to conceive and to raise one's children have been deemed 'essential * * * basic civil rights of man,' * * * and '[r]ights far more precious than property rights.' " (Citations omitted), *Stanley v. Illinois* (1972), 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551. . "[P]arents 'must be afforded every procedural and substantive protection the law allows.' " *In re S.A.*, Clark App. No. 07-CA-110, 2008-Ohio-2225, at ¶ 7, citing *In re Hays* (1997), 79 Ohio St.3d 46, 48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16.

{¶ 21} One of those rights is Civ.R. 53(E)(3), which provides that a party who disagrees with a magistrate's decision can file objections to the decision. As part of that right, the party is, in essence, entitled to receive a "second decision," since the trial court is not required to follow or accept the findings or recommendations of its magistrate. *Breece v. Breece* (November 5, 1999), Darke App. No. 99-CA-1491; *Seagraves v. Seagraves* (August 25, 1995), Montgomery App. Nos. 15047 and 15069. Rather, in accordance with Civ.R. 53, the trial court must conduct an independent review of the facts and conclusions contained in the magistrate's report and enter its own judgment. *Dayton v. Whiting* (1996), 110 Ohio App.3d 115, 118.

{¶ 22} While the trial court's standard of review of a magistrate's decision is de novo, the standard when an appellate court reviews a trial court's adoption of the magistrate's decision is abuse of discretion. See, e.g., *In re I.M.*, Montgomery App. No. 21977, 2007-Ohio-4614, at ¶ 12. In our appellate review, we will not reverse the trial court's decision unless we find that it abused its discretion in finding by clear and convincing evidence that the record contains competent, credible evidence that the

essential statutory elements for a termination of parental rights have been established. *In re matter of M.S. & D.S.*, Clark App. No. 2008-CA-70, 2009-Ohio-3123, ¶ 15. Abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Therefore, when an appellate court reviews a trial court's adoption of a magistrate's decision, it will only be reversed when it appears that the trial court's actions were arbitrary or unreasonable. *Proctor v. Proctor* (1988), 48 Ohio App.3d 55, 60-61. When applying the abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court, *Berk v. Mathews* (1990), 53 Ohio St.3d 161, 169, whereas that is precisely the duty of the trial court in reviewing a magistrate's judgment.

{¶ 23} K.C. never received an independent review by the trial court, since her objections were not considered. She filed her objections three days too late. She claims that the "three-day rule" extended the time for objections or, in the alternative, that the delay was due to her mistaken interpretation of the law, constituting excusable neglect, and that it was an abuse of discretion for the court to deny her motion for an extension of time. As a practical matter, there are no "do overs" in a decision awarding permanent custody, since the rights of other parties and the best interests of the child, always a moving target, quickly intervene. Despite the agency's argument that K.C.'s claim of excusable neglect can only be based on "attorney ignorance or lack of adequate legal research," we do not find the Rule to be so clear as to render inexcusable K.C.'s attorney's misconstruction of it. We conclude that it was an abuse of discretion for the trial court not to grant the

additional three days, especially in a case involving permanent custody. But for its error in not allowing appellant to file objections, the trial court would have had to conduct an independent review.

{¶ 24} Despite the existence of ample evidence in the record to support a finding awarding permanent custody by clear and convincing evidence, we do not find the trial court's error in not allowing consideration of K.C.'s substantive objections to have been harmless. Harmless error means a court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Civ.R. 61. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶ 25} Since her most recent release on March 31, 2009, on a drug-related probation violation, and up until the time of the hearing, K.C. has been involved with a program through Miami County Municipal Court. The program included drug and alcohol evaluations, involvement with individual therapy, completion of the life-skills program, and completion of community services. She has been successful in the outreach program and has had clean urines.

{¶ 26} Also since her release, K.C. has lived at the Franklin House and complied with all the rules and been K.C.ative with the staff; she should be eligible for transitional housing by the end of June, 2009. The transitional housing is an efficiency apartment not large enough for children, but K.C. testified she would be moving towards independent housing in four to six months. K.C. obtained a housekeeping job working twenty-five to thirty-five hours per week.

{¶ 27} K.C. wants an opportunity to reunify with the children and wants additional time to complete her case plan services reunification. There are no

relatives who are willing or appropriate to take custody of the children.

{¶ 28} Based on these findings, the magistrate decided, by clear and convincing evidence, that the three children in question should not be placed with their mother because the mother has demonstrated a lack of commitment towards them "by failing to regularly visit or communicate with her when able to do so or by other actions showing unwillingness to provide an adequate home for them. This lack of commitment is demonstrated by [mother's] failure to address her case plan services until the time of the filing on the motion for permanent custody. From April 2008 until the end of March 2009, [mother] did not maintain sobriety although she had the assistance of a drug/alcohol therapist and knew that seeing her children required she not abuse drugs. Her lack of commitment caused her not to see her children for a period of a full year. Moreover, her failure to remain drug free caused her to be incarcerated. She did not engage in individual counseling or obtain employment although these were critical parts of her case. While [mother] has recently begun to work towards completion of case plan services, by her own admission, she would not be ready to have the children until late 2009 at the earliest. Given the children's ages, this is not a reasonable time given the complete lack of progress during the first year."

{¶ 29} Further, the magistrate found that "given the total lack of progress on case plan services, the seriousness of the consequences for failing to become and remain drug free, including loss of contact with her children and incarceration, these statements [that relapse was part of recovery and that she did not abuse drugs every day] are worse than self-serving. They show a failure to grasp the impact of her

addiction and choices on her children. The children's best interest demands that their parent and custodian make decisions with them uppermost in mind. In these cases, there has been an ongoing failure by [mother] to do so."

{¶ 30} These are indeed distressing facts and may warrant the requisite statutory conclusions by clear and convincing evidence. At the same time, while it is difficult to accept that relapse is a part of recovery and that denial (e.g., "only weekend use") is almost by definition a part of addiction, there is a strong presumption against permanently taking children away from their parent. It is not a question of simply weighing whether the biological parent is a "better" parent than the foster parents, whether the parent has made stupid and even illegal choices, or whether she has gone periods of time without seeing her children (especially given the fact that some of this time was based on her struggle with her addiction and a somewhat arbitrary requirement of six clean urines).

{¶ 31} It is also true that her improvement (clean urines, employment, habitation) has only come recently, or as Samuel Johnson said, "Depend upon it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." Whether sobriety and responsibility are the result of coercive actions by the State or are self-motivated by the individual seems irrelevant. We are not prepared to hold that addiction, or absences from one's children during struggles to escape addiction, are, in and of themselves, sufficient causes to remove children from their parents permanently. See, e.g., Roberts, The Challenge of Substance Abuse for Family Preservation Policy, 3 J. Health Care L. & Policy 72 (1999).

{¶ 32} Neither are we prepared to hold that if the trial judge had conducted an

independent review of the evidence in the record, and had independently awarded permanent custody to the agency, that would necessarily constitute an abuse of discretion. We are only holding that K.C. has the right to an independent review of the entire record, and to have the trial judge exercise his discretion, after which our jurisdiction to review that decision under an appellate standard may be invoked by either party. This is a "substantial right," and we cannot say that the denial of this substantial right had no effect upon the outcome of the proceeding below.

{¶ 33} In summary, we hold that the trial court's denial of K.C.'s motion for an enlargement of three days within which to file objections was an abuse of discretion. This cause will be remanded for the trial court to consider those objections.

{¶ 34} K.C.'s First Assignment of Error is sustained.

III

{¶ 35} K.C.'s Second, Third and Fourth Assignments of Error are as follows:

{¶ 36} "THE TRIAL COURT ERRED IN FINDING THAT THE CHILDREN COULD NOT BE PLACED WITH THEIR MOTHER WITHIN A REASONABLE TIME OR SHOULD NOT BE PLACED WITH THEIR MOTHER BECAUSE OF A LACK OF COMMITMENT TOWARD THEM.

{¶ 37} "THE TRIAL COURT ERRED IN FINDING THAT A GRANT OF PERMANENT CUSTODY WAS IN THE BEST INTEREST OF THE CHILDREN.

{¶ 38} "THE TRIAL COURT ERRED IN FINDING THAT THE CHILDREN'S SERVICES BOARD HAD MADE REASONABLE EFFORTS TO REUNITE THE CHILDREN WITH THEIR MOTHER."

{¶ 39} K.C. contends that the record does not support the finding that the children could not be placed with her within a reasonable time, that a grant of permanent custody was in the best interest of the children, or that the Agency had acted reasonably in attempting to reunite her with her children.

{¶ 40} In view of our disposition of K.C.'s First Assignment of Error, we find it unnecessary, at this time, to resolve her remaining assignments of error. The trial court should exercise its de novo review of the evidence in the record and make the appropriate findings before we determine whether the evidence in the record supports those findings.

{¶ 41} K.C.'s Second, Third and Fourth assignments of error are overruled as moot.

IV

{¶ 42} K.C.'s First Assignment of Error having been sustained, and her remaining assignments of error having been overruled as moot, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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BROGAN, FAIN, and FROELICH, JJ., concur.

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