

[Cite as *In re T.S.*, 2016-Ohio-7737.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF

T. S.,

ALLEGED DEPENDENT CHILD.

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CASE NO. 16 MA 0073

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Juvenile Division of  
the Court of Common Pleas of Mahoning  
County, Ohio  
Case No. 2013 JC 704

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Lori Shells  
222 West Federal Street, 4<sup>th</sup> Floor  
Youngstown, Ohio 44503

For Defendant-Appellant:

Atty. Aviva Wilcher  
1655 West Market Street, Suite 235  
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JUDGES:

Hon. Carol Ann Robb  
Hon. Cheryl L. Waite  
Hon. Mary DeGenaro

Dated: October 28, 2016

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ROBB, J.

{¶1} Appellant (“the mother”) appeals the decision of the Mahoning County Juvenile Court terminating parental rights and granting the motion for permanent custody filed by Appellee Mahoning County Children Services Board (“CSB”). The mother contends a new dispositional hearing is required because the recording of the hearing conducted by the magistrate was unavailable for the juvenile court to review during its consideration of the mother’s objections to the magistrate’s decision.

{¶2} However, affidavits of evidence were provided to the juvenile court by the mother, her attorney, and the attorney for CSB. The mother did not ask the juvenile court to hear the case itself or to return the matter to the magistrate; nor did she otherwise indicate she was unable to construct a sufficient affidavit of evidence. In accordance, the mother’s sole assignment of error is without merit, and the decision of the juvenile court is affirmed.

#### STATEMENT OF THE CASE

{¶3} According to an affidavit of evidence filed in the juvenile court, the mother gave birth to a child in May 2013. As the child tested positive for drugs at birth, CSB immediately took custody of the child under Juv.R. 6. The child was adjudicated dependent, and temporary custody was granted to CSB. The mother did not appear at the initial dispositional hearing as she was in jail on an alleged probation violation. The mother expressed an interest in Family Dependency Treatment Court but failed to initiate the process. The mother’s initial visits with the child were sporadic. She said she was in an abusive relationship.

{¶4} The mother then went through detoxification at the Neil Kennedy Recovery Clinic followed by treatment at Meridian Community Care. The caseworker thereafter arranged for the mother to live at the Beatitude House. The mother visited and bonded with the child. She worked well with the caseworker on her case plan. As a result, CSB moved to terminate temporary custody and to provide the mother custody with protective supervision. The mother took custody of the child on June 27, 2014.

{¶15} She was then arrested in Trumbull County on October 1, 2014, for promoting prostitution and possession of criminal tools. The child was in the car with the mother when she was arrested. CSB invoked Juv.R. 6 and took custody of the child. The mother contacted the caseworker the day after this arrest. Then, on October 3, 2014, the mother was arrested in Mahoning County for promoting prostitution and soliciting. The mother's prior case plan was reinstated. The mother stopped visiting the child in January 2015. The caseworker located the mother in jail in Mahoning County in February 2015, where she was briefly incarcerated. She expressed a desire to reunify with her child, but she did not visit the child after her release.

{¶16} In May 2015, the mother was jailed in Trumbull County due to allegations she violated the conditions of her bond. She remained incarcerated pending trial as she was unable to post bond. CSB then sought permanent custody of the child. The mother obtained a continuance of the dispositional hearing. The hearing proceeded before a magistrate on October 13, 2015. Testimony was presented by the caseworker, the guardian ad litem, and the mother. The father was unknown.

{¶17} On January 19, 2016, the magistrate issued a decision terminating parental rights and granting permanent custody of the child to CSB. The magistrate's decision reviewed the testimony of each witness in detail. The magistrate recognized: the mother's direct testimony was very compelling; she clearly loves her daughter; she is bright and can be insightful; she had the ability to be a very good parent; and her problems have prevented her from focusing on reunification. The magistrate accepted the report of the guardian ad litem, noting no exhibits were otherwise offered.

{¶18} According to the magistrate's conclusions of law: the child was in temporary custody for twelve or more months of the past twenty-two consecutive months; the mother demonstrated a lack of commitment to the child for multiple periods by failing to support, visit, or communicate when able to do so; the mother's repeated incarcerations prevented her from providing for the child's care (some of

which were due to the mother's failure to follow court orders); it was significant that the mother was arrested on prostitution-related charges in Mahoning county two days after a similar arrest in Trumbull county; the agency created a reasonable case plan and made diligent efforts to assist the mother with reunification; and granting CSB permanent custody would serve the best interest of the child (with a review of best interest factors).<sup>1</sup>

**{¶9}** On February 1, 2016, the mother filed timely objections to the magistrate's decision. She argued the decision was against the manifest weight of the evidence and was not in the best interests of the child. She pointed out how the magistrate agreed with the caseworker's testimony that the mother had the ability to be a good parent. The mother emphasized how she successfully completed her case plan in the past and was previously reunified with the child, concluding this shows reunification was still possible. She suggested the caseworker failed to implement a case plan after her incarceration. Yet, she then claimed she was unable to work on her case plan between her February 2015 release from one jail and her May 2015 incarceration in another jail; she also said she was unable to work on the case plan after her May 2015 incarceration due to her financial inability to post bond. The mother noted the agency rejected her recent request to be placed into Family Dependency and Treatment Court. She criticized the guardian ad litem for filing a report in July 2015 but not updating it before the rescheduled hearing on October 13, 2015 and for failing to speak with the mother while she was incarcerated.

**{¶10}** On February 5, 2016, the mother's counsel sought an extension of time to file an affidavit of evidence to support the mother's objections, citing Juv.R. 40(D)(3)(b)(iii) and disclosing the transcript of proceedings was not available. The court granted the motion for leave and set a hearing on the objections for April 8, 2016.

**{¶11}** On March 21, 2016, the mother's counsel filed an affidavit of evidence. He explained that although a recording device was running during the dispositional

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<sup>1</sup> Based upon the mother's incarceration, the magistrate overruled CSB's alternative argument that the child was abandoned due to failure to contact the child for 90 days.

hearing, the recording itself was corrupted, lost, or is otherwise unavailable. Counsel's affidavit reviewed the testimony of the caseworker and the guardian ad litem. (Much of the information set forth above in the statement of the case is derived from this and the other affidavits of evidence.) For instance, the mother's counsel said the guardian ad litem testified: she would no longer meet with the mother after the October 2014 arrest; she had not spoken with the mother in 8 months (which would actually calculate to some months after the arrest); she did not add to her July 2015 report before the October 2015 hearing; and she was worried the child had been exposed to something bad due to the child acting uncomfortable around her.

**{¶12}** The mother filed an affidavit of evidence on March 21 as well. The first few paragraphs of her affidavit contain a timeline of the procedural history of the case. She also specified testimony was presented by the caseworker, the guardian ad litem, and herself. She then reconstructed her testimony: she is the child's only family; she initially did not work on her case plan due to a bad relationship; she then visited and bonded with the child; she sang to the child, read to the child, and played with the child; she was reunified after working on her case plan; her criminal charges did not involve abuse; she was unsure when she last saw the child; she was unable to visit during her brief release from jail as she did not have a phone; she tried to call her caseworker but was unsuccessful in reaching him; she was drug-free for the five months she had been in jail; her incarceration was due to failure to post bond (as opposed to a sentence post-conviction); and she was thereafter in jail to await a bed at Meridian Services, where she believed she could stay with the child and where she would learn to remain drug and alcohol free.

**{¶13}** On April 5, 2016, counsel for CSB filed an affidavit of evidence reconstructing the testimony of the caseworker, the mother, and the guardian ad litem. For instance, the caseworker testified that after the mother's arrest and the child's second removal, he attempted to work with the mother, who was given the same case plan as before reunification; this case plan "included drug and alcohol assessments and treatments, counseling and providing for the Minor Child's basic needs." He said he found the mother in jail in February 2015, where she was briefly

incarcerated; although, she expressed a desire to reunify, she did not contact him until June 2015.

{¶14} CSB's affidavit said the guardian ad litem expressed concern the child would be placed into a criminal environment again. The guardian ad litem linked the child's behavior of acting uncomfortable around her to the mother's troubles. She said she met with the mother after her arrests in November 2014. Another attempt to meet with the mother was unsuccessful as the mother was not present at the address she provided. The guardian ad litem also testified the mother failed to follow rules, such as curfew, while at Beatitude House.

{¶15} As to the mother's testimony, CSB's affidavit of evidence added the mother testified she pled guilty in Trumbull County in September 2015 to an amended charge of prostitution and to possessing criminal tools. The same plea was entered in Mahoning County. She was placed on probation for two years and ordered to participate in drug treatment at Meridian Services for three months once a bed was available.

{¶16} On April 8, 2016, the objection hearing proceeded before the juvenile court. The court noted the tape of the magistrate's hearing was corrupted and affidavits had been submitted. The mother's attorney provided a timeline of the events in the case. He then outlined his objections that permanent custody was not in the child's best interests as reunification was possible. He noted the mother was currently at Community Corrections Association and should finish her program in May or June. He said she was employed and was saving money for an apartment. Counsel asked if the mother could testify at the objections hearing, which the court permitted. She provided an explanation as to why she was not at Meridian Services. She said, "they kicked me out over inhalers that I did not use" and noted the judge maintained the sentence of rehabilitation in lieu of additional jail time. She also spoke of her attempt to contact the caseworker after the dispositional hearing.

{¶17} On April 29, 2016, the juvenile court entered judgment granting permanent custody of the child to CSB and terminating the parental rights of both parents. The court's judgment notes that a transcript of proceedings did not exist and

referred to the affidavits of evidence being submitted pursuant to the Juvenile Rules. The court recited the arguments set forth at the objections hearing and adopted the magistrate's decision in whole. The mother filed a timely notice of appeal. Her brief was not filed until August 31, 2016. CSB filed a timely response on September 19, 2016. No reply brief was filed.

#### ASSIGNMENT OF ERROR

{¶18} The mother's sole assignment of error and the related issue presented for review are as follows:

"THE JUVENILE COURT ERRED IN GRANTING PERMANENT CUSTODY OF T.S. TO MCCS WHEN ITS RECORDING SYSTEM FAILED TO CREATE COMPLETE RECORD OF PROCEEDINGS AS REQUIRED BY JUV.R. 37(A)."

{¶19} "When the recording system fails and no record of permanent custody dispositional hearing exists, can the Juvenile Court grant permanent custody of a child to MCCS based upon App.R. 9(C) affidavits of the parties, where the affidavits fail to recreate a complete and accurate record of the proceedings?"

{¶20} Juv.R. 37(A) provides in pertinent part: "The juvenile court shall make a record of adjudicatory and dispositional proceedings in abuse, neglect, dependent, unruly, and delinquent cases; permanent custody cases; and proceedings before magistrates. \* \* \* The record shall be taken in shorthand, stenotype, or by any other adequate mechanical, electronic, or video recording device." Juv.R. 40(D)(7) states: "Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court."

{¶21} The mother contends the juvenile court abused its discretion in adopting the magistrate's decision and granting permanent custody when there was not a complete record of proceedings. The mother believes the violation of Juv.R. 37(A) requires remand for a new dispositional hearing under the premise set forth in the Ohio Supreme Court's *In re B.E.* case. The mother equates the affidavit of evidence filed in the trial court with an App.R. 9(C) statement of the evidence and quotes: "Although an App.R. 9(C) statement may be appropriate in some cases, in this case, where parental rights are at stake and critical testimony is missing, an

App.R. 9(C) statement is insufficient.” However, this quote comes directly from the *In re B.E.* decision of the appellate court. See *In re B.E.*, 8th Dist. No. 81781, 2003-Ohio-3949, ¶ 8. See also *In re B.E.*, 102 Ohio St.3d 388, 811 N.E.2d 76, 2004-Ohio-3361, ¶ 13 (quoting the appellate court to elucidate that it was affirming on other grounds). The mother cites another Eighth District case and an Eleventh District case for this same proposition, but these cases also predate the Supreme Court’s 2004 *In re B.E.* decision.

{¶22} The Ohio Supreme Court expressly rejected the appellate court’s quoted holding. *In re B.E.*, 102 Ohio St.3d 388 at ¶ 14. In that case, the juvenile court failed to record the entire permanent custody hearing. The abrupt interruption of testimony mid-recording was noticed by the mother’s attorney while preparing the case for appeal. The mother’s attorney filed a document with the court of appeals advising that he tried to comply with App.R. 9(C) but was unable to do so because opposing counsel did not recollect the case and the guardian ad litem did not provide a proposed statement of the evidence. The Eighth District remanded for new hearing.

{¶23} The Ohio Supreme Court affirmed the remand under the particular circumstances of that case. But first, the Court recognized the procedures in App.R. 9 were “designed precisely for this type of situation, where a transcript is unavailable.” *Id.* at ¶ 14. “Therefore, we reject the court of appeals’ assertion that App.R. 9 is insufficient in a case where parental rights are at stake and critical testimony is missing.” *Id.* (the underlying nature of the case is immaterial).

{¶24} As the mother points out, however, the Court then held: “*Under the facts of this case*, we are unwilling to presume the validity of the juvenile court’s proceedings in the absence of an App.R. 9(C) statement, as appellant urges us to do. In this situation, *where it is alleged that the missing testimony cannot be recreated*, we believe that justice dictates that the matter be remanded for a rehearing.” *Id.* at ¶ 16 (emphasis added). The Court “admonish[ed]” the juvenile court, noting the use of stenographers instead of recorders would help ensure the juvenile court satisfied its obligation under Juv.R. 37(A). *Id.* at ¶ 17.

{¶25} Notably, the Court emphasized how the mother's attorney attested that he attempted to comply with App.R. 9(C) but was unable to reconstruct the record because neither trial attorney recollected the missing testimony. *Id.* According to the syllabus: "When a juvenile court fails to comply with the recording requirements of Juv.R. 37(A) and an appellant attempts *but is unable to submit* an App.R. 9(C) statement to correct or supplement the record, the matter must be remanded to the juvenile court for a rehearing." *Id.* at syllabus (emphasis added).

{¶26} The mother believes this holding is directly on point to the situation encountered in this case. Her brief says she attempted, but was unable, to reconstruct a full and complete record of the proceedings by submitting an affidavit of evidence to the juvenile court. In urging the affidavits did not sufficiently recreate the record, the mother claims the affidavits of evidence did not provide information on the case plan or provide a full witness list. However, the affidavit of evidence provided by the CSB attorney stated the caseworker testified that a case plan was formulated for the mother "which included drug and alcohol assessments and treatment, counseling and providing for the Minor Child's basic needs." The affidavit also said after the mother's arrest, she "was subsequently given the same case plan as before and the Case worker attempted to continue to work with mother." The affidavits all mentioned the mother's incarceration as one of the reasons why she could not comply with the case plan. As to the witness list, the mother's own affidavit of evidence submitted to the juvenile court stated, "At the Dispositional Trial on October 13, 2015, the testimony was heard from caseworker for Mahoning County Children Services, CASA/GAL for the subject child, and Natural Mother to the subject child." (Names omitted).

{¶27} In any event, *In re B.E.* is not directly on point. Various factors make it distinguishable. The case at bar does not involve App.R. 9, as the Rules of Appellate Procedure do not apply to the juvenile court when reviewing a magistrate's decision. Rather, this case involves Juv.R. 40(D). Even if the central premise from *In re B.E.* could translate to the situation where a juvenile court is reviewing objections to a

magistrate's decision, the mother did not claim an inability to submit a statement or otherwise inform the juvenile court of the issue now raised on appeal.

{¶28} Juv.R. 40(D) deals with proceedings referred to a magistrate. The rule provides an objection to a factual finding, whether or not specifically designated as 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.*" (Emphasis added). Juv.R. 40(D)(3)(b)(iii). The objecting party shall file the affidavit with the juvenile court within thirty days after filing objections unless the court extended the time in writing. *Id.*

{¶29} This was the procedure followed by the mother in objecting to the magistrate's decision. A transcript of the magistrate's decision was not available. The mother advised the juvenile court of this in writing and successfully sought an extension of time to file an affidavit of evidence under Juv.R. 40(D)(3)(b)(iii). The mother's attorney and the mother each submitted an affidavit of evidence. Furthermore, CSB's attorney filed an affidavit of evidence. The mother took no issue with this affidavit or its contents. No party advised the juvenile court they were unable to comply with the rule or expressed to the juvenile court they could not recreate a record. This is distinguishable from the claims in *In re B.E.*

{¶30} Moreover, in reviewing a magistrate's decision, the juvenile court "may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate." Juv.R. 40(D)(4)(b). The juvenile court took additional evidence by allowing the mother to testify at the objection hearing; she addressed items occurring since the last hearing. While on the stand, she did not seek to re-present her prior testimony. Neither before, during, or after the objections hearing did any party ask the juvenile court to exercise the discretion provided by Juv.R. 40(D)(4)(b) to hear a previously-referred matter or to return the matter to the magistrate for a new hearing. The issue was not raised at a time when the juvenile court could have considered it and acted on it.

{¶31} The mother suggests the issue with the lack of a transcript is compounded by the fact that the juvenile court adopted the magistrate's decision

which contained factual items above what was contained in the affidavits of evidence submitted to the juvenile court. As aforementioned, the magistrate's decision contained a detailed review of the testimony presented by the three witnesses and said no exhibits were offered at trial. After setting forth the arguments presented at the objections hearing, the trial court adopted the magistrate's decision and set forth its judgment.

{¶32} Although the mother filed objections to the weighing of the evidence, she did not allege portions of the magistrate's recitation of the testimony were inaccurate. An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection. Juv.R. 40(D)(3)(b)(ii). See *also* Juv.R. 40(D)(3)(b)(iv) (the lack of proper objection and support waives the issue on appeal, absent plain error). Regardless, the juvenile court "*may adopt or reject a magistrate's decision in whole or in part, with or without modification.*" *Id.* (emphasis added). See *also* Juv.R. 40(D)(4)(e) (upon adopting a magistrate's decision, the court shall also enter a judgment). The ability to adopt a magistrate's decision "in whole" exists whether the objection was supported by a transcript of the evidence or an affidavit of that evidence. See *id.*; Juv.R. 40(D)(3)(b)(iii).

{¶33} In sum, the juvenile court did not err by failing to sua sponte return the case to the magistrate for a new hearing or failing to sua sponte hear the matter itself. Under the circumstances of this case, we are not required to remand for a new dispositional hearing. For all of these reasons, the mother's sole assignment of error is overruled, and the juvenile court's judgment is affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.