

[Cite as *In re I.R.Q.*, 2018-Ohio-292.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105924

IN RE: I.R.Q.
Minor Child

[Appeal By Mother]

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. CU 16101050

BEFORE: Keough, P.J., Laster Mays, J., and Jones, J.

RELEASED AND JOURNALIZED: January 25, 2018

ATTORNEY FOR APPELLANT

Mitchell L. Alperin
29325 Chagrin Blvd., Suite 305
Pepper Pike, Ohio 44122

ATTORNEY FOR APPELLEE

James L. Simon
Law Office of Andrew J. Simon
6000 Freedom Square Drive, Bldg. II, Suite 165
Independence, Ohio 44131

GUARDIAN AD LITEM

William T. Beck
2035 Crocker Road, Suite 104
Westlake, Ohio 44145

KATHLEEN ANN KEOUGH, P.J.:

{¶1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1. The purpose of an accelerated appeal is to allow this court to render a brief and conclusory opinion. *State v. Priest*, 8th Dist. Cuyahoga No. 100614, 2014-Ohio-1735, ¶ 1; App.R. 11.1(E).

{¶2} Appellant, I.R.Q.’s biological mother (“Mother”), appeals from an order of the Cuyahoga County Juvenile Court that modified biological Father’s visitation rights. Mother contends that the trial court abused its discretion in affirming and adopting the magistrate’s decision regarding the modification because (1) the magistrate made her decision after a hearing at which she took no evidence and heard no sworn testimony; (2) the magistrate did not consider whether the modification was in I.R.Q.’s best interest and did not consider any of the best-interest factors set forth in R.C. 3109.051(D) before rendering her decision; (3) the magistrate ignored the recommendations of I.R.Q.’s guardian ad litem and medical professionals in rendering her decision; and (4) the trial court failed to conduct a de novo review of the facts and an independent analysis of the issues before adopting the magistrate’s decision.

{¶3} We find merit to the appeal, reverse the trial court’s judgment, and remand the case to the trial court with instructions for the administrative judge to reassign this case to another judge.

I. Facts and Procedural History

{¶4} I.R.Q. was born on March 3, 2014. On November 2, 2014, Father was arrested and charged in Cuyahoga C.P. No. CR-14-59088 with two counts of domestic violence in violation of R.C. 2919.25 and one count of endangering children in violation of R.C. 2919.22. He subsequently pleaded guilty to one count of domestic violence and to endangering children, and was sentenced to 14 months incarceration.

{¶5} Upon his release from prison, Father filed an application for visitation with I.R.Q. Mother filed a brief in opposition to Father's request. Attached to Mother's brief were unverified copies of court dockets showing that Father has a long and violent history of domestic abuse against Mother and her children.

{¶6} The magistrate appointed a guardian ad litem for I.R.Q. and set the matter for hearing. Subsequently, by agreement of the parties, Father was granted supervised visits with I.R.Q. at Safe and Sound, a supervised visitation center, every other Thursday.

The parties agreed that the matter would be reviewed at a hearing on May 4, 2017. The trial court affirmed and approved this decision.

{¶7} The guardian ad litem subsequently submitted his report recommending that Father be afforded regular visits with I.R.Q. but cautioning that in light of Father's "extensive history of domestic violence" and his "past violent acts," any visits should occur in a supervised setting. The guardian ad litem's report noted that Father had twice

been imprisoned for domestic violence against Mother and her children, including an incident in which he head-butted Mother while she was pregnant with I.R.Q.

{¶8} At the hearing on May 4, 2017, the magistrate took no sworn testimony and received no exhibits, and made no reference to any of the R.C. 3109.051(D) best interest factors that a court must consider before modifying visitation rights. She denied Mother's request that the court diagnostic clinic, which previously had recommended supervised visits at Safe and Sound, reevaluate the situation to determine if any circumstances had changed. She heard argument from the parties' attorneys and listened to the guardian ad litem's opinion that Father's parents could supervise Father's visits with I.R.Q. in their home. She then ordered that Father's visits with I.R.Q. would occur weekly at his parents' home (where he lives) but that the exchange of I.R.Q. between Mother and Father would take place at Safe and Sound.

{¶9} The magistrate issued her written decision on May 4, 2017. The decision stated that "[t]he magistrate heard testimony" at the hearing, despite the fact that no sworn testimony was given. Furthermore, although at the hearing the magistrate ordered Father's visits to occur at his parents' home, the written decision allowed Father to visit with I.R.Q. at any location. Finally, the decision gave no indication that the magistrate had considered the R.C. 3109.051(D) factors before modifying the visitation order, or that she had considered whether the change was in I.R.Q.'s best interest. *See Braatz v. Braatz*, 85 Ohio St.3d 40, 706 N.E.2d 1218 (1999), paragraph two of the syllabus (before

modifying visitation rights, a court must consider the factors enumerated in R.C. 3109.051(D) and determine if a modification is in the child's best interest).

{¶10} On May 11, 2017, Mother filed timely objections to the magistrate's decision and a request for a transcript of the hearing. On May 15, 2017, the trial court granted Mother's request for a transcript. On May 19, 2017, Mother refiled her objections and requested that the magistrate's decision be stayed. That same day, before ruling on Mother's objections and before the transcript was filed, the trial court issued its judgment approving and adopting the magistrate's decision, noting that it was doing so upon "an independent review of the matter." On May 23, 2017, the trial court overruled Mother's objections. The transcript of the hearing was filed on June 20, 2017. This appeal followed.

II. Law and Analysis

{¶11} An appellate court reviews a trial court's decision regarding visitation for an abuse of discretion. A discretionary act that reaches an end or purpose not justified by and clearly against reason and evidence is an abuse of discretion. *In re Guardianship of S.H.*, 9th Dist. Medina No. 13CA0066-M, 2013-Ohio-4380, ¶ 9, quoting *State v. Firouzmandi*, 5th Dist. Licking No. 2006-CA-41, 2006-Ohio-5823, ¶ 54.

{¶12} In her first assignment of error, Mother contends that the trial court abused its discretion in adopting the magistrate's decision because neither the trial court nor the magistrate considered the best interest of the child, as required by R.C. 3109.051(D),

before modifying visitation. In her second assignment of error, Mother contends that the trial court abused its discretion in adopting the magistrate's decision because the magistrate modified Father's visitation without hearing any sworn testimony or taking any evidence. We find merit to both assignments of error.

{¶13} R.C. 3109.051 governs the modification of parenting time or visitation rights. *Braatz*, 85 Ohio St.3d at 44-45, 706 N.E.2d 1218. "In modifying visitation rights, a court must determine whether a change in the visitation order is in the child's best interest, and it must consider the factors set forth in R.C. 3109.051(D) in making this determination." *Id.*

{¶14} Those factors are (1) the prior interaction of the child with the child's parents; (2) the geographical location of and distance between each parent's residence; (3) the child's and the parents' available time; including each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule; (4) the age of the child; (5) the child's adjustment to home, school, and community; (6) the wishes and concerns of the child, as expressed to the court; (7) the health and safety of the child; (8) the amount of available time for the child to spend with siblings; (9) the mental and physical health of all parties; (10) each parent's willingness to facilitate the other parent's parenting time rights; (11) whether the residential parent has denied the other parent's right to parenting time as ordered by the court; and (12) any other factor in the best interest of the child. R.C. 3109.051(D).

{¶15} The general rule is that absent evidence to the contrary, a reviewing court will presume that the trial court considered the relevant statutory factors. *Quint v. Lomakoski*, 167 Ohio App.3d 124, 128-129, 2006-Ohio-3041, 854 N.E.2d 225 (2d Dist.).

We cannot make that presumption in this case, however, because it is apparent that neither the magistrate nor the trial court considered the R.C. 3109.051(D) factors before modifying the visitation schedule.

{¶16} The transcript of the hearing reflects that the magistrate made no reference to any of the R.C. 3109.051(D) factors during the hearing. Likewise, the magistrate's decision, which was later approved and adopted by the trial court, makes no reference to any of the R.C. 3109.051(D) factors, nor does it state that the magistrate considered those factors before modifying the visitation schedule to give Father additional visitation with I.R.Q.

{¶17} Significantly, the magistrate did not take any sworn testimony before she decided to modify the schedule. Although the magistrate's decision states that "[t]he magistrate heard testimony" at the hearing, the transcript of the hearing reflects that no sworn testimony was given. Rather, the magistrate merely heard the arguments of counsel for Father and Mother, as well as the guardian ad litem's statement that Father's visits should continue to be supervised. The magistrate also received no documentary evidence at the hearing.

{¶18} Without any testimony or exhibits, the magistrate had no evidence whatsoever upon which to evaluate the R.C. 3109.051(D) factors. Thus, it is apparent that she did not consider them. Similarly, because the magistrate's decision, which was adopted by the trial court before the transcript of the hearing was available, contained no analysis of the R.C. 3109.051(D) factors nor any discussion of any evidence regarding the factors, it is apparent that the trial court likewise did not consider the best-interest factors before adopting the magistrate's decision.

{¶19} Because neither the magistrate nor the trial court considered the best-interest factors before modifying the visitation schedule, the trial court abused its discretion in adopting the magistrate's decision. The first and second assignments of error are sustained.

{¶20} In her third assignment of error, Mother contends that the trial court abused its discretion in adopting the magistrate's decision because the decision conflicts with the guardian ad litem's recommendation and that of the court diagnostic clinic. The guardian ad litem expressed his opinion at the hearing that Father's visits with I.R.Q. must be supervised, but that they could safely occur at the home of Father's parents. The earlier recommendation from the court diagnostic clinic likewise opined that Father's visits must occur in a supervised setting. Despite these recommendations, and despite the magistrate's order at the hearing that Father's expanded visits with I.R.Q. were to occur in his parents' home, the magistrate's written decision provides no restriction

whatsoever on where the visits are to occur. Further, the magistrate's decision provides no explanation as to why she deviated from the recommendations of the professionals assigned to evaluate and protect I.R.Q.'s safety during her visits with Father. Accordingly, the trial court abused its discretion in adopting the magistrate's decision. The third assignment of error is sustained.

{¶21} Last, in her fourth assignment of error, Mother asserts that the trial court abused its discretion because it failed to conduct a de novo review of the facts and an independent analysis of the issues before adopting the magistrate's decision. We agree.

{¶22} When ruling on objections to a magistrate's decision, a trial court is required to conduct an independent review of the case. *In re S.R.L.*, 8th Dist. Cuyahoga No. 102797, 2015-Ohio-5227, ¶ 49. Juv.R.40(D)(4)(d) provides, in relevant part:

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.

{¶23} Thus, under Juv.R. 40(D)(4)(d), the trial court must "conduct a de novo review of the facts and an independent analysis of the issues to reach its own conclusions about the issues in the case." *Radford v. Radford*, 8th Dist. Cuyahoga Nos. 96267 and 96445, 2011-Ohio-6263, ¶ 13. "The trial court may not properly defer to the magistrate in the exercise of the trial court's de novo review. The magistrate is a subordinate

officer of the trial court, not an independent officer performing a separate function.” *In re R.C.*, 8th Dist. Cuyahoga No. 96396, 2011-Ohio-4641, ¶ 11.

{¶24} This court has held that “it is an abuse of discretion [for a trial court] to adopt a magistrate’s decision over an objection to factual findings prior to its receipt of a timely requested transcript or other material necessary to conduct an independent review of the matter.” *In re H.R.K.*, 8th Dist. Cuyahoga No. 97780, 2012-Ohio-4054, ¶ 12; *see also, In re R.C.*, 8th Dist. Cuyahoga No. 96396, 2011-Ohio-4641, ¶ 8, citing *Savioli v. Savioli*, 99 Ohio App.3d 69, 71, 649 N.E.2d 1295 (8th Dist.1994) (“a trial court abuses its discretion when it rules on objections to a [magistrate’s] report without the benefit of a transcript”); *In re K.D.W.*, 8th Dist. Cuyhoga No. 104273, 2017-Ohio-1280 (trial court abused its discretion in adopting the magistrate’s decision where it granted appellant leave to file the transcript but then adopted the magistrate’s decision the following day without reviewing the transcript).

{¶25} Here, Mother filed timely objections to the magistrate’s decision. In her objections, she cited to facts argued at the hearing but apparently not considered by the magistrate. The trial court granted Mother leave to file the transcript, but then adopted the magistrate’s decision two days later without reviewing the transcript, which had yet to be filed. Several days later, it overruled Mother’s objections. It was impossible for the trial court to independently review the magistrate’s decision and Mother’s objections without reviewing the transcript, however, because the magistrate’s decision contained no

facts or legal analysis relevant to modifying Father's visitation. Accordingly, the trial court abused its discretion in adopting the magistrate's decision without conducting the independent review required by Juv.R. 40(D)(4). Mother's fourth assignment of error is sustained.

{¶26} The trial court's judgment adopting the magistrate's decision is therefore reversed. Furthermore, because of the abuse of discretion exhibited by both the magistrate and the trial court in this case, which causes us to question whether Mother's due process rights would be adequately protected upon remand, the matter is remanded with instructions for the administrative judge to reassign this case to another judge.

{¶27} Judgment reversed; remanded with instructions for the administrative judge to reassign this matter to another judge.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
LARRY A. JONES, SR., J., CONCUR