

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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| IN RE J.H., ET AL. | : | |
| | : | No. 109332 |
| A Minor Child | : | |
| | : | |
| [Appeal by A.H., Mother] | : | |

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: March 11, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD-12920956 and AD-12920957

Appearances:

A.H., *pro se*.

LARRY A. JONES, SR., P.J.:

{¶ 1} This appeal arises from a decision after remand from this court with regard to Mother-appellant’s motion to modify custody and visitation. For the reasons that follow, we affirm.

{¶ 2} Mother has two children: K.M., date of birth, March 25, 2003, and J.H., date of birth, August 27, 2012. At all times relevant to the issues presented in this appeal, the children were not living with Mother or their alleged fathers. The children have also been living separate and apart from one another; since 2014,

K.M. was in the care and custody of an uncle, and since 2013, J.H. was in the care and custody of an aunt. Although K.M. has previously lived with Mother, J.H. has never lived with her.

{¶ 3} In 2015, Mother filed a pro se motion to “modify custody and visitation and set visitation,” asking the court to place the children in her custody or, alternatively, that she be granted additional visitation with them.

{¶ 4} A guardian ad litem (“GAL”) was appointed for the children. Mother requested an attorney; she had a GAL who had been representing her. Mother’s GAL subsequently filed a motion to withdraw and a new GAL was appointed. The court held a hearing on Mother’s motion and issued a decision on each child. Relative to J.H., the younger child, the magistrate denied Mother’s requests to modify custody and for visitation, determining that it was in the best interest of J.H. if his custodian retained sole legal custody of him, and Mother had no visitation with him.

{¶ 5} Relative to K.M., the magistrate decided that the evidence was insufficient to warrant a change in custody and that no modification was necessary. The magistrate granted visitation and ordered that Mother’s visitation with K.M. occur on Saturdays.

{¶ 6} Mother filed objections to the magistrate’s decisions regarding both children. The juvenile court affirmed, approved, and adopted the magistrate’s decisions. The trial court failed, however, to rule on Mother’s objections. Mother

appealed, but this court dismissed the appeal for lack of a final, appealable order. *In re J.H.*, 8th Dist. Cuyahoga No. 106658, 2018-Ohio-4026.

{¶ 7} After dismissal of her appeal, Mother requested, and was granted, a ruling from the trial court on her objections. The juvenile court overruled Mother's objections to the magistrate's decisions relating to J.H. and K.M., and affirmed, approved, and adopted the magistrate's decisions. Mother thereafter requested that her appeal be reinstated; this court granted her request.¹

{¶ 8} On appeal, Mother argued that the trial court abused its discretion in removing her GAL, in limiting visitation between her and the children, and that the trial court's decisions were against the manifest weight of the decision. In a reconsidered opinion, this court found that the trial court did not violate her due process rights by removing her GAL and that the trial court correctly determined that there was insufficient evidence to warrant a change in custody. *In re J.H.*, 8th Dist. Cuyahoga No. 106658, 2019-Ohio-696, ¶ 26, 35. This court further found, however, that the trial court abused its discretion in deciding that Mother should not have supervised visits with J.H. and by not allowing visitation between J.H. and K.M. to occur. *Id.* at ¶ 54. The case was remanded with instructions to the trial court to: 1) establish a supervised visitation schedule for Mother and J.H., and 2) "fashion a schedule that would allow the two brothers to have time together."

¹In a separate appeal, Mother appealed an order from juvenile court requiring her to pay child support for J.H. A panel of this court found that its review was limited to plain error because Mother had failed to file timely objections to the magistrate's decision. This court noted that Mother failed to file a transcript of the hearing in question and declined to find plain error. *In re J.H.*, 8th Dist. Cuyahoga No. 108565, 2020-Ohio-576, ¶ 18.

{¶ 9} The case was remanded to juvenile court. Mother filed a pro se motion for a hearing. In the motion she requested a hearing, but did not request an attorney. The magistrate held a hearing on October 29, 2019, and issued an order the same day. Present at the hearing were Mother, her GAL, and other pertinent parties (neither of the children’s fathers were present and are not parties to this appeal). A transcript of the hearing was not made part of the record on appeal.

{¶ 10} In its October 29, 2019 order, the magistrate noted that Mother had not visited J.H. or attended his medical appointments. The magistrate determined that: (1) J.H. and K.M. would have sibling visitation every other weekend; (2) Mother was ordered to attend J.H.’s medical appointments with the legal custodian providing Mother notice of the appointments; and (3) Mother would have supervised visitation with J.H. during therapy appointments. As to visitation between Mother and J.H., the magistrate stated that “reunification counseling is appropriate once per month. The court further finds that the mother shall have supervised visitation through a therapist as she arranges and at her expense. Mother shall provide notice of the appointments to the legal custodian.”

{¶ 11} Additionally, the magistrate decided Mother was allowed phone contact with J.H. and could call him once a week between the hours of 5:00 p.m. and 8:00 p.m.

{¶ 12} Relative to visitation between Mother and K.M., the court modified visitation to every Sunday, instead of every Saturday as previously ordered, due to

K.M.'s extracurricular activities. The magistrate specified that the children's legal guardians were responsible for transportation to and from the visits.

{¶ 13} Mother filed lengthy objections to the magistrate's decision. In her objections, she claimed that J.H. was not safe under the custody of his current guardian, the court should pay for reunification counseling, the doctor's office should inform her of J.H.'s appointments because she could not trust J.H.'s guardian, visitation with J.H. should be unsupervised, visitation time with K.M. should be increased, and K.M. should be in her care and custody. The trial court overruled Mother's objections in their entirety.

{¶ 14} On November 14, 2019, the juvenile court affirmed, approved, and adopted the magistrate's decisions.

{¶ 15} It is from this decision Mother appeals, pro se, raising the following assignment of error for our review:

I. Trial court committed plain errors and omissions in failing to secure a waiver in open court showing that the parent's right to counsel was knowingly, voluntarily and intelligently entered, as well as ensuring the parent received due process of law and a fair and adequate hearing.

{¶ 16} As an initial matter, we note that Mother contests the entirety of the trial court proceedings from the time she filed her May 2015 motion to modify custody and for visitation. But the only journal entry on appeal, and the only journal entry Mother attached to her notice of appeal, is the juvenile court's November 14, 2019 judgment entry. That judgment entry was limited in scope and

concerns only what was on remand from this court — establishing Mother’s visitation schedule with J.H. and visitation between the brothers.

{¶ 17} In her sole assignment of error, Mother claims that the trial court abused its discretion when Mother appeared for the October 29, 2019 hearing and the magistrate did not appoint her counsel or ensure that Mother waived her right to counsel.

{¶ 18} Juv.R. 4 provides that “[e]very party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent * * *.” However, the rule further states that it does not create a “right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.”

{¶ 19} As mentioned, Mother filed objections to the magistrate’s decision. In her objections, Mother does not raise the issue of the trial court’s alleged error in failing to appoint her an attorney for her hearing or ensuring that she waived her right to counsel. Civ.R. 53(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, 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).

{¶ 20} Thus, because Mother raises issues on appeal that she did not raise in her objections to the magistrate’s decision, our review is for plain error.

{¶ 21} We are further constrained in our review, however, because Mother failed to file a transcript of the proceedings below.

{¶ 22} After this court's decision in *In re J.H.*, 8th Dist. Cuyahoga No. 106658, 2019-Ohio-696, Mother filed a motion for a hearing. In her motion, Mother requested a hearing to determine visitation and asked that the matter be set for hearing "as soon as possible." Mother did not, however, ask for an attorney in her motion. On appeal, Mother claims that she expressly stated during the October 29, 2019 hearing that she needed an attorney. She also claims that she thought her GAL would serve as her attorney and the magistrate failed to inquire into Mother's competency.

{¶ 23} Mother failed to file a transcript of the October 29, 2019 hearing with this court and both the magistrate and trial court's decisions are limited in their findings. It is incumbent upon an appellant to file a transcript for this court to review. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980); *see also* App.R. 9(B).

{¶ 24} Because we have no transcript of the proceedings, we do not know if Mother asked for counsel pursuant to Juv.R. 4, if Mother waived her right to counsel as she has done in prior proceedings, or if Mother was under the impression that her GAL would serve as her attorney. This court also cannot determine any issues as to competency, although we do note that Mother had a GAL with her at the hearing and Mother's discussion relative to competency centers solely around whether she was competent to waive her right to an attorney.

Without a transcript to see what was discussed as to these matters, we must presume regularity of the proceedings in the juvenile court and affirm. *See In re J.H.*, 8th Dist. Cuyahoga No. 108565, 2020-Ohio-576, ¶ 18; *Tibbitts v. Tibbitts*, 8th Dist. Cuyahoga No. 96746, 2011-Ohio-5280, ¶ 5.

{¶ 25} Mother failed to raise in her objections to the magistrate's decision those issues that she raises on appeal. In addition, because Mother failed to file a transcript of the October 29, 2019 magistrate's hearing, we presume regularity of the trial court proceedings.

{¶ 26} In light of the above, the sole assignment of error is overruled.

{¶ 27} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, 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.

LARRY A. JONES, SR., PRESIDING JUDGE

LISA B. FORBES, J., CONCURS;
MARY EILEEN KILBANE, J., DISSENTS
WITH SEPARATE OPINION

MARY EILEEN KILBANE, J., DISSENTING:

{¶ 28} I respectfully dissent and would reverse and remand for the appointment of trial counsel. Mother was appointed a G.A.L. not once but twice by the trial court. The record reflects that mother requested trial counsel.