

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Wendy A. Foos

Court of Appeals No. WD-08-049

Appellant

Trial Court No. 03-DR-113

v.

Clarence T. Foos

DECISION AND JUDGMENT

Appellee

Decided: July 10, 2009

* * * * *

Michael R. Bassett, for appellant.

Bonnie R. Rankin, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Wendy Foos, appeals a June 10, 2008 judgment of the Domestic Relations Division of the Wood County Court of Common Pleas ordering a modification of parental rights and responsibilities with respect to the two minor children of the parties. Appellant and appellee, Clarence T. Foos, were divorced under a divorce decree filed in 2004. Under the decree, they agreed to a shared parenting plan.

{¶ 2} Appellee subsequently filed a motion to modify parental rights and responsibilities. The matter was tried to a magistrate on March 18, 2008. The magistrate issued her decision on April 14, 2008. The trial court issued judgment on June 10, 2008. Appellant appeals the June 10, 2008 judgment.

{¶ 3} Appellant asserts three assignments of error on appeal:

{¶ 4} "Assignment of Error No. 1. The trial court committed plain error when it denied appellant due process of law by failing to allow her to review the entire psychological report [a review required under §3109.04(C) ORC] that was submitted by the court-appointed psychologist; this failure denied her the opportunity to meaningfully cross-examine the psychologist on the contents of the report.

{¶ 5} "Assignment of Error No. 2. The trial court committed plain error when it considered reports and testimony of both the psychologist and the guardian ad litem, because the notice and disclosure requirements of §2317.39 had not been complied with, and because the appellant was not permitted to review the report in its entirety.

{¶ 6} "Assignment of Error No. 3. The trial court committed plain error when it considered the psychological report, which was not admitted as evidence."

{¶ 7} Appellant represented herself, pro se, at the hearing on the motion. Two prior counsel had withdrawn from representation. Attorney Evelyn Backman was granted leave of court to withdraw as counsel on November 29, 2006. On January 16, 2007, attorney Jeffrey P. Nunnari entered an appearance as new counsel for appellant. Nunnari, himself, filed a motion for leave to withdraw as counsel on May 31, 2007 that was granted on June 13, 2007.

{¶ 8} Shortly before Nunnari filed his motion to withdraw, the trial court issued an order setting a hearing date of July 12, 2007, on the motion to modify parental rights and responsibilities. That hearing date was rescheduled to allow time to permit appellant to secure new counsel. Subsequent hearing dates were set and continued. Ultimately the matter was tried to a magistrate on March 18, 2008.

Failure to Assert Specific Objections to Magistrate Decision

{¶ 9} The magistrate issued her decision on April 14, 2008. On April 21, 2008, appellant filed an untitled document stating in pertinent part: "Now comes Wendy A. Foos, pro se, and hereby notifies the Court that I am appealing the Magistrate's Decision dated April 14th, 2008."¹ On May 1, 2008, appellant filed a motion for additional time "to supplement my objection to the magistrate's decision, filed on April 21, 2008, until after I have had an opportunity to obtain and review the transcript from the trial in this matter." The motion included a request that the magistrate's decision be stayed.

{¶ 10} The trial court considered appellant's document of April 21 and motion of May 1, 2008, in a judgment filed on May 8, 2008. The trial court held that appellant failed to comply with Civ.R. 53(D)(3)(b)(ii) in the April 21, 2008 document "because it gave no indication of what Plaintiff was objecting to; there were no specific objections." The court also ruled that the May 1, 2008 filing was untimely. It was filed after the 14 day period for the filing of objections had expired. Additionally the court held that the May 1, 2008 filing also lacked specific objections.

¹Appellant also stated she was indigent and requested a trial transcript be provided to her free of cost.

Adoption of Magistrate's Findings of Fact and Conclusions of Law on
Modification of Parental Rights and Responsibilities

{¶ 11} The trial court issued its judgment on the motion for modification of parental rights and responsibilities on June 10, 2008. In the judgment, the trial court adopted each of the 15 numbered findings of fact of the magistrate in her opinion. The trial court also adopted the magistrate's recommendation to terminate the shared parenting plan, to designate Clarence T. Foos as the residential parent and legal custodian of the minor children of the parties, the magistrate's proposed schedule of parenting time both during the school year and during school vacation, the requirement that appellant continue her mental health counseling, and that the father shall receive tax exemptions for both minor children beginning with calendar year 2008. The trial court's judgment also ordered payment of child support, health insurance and medical expenses, costs, attorney fees, guardian ad litem fees, and fees for the attorney for the minor children.

{¶ 12} Under the three assignments of error, appellant challenges consideration of the opinions of the court appointed psychologist and the guardian ad litem in determining whether the motion to modify parental rights and responsibilities should be granted. Under Assignment of Error No. 1, appellant asserts that she was denied "the opportunity to meaningfully cross-examine" psychologist Dr. Wayne Graves at trial. The claim is based upon the assertion that she had been denied an opportunity to review all portions of Dr. Graves' entire report. Under Assignment of Error No. 2, appellant claims that the trial court failed to provide notice of either the psychologist or guardian ad litem reports

or an opportunity to review them in their entirety in violation of the requirements of R.C. 2317.39. Under Assignment of Error No. 3, appellant claims error by the trial court in considering the psychologist report as evidence when the report had not been admitted into evidence at trial.

Waiver under Civ.R. 53

{¶ 13} Appellee argues that under Civ.R. 53(D)(3)(b)(iv) appellant has waived her right to raise the issues on appeal to this court. Civ.R. 53(D)(3)(b)(i) requires that objections to a magistrate's decision be made within 14 days of the filing of the decision. Objections are to be "specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). Where objections are made, the trial court may elect to hear additional evidence in an "independent review as to the objected matters." Civ.R. 53(D)(4)(d).

{¶ 14} We agree with the trial court that appellant failed to assert any specific objection to the magistrate's decision within 14 days as required by rule. In fact, the record reflects that appellant did not object to the magistrate's decision based upon any issue asserted in her three assignments of error in this appeal before the trial court issued its judgment of June 10, 2008.

{¶ 15} 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)."

{¶ 16} The failure to make a timely and specific objection to a magistrate's report, as required under the rule, results in a waiver of claimed error by the trial court in adopting a magistrate's findings of fact or conclusions of law. See, *Slough v. Slough*, 6th Dist. No. WM-08-017, 2009-Ohio-1746, ¶ 26; *Burns v. Burns*, 6th Dist. No. S-07-019, 2008-Ohio-2483, ¶ 15; *Crites v. Crites*, 6th Dist. Nos. WD-04-034 and WD-04-042, 2004-Ohio-6162, ¶ 37. We view appellant's assignments of error as challenges to both the magistrate's findings of fact and conclusions of law in the magistrate's decision. According, appellant's claims in this appeal are deemed waived, absent a showing of plain error.

Plain Error

{¶ 17} Appellant claims plain error in each assignment of error in this appeal. In *Burns v. Burns*, 6th Dist. No. S-07-019, 2008-Ohio-2483, we considered plain error in the context of waiver under Civ.R. 53(D)(3)(b)(iv).

{¶ 18} "We are aware that, in rare cases, Ohio courts recognize that a party's failure to object pursuant to Civ.R. 53(D) does not bar review for plain error. *Seaburn v. Seaburn*, 5th Dist. No. 2004CA00343, 2005-Ohio-4722, ¶ 46, citing *In re Lemon*, 5th Dist. No. 2002 CA 0098, 2002-Ohio-6243. (Other citations omitted.) However, those cases are limited to situations in which the error "rises to the level of challenging the legitimacy of the underlying judicial process itself." *Id.*, quoting *Goldfuss v. Davidson* [1997], 79 Ohio St.3d 116, 122." *Burns v. Burns* at ¶ 17.

{¶ 19} Upon review of the record we find no manifest injustice in the proceedings in the trial court that would constitute plain error. The record clearly shows that appellant was allowed access to both reports. Appellant claims that a comment made by her during her questioning of the psychologist shows denial of access to the full psychologist report. Appellee argues the opposite. He argues that a comment by the magistrate at the hearing, referring to appellant's right of access to reports, proves that she was provided unlimited access to reports of both the psychologist and the guardian ad litem.

{¶ 20} Our review of the record leads to the conclusion that the record is unclear as to whether appellant was permitted access to full and complete copies of the reports. Additionally, appellant was represented by counsel after the psychologist issued his report. The record is silent on the issue of whether her prior counsel had reviewed the psychologist report on her behalf.

{¶ 21} "[A]n appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St.2d 162, 372 N.E.2d 1355." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199; App.R. 9(B). Appellant failed to meet that burden. Appellant failed to preserve the issue in the record for appeal. We must, therefore, presume validity of proceedings in the trial court with respect to access to the reports. *Knapp v. Edwards Laboratories* at 199; *Drenning v. Blue Ribbon Homes*, 6th Dist. No. F-06-001, 2007-Ohio-1323, ¶ 52.

{¶ 22} The magistrate notified the parties that she would consider the reports of the psychologist and the guardian ad litem in making her decision on the motion at the

beginning of the hearing. This was before testimony and the introduction of evidence. Appellant did not object to the procedure. "An appellate court will not consider any error which a party complaining of a trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *Lefort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 123. (Citations omitted.)

{¶ 23} Additionally, appellant has not presented any argument as to how consideration of the report itself prejudiced her. The psychologist testified fully as to his opinions on the motion at the hearing. Appellant has not presented any argument as to how the report of the psychologist differed in any significant manner from the testimony of the psychologist at trial. The issue was tried to the bench.

{¶ 24} This case presents no manifest injustice in the proceedings that would constitute plain error.

{¶ 25} Assignments of Error Nos. 1, 2, and 3 are not well-taken.

{¶ 26} On consideration whereof, the court finds that substantial justice has been done the party complaining and that appellant was not prejudiced or prevented from having a fair hearing. The judgment of the Domestic Relations Division of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

John R. Willamowski, J.
CONCUR.

JUDGE

JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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