[Cite as *Tierney v. Tierney*, 2009-Ohio-2438.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

VALERIE LYNN TIERNEY,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2008-T-0104**
- vs -	:	
DANIEL WILLIAM TIERNEY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2003 DR 476.

Judgment: Affirmed.

Irene K. Makridis, 183 West Market Street, #201, Warren, OH 44481 (For Plaintiff-Appellant).

Michael A. Scala, 244 Seneca Avenue, N.E., P.O. Box 4306, Warren, OH (For Defendant-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Ms. Valerie Tierney appeals from the trial court's judgment entry, which affirmed the magistrate's decision that the parties' minor child remain in her custody and that no child support shall be paid by her former husband and appellee, Daniel Tierney.

{¶2} Ms. Tierney contends that the trial court erred in overruling her objections to the magistrate's decision solely due to her counsel's inadvertent mistake of failing to attach a copy of that decision when she filed her objections. She also claims she is entitled to child support because the minor child has been in her possession since the

magistrate granted her temporary custody on January 1, 2008. Ms. Tierney claims that since the child has been in her possession she has continued to pay child support to Mr. Tierney, when in fact, he should be paying child support to her.

{¶3} We determine that Ms. Tierney's contentions are without merit because the trial court properly adopted the magistrate's decision as no transcript of the hearing before the magistrate was filed, either with the trial court or on appeal. Moreover, as to the merits of the case, we can glean from the stark record before us that no child support was ordered because none was due. Ms. Tierney was in arrears in her child support payments to Mr. Tierney while the child was in his possession, and at the time of the hearing, the minor child was less than one month away from turning eighteen.

{¶4} In any case, we presume the regularity of the proceedings below and find no abuse of discretion in the trial court's decision or an error in law. Thus, we determine that Ms. Tierney's contentions are without merit and we affirm.

{¶5} **Substantive and Procedural History**

{¶6} Since the inception of this case, which began when the case was moved from Texas to Ohio in 2003, the parties have alternatively been granted custody of the child for different periods of time. Initially, the minor child, who is now of legal age, having been born September 13, 1990, was in the custody of Ms. Tierney.

{¶7} The court granted custody to Mr. Tierney in the late fall of 2004 and Ms. Tierney was ordered to pay child support. In 2005, early May of 2007, and in late July of 2007, Ms. Tierney filed ex parte motions for custody alleging Mr. Tierney was abusive. Each time, the court denied her motion, finding that Ms. Tierney's allegations of abuse were not validated and the child should remain in the custody of Mr. Tierney.

Ms. Tierney, however, refused to relinquish possession of the child at the end of her summer visitation, and Mr. Tierney subsequently filed a post-decree motion for police assistance.[1] The court ordered Ms. Tierney to return the child to Mr. Tierney so that she could begin the school year on time. The court additionally set the matter for a full custody hearing and ordered the parties to submit to psychological evaluations.

{¶8} On January 1, 2008, the magistrate issued a decision granting Ms. Tierney temporary custody of the child, terminating her child support order to Mr. Tierney as of the date of the entry, and ordered Ms. Tierney to continue to pay Mr. Tierney for the child support arrearage she owed while the child had been in Mr. Tierney's custody.

{¶9} On May 16, 2008, several days after a hearing, the magistrate found that the child had been residing with Ms. Tierney and was enrolled in school, but that she had been absent from school for ten days since her enrollment on January 28, 2008. The child was to enroll in summer school and potentially get tutoring. The magistrate further found that Ms. Tierney's appeal of Mr. Tierney's writ of habeas corpus for Ms. Tierney to relinquish physical possession of the child at the end of her summer visitation was still pending. Ms. Tierney and the child underwent psychological evaluations in March of 2008 that were to be provided to the court. Further, the magistrate noted that Mr. Tierney had given up his attempt to oppose the change in custody, deciding it was futile since the minor child was going to turn of legal age on September 13, 2008. The

1. Mr. Tierney filed a writ of habeas corpus for Ms. Tierney to relinquish physical possession of the child at the end of her summer visitation, which the trial court granted. We reversed in *Tierney v. Tierney*, 11th Dist. No. 2007-T-0095, 2008-Ohio-2755, because the writ of habeas corpus was not the proper procedural vehicle as there was another adequate remedy at law, by way of enforcing the custody decree through contempt proceedings to enforce the custody decree. In addition, the writ was defective in that it was not properly verified pursuant to R.C. 2725.04.

court adopted the magistrate's decision and ordered all the parties to return for a finalization hearing in mid-August.

{¶10} On June 23, 2008, Ms. Tierney filed a motion for child support alleging that the minor child was permanently placed with her on May 16, 2008, and that she has not been paid child support since she was granted temporary custody on January 1, 2008.

{¶11} The finalization hearing was held on August 18, 2008, at which time the magistrate found that neither the psychological evaluations of Ms. Tierney and the child, nor the child's grades and proof of enrollment had been filed. Further, the child did not finish school in the spring or attend summer school, and was currently babysitting and working part-time in retail. She was enrolled in "on-line" school and could still graduate "on time." The magistrate also noted that the child struck Ms. Tierney in the mouth, but that Ms. Tierney was not injured. The magistrate concluded that all pending motions should be denied, that the child should remain in Ms. Tierney's possession, and that no child support was to be paid to Ms. Tierney.

{¶12} Ms. Tierney filed her objections to the magistrate's report on September 2, 2008, arguing that she should be awarded child support because the minor child had been in her possession since January 1, 2008. She contended that the magistrate's decision was in error because she did try to enroll the child in summer school, but due to the delay in the court's issuance of an order, she could not. She also argued that she testified during the hearing that both her and the child had undergone psychological evaluations, which were to be submitted to the court, but Mr. Tierney had yet to submit to an evaluation; and although the magistrate noted the child had hit her mother, the

magistrate ignored the fact that Mr. Tierney tried to commit suicide for the third time and was hospitalized for treatment over the summer. Attached to her objections was an affidavit averring that she was owed child support for the past year, and that for six months of the year she had been paying Mr. Tierney child support even though the child was in her possession. Ms. Tierney failed to file a transcript or suitable substitute from the magistrate's hearing on August 18, 2008.

{¶13} The court adopted the magistrate's decision on September 5, 2008, after conducting an independent review of the record, the motion, and the magistrate's decision that was in dispute. The court overruled Ms. Tierney's objections because they were not in compliance with the local rules.

{¶14} Ms. Tierney then filed a motion for relief from judgment, arguing that the trial court erroneously overruled her objections solely because she did not attach the magistrate's decision to her objections. Thus, she argued that the court did not review her objections on a purely technical basis when she was entitled to be heard on the merits of the case. The court overruled Ms. Tierney's motion for relief from judgment and ordered all previous orders to remain in effect on September 25, 2008.

{¶15} A review of the record reflects that Ms. Tierney did attempt to request a DVD of the magistrate's hearing on September 9, 2008, and apparently provided a check for the payment for the DVD. The clerk, however, notated on the request "[t]his is the wrong information as far as date and time. Could not find." Ms. Tierney did submit another DVD to supplement the record on October 9, 2008, although the DVD she submitted is from an entirely different case involving a little boy. Thus, although some attempt was made to provide a DVD of the magistrate's hearing, Ms. Tierney failed to

provide a transcript of the hearing at issue, and thus provided neither the trial court nor this court with a transcript or other acceptable substitute from which to review the magistrate's decision.

{¶16} Ms. Tierney now timely appeals, raising two issues for our review:

{¶17} "[1.] The court erred in not awarding child support to the appellant when there was a proper motion before it, and she was entitled to child support under the undisputed facts and the law.

{¶18} "[2.] The court erred to the prejudice of the appellant in summarily overruling her objections to the magistrate's decision for not attaching a copy of the decision."

{¶19} **Failure to Award Child Support**

{¶20} In her first assignment of error, Ms. Tierney contends that the court erred in finding she was not entitled to child support. Specifically, she argues that because she was awarded custody, Mr. Tierney is obligated to pay child support pursuant to R.C. 3103.031. We find this contention wholly without merit, as Ms. Tierney failed to comply with the mandates of the civil rules and provide a transcript for review by the trial court or this court. Thus, she cannot now challenge the factual findings of the magistrate, and, as there is no defect appearing on the face of the decision, we find no abuse of discretion in the trial court's order.

{¶21} "Civ.R.53(E)(3)(b) [now Civ.R.53(D)(3)(b)(iii)] states that any objections to a finding of fact must be supported by a transcript, or affidavit if a transcript is unavailable, of all the evidence submitted to the magistrate relevant to that fact. Moreover, an appellate court is 'not permitted to review or rely upon any materials that

were not before the trial judge.'" *Allen v. Allen* (March 31, 2000), 11th Dist. No. 98-T-0204, 2000 Ohio App. LEXIS 1464, 7, citing *Allen v. Allen* (June 26, 1998), 11th Dist. No. 97-T-0114, 1998 Ohio App. LEXIS 2922, 8.

{¶22} "Since appellant's objections to the magistrate's decision were not supported by transcript or affidavit [if the transcript is unavailable], she is precluded from challenging the trial court's findings of fact on appeal and has waived any claim that the lower court erred in adopting the magistrate's findings." Id. at 7-8; see, generally, *Pawlowski v. Pawlowski* (Aug. 22, 1997), 11th Dist. No. 96-L-144, 1997 Ohio App. LEXIS 3778. "[A]lthough appellant is forestalled from challenging the court's findings of fact, she may still properly appeal issues of law related to the findings of fact." Id. at 8, citing *In re Alexander* (Dec. 19, 1997), 11th Dist. No. 96-T-5510, 1997 Ohio App. LEXIS 5742, 4. This limits our review of the lower court's adoption of a finding of fact to determine whether such adoption constituted an abuse of discretion. Id. at 8, citing *Gorombol v. Gorombol* (Aug. 9, 1996), 11th Dist. No. 95-L-036, 1996 Ohio App. LEXIS 3366, 4.

{¶23} We note, however, that even if we were able to consider the DVD of the hearing Ms. Tierney submitted and filed with the court on October 9, 2008, it is not the correct DVD, as it is a hearing regarding the custody of a little boy. "[I]t is not the duty of the trial court to request a transcript of the proceedings before the magistrate. The party who objects to the magistrate's decision has the duty to provide a [proper] transcript to the trial court." *Guertin v. Guertin*, 10th Dist. No. 06AP-1101, 2007-Ohio-2008, ¶8, citing Civ.R. 53(E)(3)(b) (citations omitted).

{¶24} While Ms. Tierney did attach an affidavit to her objections to the magistrate's decision, it does not indicate it was being filed pursuant to Civ.R. 53 or that a transcript of the proceedings was unavailable. Further, the affidavit does not provide a complete statement of the relevant evidence. "In construing Civ.R.53(E)(3)(c), the courts of this state have held that an affidavit of the evidence cannot be used as a substitute for a transcript unless it refers to all of the relevant evidence submitted to the magistrate, as compared to selected parts of the evidence which the objective party believes is critical." *Beres v. G.S. Building Co., Inc.*, 11th Dist. No. 2007-L-061, 2007-Ohio-6564, ¶25, citing *Bodor v. Fontanella*, 11th Dist. No. 2005-T-0091, 2006-Ohio-3883, ¶22, citing *Gladden v. Grafton*, 10th Dist. No. 05AP-567, 2005-Ohio-6476 and *Naso-Draiss v. Peters,* 9th Dist. No. 03CA0086-M, 2004-Ohio-1983.

{¶25} In addition to failing to file a transcript of the hearing or proper substitute with the trial court and on appeal, we note that Ms. Tierney's argument that she was paying Mr. Tierney for child support while the minor child was in her possession is without merit. We can glean from the record that Ms. Tierney was ordered to pay Mr. Tierney child support for six months after January 1, 2008, because she was in arrears of her child support obligation while the child was in Mr. Tierney's custody. By the time of the hearing on August 18, 2008, the minor was less than a month away from turning eighteen and working two jobs. Indeed, Ms. Tierney did not even file her motion for child support until June 23, 2008.

{¶26} We find no abuse of discretion in the trial court's adoption of the magistrate's decision overruling Ms. Tierney's objections, denying all pending motions, ordering the child to remain in Ms. Tierney's custody, and concluding no child support

was to be paid. Ms. Tierney failed to provide a proper evidentiary basis for the trial court to sustain her objections, and there is no error of law in the court's decision.

{¶27} Ms. Tierney's first assignment of error is without merit.

{¶28} **Failure to Attach Magistrate's Decision to Objections**

{¶29} In Ms. Tierney's second assignment of error, she contends the trial court erred by summarily overruling her objections to the magistrate's decision on a purely technical basis because she did not attach a copy of the decision to her objections per Loc.R. 32.04. She also argues that the court then erred in overruling her motion for relief from judgment when she proved excusable neglect for the failure to attach the magistrate's decision to her objections because her counsel had been on vacation and inadvertently failed to attach the decision. Thus, only her objections and personal affidavit were submitted.

{¶30} We find these contentions to be wholly without merit because the court did consider the magistrate's decision. The trial court specifically noted in both of its judgment entries overruling Ms. Tierney's objections and her 60(B) motion, that it "conducted an independent review of the record, the motion, *and the Magistrate's Report in dispute*." The failure to attach the magistrate's decision was Ms. Tierney's only argument in her motion for relief from judgment.

{¶31} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1),(2), or (3), not more than one year after the

judgment, order, or proceeding as entered or taken." *Bluhm v. Corrado*, 11th Dist. Nos. 2007-A-0037 and 2007-A-0053, 2007-Ohio-6566, ¶31, citing *Len-Ran, Inc. v. Erie Insurance Group*, 11th Dist. No. 2006-P-0025, 2007-Ohio-4763, ¶19, citing *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. "Failure to satisfy any one of the three prongs of the *GTE* decision is fatal to a motion for relief from judgment." Id. at ¶32, citing *Len-Ran, Inc.* at ¶20, citing *Rose Chevrolet Inc., v. Adams* (1988), 36 Ohio St.3d 17, 20.

{¶32} Quite simply the negative outcome for Ms. Tierney was not caused by her failure to attach the magistrate's decision (which is not in and of itself necessarily fatal), but rather, by her failure to file a transcript or suitable substitute of such of the magistrate's hearing at issue. Thus, the trial court had no evidentiary basis upon which to sustain her objections, and was bound to presume the regularity of the proceedings below after finding no error of law. Further, the child is now of legal age, having turned eighteen on September 13, 2008, some two months after Ms. Tierney filed her motion for child support and less than one month after the magistrate filed her decision on August 18, 2008. The magistrate found that the child was working two jobs, that she was enrolled in high-school classes "on-line," and that she should remain in Ms. Tierney's custody with "no child support to be paid. Case closed."

{¶33} As there was no error of law in the magistrate's decision, the trial court properly adopted the decision, overruling Ms. Tierney's objections after conducting an independent review of the record, Ms. Tierney's objections, and the magistrate's decision. Further, the trial court did not abuse its discretion in overruling her motion for

relief from judgment, as Ms. Tierney failed to demonstrate a meritorious claim if such relief was granted.

{¶34} Ms. Tierney's second assignment of error is without merit.

{¶35} The judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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{¶36} I respectfully dissent from the majority.

{¶37} Civ.R. 53 does not require a complete transcript of proceedings to be filed in order to sustain objections to the magistrate's report.

{¶38} Civ.R. 53(D)(3)(b)(iii) states:

{¶39} "An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), 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. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other

good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections."

{¶40} In fact, if a magistrate's findings or decisions are insufficient or incorrect, as a matter of law, on their face, this is inherently an abuse of discretion. Although we review the trial court's findings under an abuse of discretion standard, we review errors of law de novo. Similarly, as an error of law due to misapplication of a statute, is inherently an abuse of discretion.

{¶41} When the court awarded or changed custody on January 1, 2008, it erred in not determining or reviewing the issue of support. See R.C. 3103.03.

{¶42} Since this was not appealed, so we decline to review it. However, the mother's application for a modification of support filed on June 23, 2008, was awarded retroactive to the date of filing once the hearing was held and the motion and judgment entered. See, generally, *Howell v. Howell*, 7th Dist. No. 08 CO 4, 2008-Ohio-6639.

{¶43} Furthermore, Ms. Tierney had the right to receive child support until the child turns 18 or graduates from high school. R.C. 3103.03. The court was required to make that finding as well as the best interest determination for terminating support, or to find the child no longer is eligible for support. See, e.g., *Ankney v. Bonos*, 9th Dist. No. 23178, 2006-Ohio-6009.

{¶44} The lack of proper findings by the magistrate and the judge in the judgment entry created an entry that did not comport with the statute and was insufficient as a matter of law on its face.

{¶45} Accordingly, I dissent.