[Cite as *In re L.P.R.*, 2012-Ohio-1671.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN RE: L.P.R., A MINOR CHILD	**:**	**O P I N I O N**
	:	**CASE NO. 2010-L-144**

Civil Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2010 DP 00988.

Judgment: Affirmed.

Svetlana Schreiber, 1370 Ontario, Suite 1620, Cleveland, OH 44113 (For Appellant-Kim Martin).

Mario Pacheco Rodriguez, pro se, 155 Morse Avenue, Painesville, OH 44077 (Appellee).

Carlota Rodriguez, pro se, 155 Morse Avenue, Painesville, OH 44077 (Appellee).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Kim Martin, appeals from a judgment of the Lake County Court of Common Pleas, Juvenile Division, adopting a magistrate's decision and dismissing her dependent complaint.

{¶2} Appellees, Mario and Carlota Rodriguez, are the natural parents of L.P.R. ("minor child"), who was born on October 7, 1994. Appellees and their son are citizens of Mexico. They have resided in the United States without legal status since 2000.

{¶3} Appellant, the minor child's high school principal, filed a complaint in dependency pursuant to R.C. 2151.04 and an amended petition for adjudication of dependency, alleging that the minor child is dependent. Appellant specifically claimed that neither parent has taken any steps to ameliorate their son's immigration situation; they have allowed their son to work in violation of the law; and they have permitted him to drive in automobiles operated by individuals who have no legal driving privileges. Appellant further alleged that in March 2010, the minor child was driven home from work by an undocumented individual who was not licensed or authorized to drive. The automobile was stopped by Mentor police, and the minor child was detained and turned over to Immigration and Customs Enforcement ("I.C.E.") Appellant maintains that appellees' inadequate care resulted in their son's traumatic arrest which placed him in immediate danger of removal from the United States. Appellees did not file an answer to the complaint.

{¶4} An adjudicatory hearing was held before a magistrate. At that hearing, appellees waived their right to counsel and presented no evidence. Appellant testified and presented the testimony of three witnesses, including the minor child, Gary Echt, a licensed professional clinical counselor, and Michelle Norton, an immigration attorney, who collectively established the following:

{¶5} Appellees have not taken any action to correct their family's immigration status, even though there have been two separate forms of "amnesty" since their entry into the United States, which provided a means to legalization for undocumented aliens.

{¶6} The minor child worked at a Mexican restaurant for about five or six months. On the night at issue, he was transported home by his friend's mother, a

woman named Agiana, who also worked at the restaurant. Agiana was an undocumented alien and did not have a driver's license. The Mentor police stopped Agiana's vehicle and ultimately arrested Agiana, her son, and the minor child.

{¶7} The Mentor police contacted and later transferred the three to the custody of I.C.E. I.C.E. officials transported Agiana, her son, and the minor child to Erie, Pennsylvania. The following morning, I.C.E. released Agiana and her son from custody but did not release the minor child. An I.C.E. official subsequently transported the minor child to Pittsburgh, Pennsylvania. I.C.E. officials then drove the minor child to the airport where he boarded a flight to Florida. After arriving in Florida, I.C.E. officials transported the minor child to a facility named Boystown where he was detained for a few weeks. The minor child was ultimately released from Boystown and returned to Ohio.

{¶8} The minor child was later diagnosed with post-traumatic stress disorder as a result of the incident. The minor child, however, described his home life in a positive manner. He described his parents as "nice" and by no means either physically or emotionally abusive.

{¶9} Following the hearing, the magistrate filed a decision finding that appellees have always been loving parents and have taken care of the minor child's basic needs; appellees did not abandon the minor child; and appellant failed to demonstrate by clear and convincing evidence that the minor child is dependent as defined in R.C. 2151.04. The magistrate recommended to dismiss appellant's complaint. Appellant did not file objections. The juvenile court adopted the magistrate's decision in its entirety.

{¶10} Fifteen days after the magistrate filed his decision, appellant filed a motion for an extension of time to file objections. The court denied that motion. Thereafter, appellant filed a motion for reconsideration and a motion requesting findings of fact and conclusions of law. The court denied those motions as well.

{¶11} Appellant filed a timely notice of appeal from the juvenile court's adoption of the magistrate's decision dismissing her complaint and asserts the following assignments of error:

{¶12} "[1.] The trial court committed plain error in finding that Appellant failed to meet her burden of demonstrating by clear and convincing evidence that the minor child is a dependent as defined in Ohio Revised Code 2151.04.

{¶13} "[2.] The trial court committed plain error in failing to adequately record the proceedings at the adjudicatory hearing before Magistrate Wuliger as required by Juvenile Rule 37(A).

{¶14} "[3.] The trial court committed plain error by denying Appellant's post-hearing motions."

{¶15} In her first assignment of error, appellant argues the juvenile court committed plain error in finding that she failed to meet her burden of demonstrating by clear and convincing evidence that the minor child is dependent as defined in R.C. 2151.04. Appellant maintains the court's decision finding the minor child to not be dependent was against the manifest weight and sufficiency of the evidence. Appellant stresses that but for appellees' failure to provide adequate parental care, the minor child would not have been arrested, detained, and placed into removal proceedings.

{¶16} Preliminarily, we note that a party's failure to object to a magistrate's decision operates as a waiver of the right to assign as error that aspect of the court's adoption of the magistrate's decision, except for a claim of plain error. Juv.R. 40(D)(3)(b)(iv). "'In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.'" *In re A.J.,* 11th Dist. No. 2010-T-0041, 2010-Ohio-4553, at ¶40, quoting *Heerlein v. Farinacci*, 11th Dist. No. 2008-G-2818, 2008-Ohio-4979, ¶17.

{¶17} A juvenile court's adjudication regarding a claim of dependency must be supported by clear and convincing evidence. *In re Anthony*, 11th Dist. No. 2002-A-0096, 2003-Ohio-5712, at ¶16. "Clear and convincing evidence is more than a mere preponderance of the evidence; it is evidence sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Krems*, 11th Dist. No. 2003-G-2535, 2004-Ohio-2449, at ¶36, citing *In re Holcomb* (1985), 18 Ohio St.3d 361, 368.

{¶18} Appellate courts apply the criminal standard for reviewing manifest weight challenges in juvenile proceedings. *In re Savchuk*, 180 Ohio App.3d 349, 2008-Ohio-6877, at ¶28. "Under this standard, when reviewing a claim that a judgment was against the manifest weight of the evidence, an appellate court must review the entire record, weigh both the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts, the trier of fact clearly lost its

way and created *** a manifest miscarriage of justice ***." Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶19} "'[O]nce the clear and convincing standard has been met to the satisfaction of the (juvenile) court, the reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy this burden of proof.'" *In re Savchuk*, supra, at ¶29, quoting *In re Holcomb*, supra, at 368. Sufficiency is a legal term of art describing the legal standard which is applied to determine whether the evidence is legally sufficient to support the judgment as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶20} R.C. 2151.04 defines a "dependent child" as a minor:

{¶21} "(A) Who is homeless or destitute or without adequate parental care, through no fault of the child's parents, guardian, or custodian;

{¶22} "(B) Who lacks adequate parental care by reason of the mental or physical condition of the child's parents, guardian, or custodian;

{¶23} "(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship ***."

{¶24} "'A finding of dependency under R.C. 2151.04 focuses on whether the child is receiving proper care and support. *In re Walling*, 1st Dist. No. C-050646, 2006-Ohio-810, ¶16, citing *In re Bibb* (1980), 70 Ohio App.2d 117, *** (***). Therefore, the determination must be based on the condition or environment of the child, not the fault of the parents. *In re Bishop* (1987), 36 Ohio App.3d 123, 124, *** (***); *In re Burchfield* (1988), 51 Ohio App.3d 148, 156, *** (***). That being said, a court may consider a parent's conduct insofar as it forms part of the child's environment. See *In re Burrell*

(1979), 58 Ohio St.2d 37, 39, *** (***).'" *State ex rel. Swanson v. Hague*, 11th Dist. No. 2009-A-0053, 2010-Ohio-4200, at ¶24, quoting *In re Z.P.*, 5th Dist. No. 20008CA00209, 2009-Ohio-378, at ¶17. (Parallel citations omitted.)

{¶25} Given that the present environment of the minor child is the critical factor in determining whether he is dependent, the evidence establishes that none of the three statutory definitions was met. First, there is no evidence that the minor child was homeless, destitute or without adequate parental care. R.C. 2151.04(A). Gary Echt, the licensed professional clinical counselor that interviewed the minor child, testified that the minor child described his home life in a positive manner, described his parents as "nice," and stated that they were neither physically nor emotionally abusive. Second, there is no evidence that the minor child lacked adequate parental care by reason of the mental or physical condition of his parents. R.C. 2151.04(B). There is no mention in the record regarding any mental or physical conditions of appellees. Third, there is no evidence that the nature of the minor child's condition or environment was such that the intervention of appellant was justified. R.C. 2151.04(C). Although appellees and their son are citizens of Mexico and the incident at issue was truly unfortunate, we fail to find that the minor child's condition or environment warranted a finding of dependency.

{¶26} Based upon the evidence presented at the adjudicatory hearing, as previously discussed, we find the juvenile court did not commit plain error in finding that appellant failed to meet her burden of demonstrating by clear and convincing evidence that the minor child is dependent as defined in R.C. 2151.04. We determine that there is nothing to suggest that any of the evidence is legally insufficient to support the juvenile court's judgment or that its judgment is based on an irrational view of the

evidence. We also determine that there is nothing to suggest that the trier of fact clearly lost its way and created a manifest miscarriage of justice.

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

{¶28} In her second assignment of error, appellant contends the juvenile court committed plain error in failing to adequately record the proceedings before the magistrate at the adjudicatory hearing as required by Juv.R. 37(A). Appellant asserts the court improperly prohibited her from correcting the record by submitting an App.R. 9(C) statement.

{¶29} Juv.R. 37(A) states in part: "[t]he 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. ***"

{¶30} "Although failure to make *any* record of adjudicatory and dispositional proceedings clearly violates Juv.R. 37(A), failure to create a *complete* record does not always violate the rule." *In re Mitchell*, 11th Dist. Nos. 2002-L-078 and 2002-L-079, 2003-Ohio-4102, at ¶26. (Emphasis sic.) If portions of a record are inaudible but there is no difficulty in fully understanding the development of the proceedings regarding the facts at issue, there is no violation of Juv.R. 37(A). Id. at ¶29.

{¶31} App.R. 9(C) states in part: "[i]f no recording of the proceedings was made, if a transcript is unavailable, or if a recording was made but is no longer available for transcription, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection."

{¶32} Appellant relies on *In re B.E.*, 102 Ohio St.3d 388, 2004-Ohio-3361, for the proposition that "[w]hen 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. Appellant's reliance on that case, however, is misplaced. In *In re B.E.,* a hearing was tape-recorded, but the juvenile court failed to record the entire proceeding, which ended abruptly during the critical testimony of a witness. Id. at ¶2. The Ohio Supreme Court held that the procedures outlined in App.R. 9 are designed for situations where a transcript is unavailable. Id. at ¶14.

{¶33} Unlike the facts in *In re B.E.,* in our case, the juvenile court recorded the entire proceeding, which included the testimony of all four witnesses. The court complied with the requirements of Juv.R. 37(A) in making a record.

{¶34} Appellant correctly points out that she retained a registered professional reporter to transcribe the proceeding. The reporter filed an affidavit with the juvenile court maintaining that transcription would not be possible due to many inaudibles. Thereafter, appellant prepared an App.R. 9(C) statement to be submitted in lieu of a transcript. The court struck appellant's statement after listening to the recording in its entirety and determining that it was audible. Following the court's finding, appellant retained another reporter to transcribe the record of the adjudicatory hearing.

{¶35} This court has reviewed the transcript in its entirety. Although small portions of the record are inaudible, there is no difficulty in fully understanding the development of the proceedings regarding the facts at issue. Thus, there is no violation of Juv.R. 37(A). *In re Mitchell*, supra, at ¶29. As such, because a recording was made, and a transcript is available and was transcribed, App.R. 9(C) does not apply. Also,

appellant failed to inform the court with specificity what evidence or prejudicial errors, if any, were contained in the inaudible portions of the record. See *In re Mitchell*, supra, at ¶30. The juvenile court's recording of the proceeding does not amount to plain error under Juv.R. 37(A).

{¶36} Appellant's second assignment of error is without merit.

{¶37} In her third assignment of error, appellant alleges that the juvenile court committed plain error in denying her post-hearing motions for an extension of time to file objections to the magistrate's decision, for reconsideration, and for findings of fact and conclusions of law.

{¶38} "'The grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of the trial judge.'" *DePizzo v. Stabile*, 11th Dist. No. 2006-T-0027, 2006-Ohio-6102, at ¶7, quoting *State v. Unger* (1981), 67 Ohio St.2d 65, paragraph one of the syllabus. "'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" *DePizzo* at ¶8, quoting *Unger* at 67.

{¶39} "*** [A] magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. ***" Juv.R. 40(D)(3)(a)(ii).

{¶40} "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the

decision during that fourteen-day period as permitted by Juv.R. 40(D)(4)(e)(i). ***" Juv.R. 40(D)(3)(b)(i).

{¶41} "*** 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." Juv.R. 40(D)(3)(b)(iii).

{¶42} "For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. 'Good cause' includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision." Juv.R. 40(D)(5).

{¶43} In our case, the magistrate filed his decision on November 8, 2010. The juvenile court adopted that decision four days later. Pursuant to Juv.R. 40(D)(3)(b)(i), appellant had 14 days to file objections to the magistrate's November 8, 2010 decision. However, as she concedes, appellant did not file objections within that 14-day period. Rather, on November 23, 2010, one day after the 14-day period, appellant filed a motion for an extension of time to file objections. In her motion, appellant alleged that the magistrate's decision should have contained findings of fact, and that she was in the process of obtaining the transcript.

{¶44} The juvenile court denied appellant's untimely motion for the following reasons: pursuant to Juv.R. 40(D)(3)(a)(ii), findings of fact and conclusions of law are not required by law and no timely request was made; and pursuant to Juv.R.

40(D)(3)(b)(iii), a party has 30 days to file a transcript after filing objections, may supplement the timely filed objections after a transcript is prepared, and appellant's desire to not file objections until after she has reviewed the transcript does not amount to "good cause" for an extension of time under Juv.R. 40(D)(5).

{¶45} The circumstances of the present case justify the denial of appellant's post-hearing motions. Appellant waited until the day after her objections were due to file a motion for an extension of time. Appellant did not demonstrate the existence of circumstances that prevented her from timely filing objections to the magistrate's decision. Appellant was not entitled to an extension of time merely because she requested one. *DePizzo*, supra, at ¶13. The juvenile court did not commit plain error in denying appellant's post-hearing motions.

{¶46} Appellant's third assignment of error is without merit.

{¶47} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas, Juvenile Division, is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.