[Cite as *In re K.E.C.*, 2010-Ohio-2819.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN THE MATTER OF:	**:**	**O P I N I O N**
K.E.C., DEPENDENT CHILD	**:**	**CASE NO. 2009-T-0035**
	:	

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 07 JC 244.

Judgment: Reversed and remanded.

Elise M. Burkey, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483-5805 (For Appellant, Megan Coward, Mother).

Dwight Smith, pro se, 226 Highland Avenue, Newton Falls, OH 44444 (Appellee, Uncle).

Jacqueline Smith, pro se, 226 Highland Avenue, Newton Falls, OH 44444 (Appellee, Aunt).

Craig H. Neuman and *Susan Porter Collins*, Trumbull County Children Services Board, 2282 Reeves Road, N.E., Warren, OH 44483 (For Appellee, Trumbull County Children Services Board).

Kimberly A. Kohli, 3680 Starrs Centre Drive, Canfield, OH 44406-9514 (Guardian ad litem).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Megan Coward, mother of K.E.C. ("minor child"), appeals from the March 18, 2009 judgment entry of the Trumbull County Court of Common Pleas, Juvenile Division, overruling her objections to the magistrate's decision and granting

legal custody of the minor child to the minor child's paternal uncle and aunt, appellees, Dwight and Jacqueline Smith ("the Smiths").

{¶2} Appellant is the mother of three children: a set of twins, L.P. and A.P. ("twins"), d.o.b. October 28, 2005, and the minor child, d.o.b. March 18, 2008.

{¶3} While appellant was pregnant with the minor child, appellee, Trumbull County Children Services Board ("TCCSB") filed a complaint for dependency and neglect with respect to the twins on August 10, 2007. On August 13, 2007, Attorney Kimberly A. Kohli ("GAL") was appointed as the guardian ad litem and counsel for the twins.

{¶4} Adjudicatory and dispositional hearings with regard to the twins were held on September 12, 2007. TCCSB had been providing services to the family at issue since January of 2007. The trial court determined there were issues of inappropriate supervision, lack of medical care, delayed immunizations, alcohol abuse, poor home conditions, and conflict between the parents and third parties in the home who were usurping the minimal assets and resources of the family. However, at the time of the hearings, appellant had obtained a medical card for the twins, improved the home conditions, and posted no trespassing signs at the home.

{¶5} Pursuant to his September 12, 2007 decision, the magistrate found the twins dependent. The trial court approved and adopted the magistrate's decision on October 2, 2007. Appellant maintained temporary custody of the twins subject to an order of protective supervision. Appellant was to obtain prenatal care, complete a drug and alcohol assessment, submit to random screens, complete a psychological evaluation, follow treatment recommendations, complete an assessment for anger

management, complete parenting classes, and maintain her home free of known felons and persons likely to engage in domestic violence.

{¶6} On December 12, 2007, TCCSB filed a motion for ex-parte temporary orders due to appellant's failure to follow court orders. Specifically, appellant had not completed her drug and alcohol assessment and refused to take random screens. In addition, there was a domestic violence incident at appellant's home where her new boyfriend attempted to break in with an ax. There were also other existing warrants for the boyfriend's arrest. Further, appellant had permitted third parties into the home and her utilities were shut off.

{¶7} On December 12, 2007, the trial court issued a judgment entry, ordering temporary custody of the twins to TCCSB, and directing TCCSB to relocate the twins to a safe placement with a relative or to place them in foster care, pending a shelter care hearing. On December 13, 2007, a shelter care hearing was held. TCCSB continued to hold temporary custody of the twins, with visitation permitted to family.

{¶8} A dispositional review hearing was held on January 9, 2008. Pursuant to his decision, the magistrate determined that temporary custody of the twins, subject to an order of protective supervision, be granted to the paternal grandparents, Larry and Terri Pigg ("the Piggs"). The trial court approved and adopted the magistrate's decision on January 23, 2008.

{¶9} On March 18, 2008, appellant gave birth to the minor child. She had entered the Beatitude House, a supervised residential facility that deals with income and housing problems.

{¶10} On April 2, 2008, TCCSB filed a complaint for dependency with respect to the minor child. The GAL was appointed as the guardian ad litem and counsel for the minor child on April 4, 2008. On April 15, 2008, appellant filed a motion to regain custody of the twins. The GAL filed her report on April 23, 2008, recommending that it would be in the minor child's best interest to reside with appellant and in the best interests of the twins to restore allocation of parental rights and responsibilities to appellant, as she had been complying with her case plan.

{¶11} Adjudicatory and dispositional hearings were held on April 23, 2008. Pursuant to his April 23, 2008 decision, the magistrate found the minor child dependent. Since appellant was at the Beatitude House, the trial court granted her temporary custody of the minor child, subject to an order of protective supervision, on May 15, 2008.

{¶12} A review hearing was held on June 19, 2008, with regard to appellant's motion concerning the twins. Pursuant to his June 19, 2008 decision, the magistrate determined that appellant should be granted temporary custody of the twins, subject to an order of protective supervision. The trial court approved and adopted the magistrate's decision on June 26, 2008.

{¶13} Appellant failed to comply with the trial court's orders and the rules of the Beatitude House. For example, the twins were discovered unsupervised in their apartment playing with a full tub of bath water; were found outside of the apartment by other residents; and had not been properly cleaned or fed. Appellant was asked to leave the facility because she did not follow house rules.

{¶14} Because appellant violated the terms of the trial court's protective supervision order, TCCSB filed a motion for modification of dispositional orders on September 18, 2008. A review hearing was held on October 8, 2008. Appellant did not appear. At the time of that hearing, the paternal grandparents, the Piggs, had completed a full home evaluation for custody. They were willing to take legal custody of the twins, but were hesitant to take full custody of the infant minor child at that point of their lives. The Piggs agreed to take temporary custody of the minor child while other relative options could be identified.

{¶15} Pursuant to his October 8, 2008 decision, the magistrate determined that legal custody of the twins and temporary custody of the minor child be granted to the Piggs. The trial court approved and adopted the magistrate's decision on October 24, 2008.

{¶16} On February 19, 2009, TCCSB filed a motion to grant legal custody of the minor child to the minor child's paternal uncle and aunt, the Smiths. A review hearing was held on March 2, 2009. It was determined that appellant maintained limited contact with her assigned caseworker; had no housing; no income; and no driver's license.

{¶17} Pursuant to his March 2, 2009 decision, the magistrate determined that it would be in the best interests of the minor child to grant legal custody to the Smiths, who had completed a full home evaluation and were appropriate custodians. Appellant filed objections to the magistrate's decision on March 16, 2009.

{¶18} Pursuant to its March 18, 2009 judgment entry, the trial court overruled appellant's objections, and approved and adopted the magistrate's decision, granting

legal custody of the minor child to the Smiths. It is from that judgment that appellant filed a timely appeal, raising the following assignments of error for our review:

{¶19} "[1.] THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MOTHER'S REQUEST FOR A CONTINUANCE BECAUSE OF HER SUBSTANTIAL COMPLIANCE WITH THE CASE PLAN.

{¶20} "[2.] THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING MOTHER SUCH RESTRICTIVE VISITATION AS IT WAS A DENIAL OF VISITATION AGAINST THE GUARDIAN AD LITEM'S RECOMMENDATION AND BY THEN ALLOWING THE FATHER TO CONTINUE TO RESIDE IN THE HOME AND VISIT THE CHILDREN WITHOUT ANY ATTEMPTS ON HIS PART TO COMPLETE HIS CASE PLAN.

{¶21} "[3.] THE TRIAL COURT ABUSED ITS DISCRETION IN PLACING THE CHILDREN WITH A PATERNAL RELATIVE WITHOUT FURTHER INQUIRY INTO A CRIMINAL CHARGE FILED AGAINST HIM."

{¶22} For ease of discussion, we will consider appellant's assignments of error out of order.

{¶23} In her third assignment of error, appellant maintains that the trial court abused its discretion in overruling her objections to the magistrate's decision, only two days after filing, without an independent review or additional hearing. We agree.

{¶24} "The standard of review generally applied when reviewing a court's adoption of a magistrate's decision is abuse of discretion. *Wade v. Wade* (1996), 113 Ohio App.3d 414, 419 ***; *Stafinsky v. Stafinsky* (1996), 116 Ohio App.3d 781, 785 ***." *Defrank-Jenne v. Pruitt*, 11th Dist. No. 2008-L-156, 2009-Ohio-1438, at ¶8. (Parallel

citations omitted). An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. Therefore, "abuse of discretion" describes a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶25} Appellant cites Civ.R. 53(D)(4)(d), which provides: "[i]f 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. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate."

{¶26} In addition, Civ.R. 53(D)(3)(b)(iii) states: "[a]n 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."

{¶27} We note that this matter was a juvenile court proceeding, therefore, Juv.R. 40(D)(3)(b)(iii) is the applicable rule, and states: "*** [a]n objection to a factual finding, whether or not specifically designated as a finding of fact under Juv.R. 40(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."

{¶28} The language of Civ.R. 53(D)(3)(b)(iii) and Juv.R. 40(D)(3)(b)(iii) is nearly identical. Both state that a party who objects to a magistrate's decision has thirty days to provide the record of the magistrate's proceedings.

{¶29} In the case at bar, a hearing was held before the magistrate on March 2, 2009. Appellant filed objections to the magistrate's decision on March 16, 2009. Thus, pursuant to Juv.R. 40(D)(3)(b)(iii), appellant had until April 15, 2009, to file a supporting transcript or affidavit. See *Pruitt*, supra, at ¶11. However, on March 18, 2009, only two days after appellant filed her objections, the trial court issued its judgment entry, overruling appellant's objections in a handwritten note, and approving and adopting the magistrate's decision.

{¶30} Juv.R. 40(D)(3)(b)(iii) unambiguously grants a litigant thirty days in which to file a transcript in support of objections. "*** [A] court does not act reasonably when it

affords a party less than thirty days from the date on which objections are filed to submit a transcript or affidavit in support." *Pruitt*, supra, at ¶14. It is irrelevant whether appellant did or did not actually request a transcript or proceedings at the time she filed her objections. Id. at ¶15. "The rule is clear -- a party who objects to a magistrate's ruling has thirty days to provide the record of the magistrate's proceedings." Id.

{¶31} Clearly, the record reveals here that the rule was not followed. Although the transcript from the March 2, 2009 hearing before the magistrate was filed upon appeal, appellant was not given the full thirty-day opportunity to file it with the trial court when it ruled on her objections. Thus, this court cannot consider it. See *In re Stambolia*, 11th Dist. No. 2006-T-0005, 2006-Ohio-4314, at ¶19.

{¶32} Appellant's third assignment of error is with merit.

{¶33} Because we have determined that the trial court erred by overruling appellant's objections to the magistrate's decision, only two days after she filed them, our disposition of appellant's third assignment of error renders her first and second assignments of error moot. A determination of the first two assignments would have no effect upon the controversy at issue at this time, and thus will not be addressed in this opinion. See App.R. 12(A)(1)(c); *State v. Miller* (1996), 113 Ohio App.3d 606, 610.

{¶34} For the foregoing reasons, appellant's third assignment of error is well-taken, and her first and second assignments of error are moot. The judgment of the Trumbull County Court of Common Pleas, Juvenile Division, is reversed and the matter is remanded for further proceedings consistent with this opinion. It is ordered that

appellees are assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J., concurs,

MARY JANE TRAPP, P.J., dissents with Dissenting Opinion

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{¶35} I must respectfully dissent as Ms. Coward neither requested a transcript nor sought leave to do so. Judge Cannon's dissent in *Pruitt* is cogent and is in keeping with the clear import of the extensive changes to Civ.R. 53 and Juv.R. 40, which became effective in 2006. His reasoning is equally applicable to this case:

{¶36} "If appellant had actually requested a transcript of the proceedings before the magistrate or sought leave to supplement the objections with the transcript of proceedings, I would agree with the majority. However, the record is void of any request for a transcript to be prepared. ***.

{¶37} "*** Appellant did not seek leave of the court to supplement the objections as per the rule, and the relief requested by her gives no indication to the trial court that a request for a transcript is forthcoming. Accordingly, under these facts, I cannot say the trial court abused its discretion in overruling appellant's objections to the magistrate's decision prior to the expiration of the deadline to file a transcript." *Pruitt* at ¶19-20.

{¶38} As the majority relies on its opinion in *Pruitt*, a closer look at *Pruitt* is warranted. The majority in *Pruitt* cites only to *Cavo v. Cavo*, 4th Dist. No. 05CA14, 2006-Ohio-928, in support of its proposition that the amendments of Civ.R. 53, which

became effective July 1, 2006, "unambiguously" grant a litigant thirty days in which to file a transcript. *Cavo*, however, was decided prior to the July 1, 2006 amendments, and discussed an Eleventh District case, *Cunnane-Gygli v. MacDougal,* 11th Dist. No. 2004-G-2597, 2005-Ohio-3258, where we *affirmed* the trial court's denial of appellant's motion to supplement her objections with a transcript as untimely. The appellant provided no reason for her delay, and thus we found the trial court did not abuse its discretion.

{¶39} In cases where the trial court has ruled in less than thirty days and it was found to be an abuse of discretion to do so, the appellant had already requested the transcript and informed the court it would be forthcoming. See, e.g., *Black v. Brewer*, 178 Ohio App.3d 113, 2008-Ohio-4365; *Gruger v. Diversified Air Systems, Inc.,* 7th Dist. No. 05-MA-103, 2006-Ohio-3568.

{¶40} Although the Fifth District declined to address this issue in *Blaser v. McNulty*, 5th Dist. No. 2006 CA 00222, 2007-Ohio-3320, as the appellant raised the thirty-day question for the first time in his reply brief, the court held the trial court did "not err in summarily overruling appellant's objections to the magistrate's decision. The appellant did not request a transcript at the time he filed his objection or request that a transcript of the proceedings before the magistrate be prepared. He did not seek leave to supplement his objections when a transcript became available." Id. at ¶27.

{¶41} I can find no support in the plain language of the rule or in case law interpreting the rule for the majority's pronouncement which effectively amends the rule to provide that the trial judge must wait thirty days to rule on objections because the objecting party has thirty days to provide the record. In fact, the rule is designed to

timely resolve disputes after a hearing while maintaining due process via the objections process. See the early Staff Notes to the amendments to Juv.R. 40 in which it was explained that "[a]ll of these provisions reflect what has been existing practice in many courts in response to increased pressure on the court system to process a burgeoning caseload efficiently and expeditiously. Due process considerations mandate that access to the court via the objection process be retained." Staff Notes to the 7-1-95 Amendment.

{¶42} This is the reasoning behind the rule that provides "the court may enter a judgment either during the fourteen days permitted by Juv.R. 40(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the fourteen days have expired." To move the case along to resolution the court may enter a judgment. If there are objections they must be filed within fourteen days of the decision. The rule presumes that the transcript will be requested prior to or, at the very latest, at the time the objections are filed and gives the objector thirty days from that date to file the transcript. This is why the rule permits the objector to seek leave of court to *supplement* the objections if the objector had to file the objections *"prior to the date on which the transcript is prepared."* If, indeed, the drafters of the rule had intended to allow the objector to wait a full thirty days to request a transcript it would have said so and other time periods within the rule would have been adjusted accordingly.

{¶43} For these reasons, I would affirm the decision of the trial court.