[Cite as *In re A.L.W.*, 2012-Ohio-1458.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

IN RE:	**:**	**O P I N I O N**
A.L.W., A.L.W., AND A.L.W., JR.,		
ABUSED AND DEPENDENT CHILDREN	**:**	**CASE NOS. 2011-P-0050,**
		2011-P-0051,
	:	**and 2011-P-0052**

Civil Appeals from the Portage County Court of Common Pleas, Juvenile Division, Case Nos. 2011 JCC 00166, 2011 JCC 00167, and 2011 JCC 00168.

Judgment: Reversed and remanded.

Neil P. Agarwal, 3766 Fishcreek Road, Suite 289, Stow, OH 44224-4379 (For Appellant).

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Appellee).

Leonard J. Breiding, II, 4825 Almond Way, Ravenna, OH 44266 (Guardian ad litem).

MARY JANE TRAPP, J.

{¶1} Anthony L. Wilson appeals from the judgments of Portage County Court of Common Pleas, Juvenile Division, regarding the adjudication and disposition of his three children. Finding that the trial court failed to safeguard his rights as a biological father, we reverse the court's judgments and remand this matter for further proceedings consistent with this opinion.

Substantive Facts and Procedural History

{¶2} Mr. Wilson, a prison inmate, has three children with Vincentia D. Stewart: A.L.W., born 9/26/1998, A.L.W., born 4/28/2000, and A.L.W., born 11/18/2002. (As these children have the same initials, we refer to them hereafter as Child 1, Child 2, and Child 3, respectively.) Ms. Stewart has a fourth child, L.D.H. ("Child 4"), fathered by another individual. This appeal involves Mr. Wilson's rights as the biological father of Child 1, 2, and 3 regarding their adjudication and disposition; Child 4 is not part of this appeal.

{¶3} Ms. Stewart's boyfriend, Rodney Jews, provided childcare for all four children. In January 2011, the Portage County Department of Job and Family Services ("PCDJFS") received a report that Child 1 had been hit on the head by Mr. Jews. Further investigation revealed that Child 1 told Ms. Stewart that Mr. Jews had hit her, called her names, and touched her "swimsuit parts" while alone with him, although Ms. Stewart did not believe the allegations.

{¶4} On February 25, 2011, the PCDJFS filed two complaints alleging Child 1 was abused and all four children were neglected and dependent. The agency's subsequent investigations revealed that Mr. Jews had allegedly engaged in sexual conduct with Child 1 on several occasions. Ms. Stewart also informed the agency that Mr. Jews hid from her his previous rape conviction involving his former girlfriend's 16-year-old daughter.

{¶5} The docket reveals the following procedural history following the filing of these complaints:

{¶6} On February 25, 2011, the magistrate held a shelter care hearing. On March 4, 2011, the magistrate issued an order committing the children to the interim pre-dispositional custody of PCDJFS. The matter was then set for an adjudicatory hearing on March 22, 2011. Attorney Theresa Farwell was appointed by the court to represent Mr. Wilson.

{¶7} Mr. Wilson, through counsel, requested transportation to the court in order to attend the adjudicatory hearing. The magistrate denied the request on the ground that the agency's complaints did not allege any conduct of Mr. Wilson that related to the abuse, neglect, and dependency alleged in the complaints.

{¶8} On March 22, 2011, the adjudicatory hearing took place. Mr. Wilson did not attend, but he was represented by Attorney Farwell. On March 29, 2011, the magistrate issued a decision finding Child 1 abused and all four children dependent, pursuant to stipulations by Ms. Stewart. The court, however, continued the adjudicatory hearing to April 21, 2011, to allow for proper service on the biological father of Child 4.

{¶9} On April 1, 2011, Attorney Farwell filed a motion to withdraw on the grounds that Mr. Wilson found her representation inadequate and had discharged her. On April 4, 2011, the magistrate granted counsel's motion to withdraw, after finding good cause. Two days later, Mr. Wilson himself filed a motion to remove counsel, which the magistrate found moot.

{¶10} On April 18, 2011, Mr. Wilson filed a motion requesting transportation to the April 21, 2011 adjudicatory hearing, as well as a motion for discovery. The magistrate denied the motion for transportation, and instructed the PCDJFS to make a good faith effort to comply with Mr. Wilson's discovery request.

{¶11} The continued adjudicatory hearing took place as scheduled. Mr. Wilson did not attend, nor did he have legal representation at the proceeding. On April 28, 2011, the magistrate issued a decision finding Child 1 abused and all of the children dependent, and committing the children to the interim pre-dispositional custody of the agency. The magistrate then scheduled the dispositional hearing for May 17, 2011.

{¶12} Mr. Wilson did not attend the dispositional hearing, but was represented by Attorney Neil Agarwal. On May 24, 2011, the magistrate issued a decision granting temporary custody of the children to the PCDJFS.

{¶13} Mr. Wilson, pro se, filed a "Motion to Set Aside and Objection According to Civ.R. 53 & Juv.R. 40 to Magistrate Decision and/or Order." He objected to the May 17, 2011 dispositional hearing and the magistrate's decision on May 24, 2011 granting the temporary custody of his children to the agency. Although he referenced those dates, a review of his memorandum in support indicates his objections actually concerned his lack of counsel at the April 21, 2011 adjudicatory hearing. On June 7, 2011, the trial court overruled his objections.

{¶14} On June 22, 2011, Mr. Wilson, pro se, filed a notice of appeal. In the notice, he stated his appeal was being taken from the trial court's May 24, 2011 and June 7, 2011 judgment entries, in which the trial court granted temporary custody to the agency.

{¶15} Mr. Wilson, now represented by Attorney Agarwal on appeal, raises the following assignments of error for our review:

{¶16} "[1.] The Appellate Court lacks jurisdiction to hear this appeal as there is no final appealable order or ruling. (3/29/11 and 4/28/11 Journal Entry).

{¶17} "[2.] The Trial Court committed reversible error by proceeding to the adjudicatory hearing when Father had not been properly served a copy of the summons in accordance with R.C. 2151.29, and therefore, the Court lacked personal jurisdiction over the Father. (8/1/11 T.d. for 2011 JCC 166, 167, and 168, T.d. p.5).

{¶18} "[3.] The Trial Court committed reversible error by allowing Father's attorney to withdraw without just cause and by not re-appointing new counsel for Father after his appointed counsel was removed. (A 9; 4/4/11 T.d. p. 9 for 2011 JCC 166; T.d. p.8 for 2011 JCC 167 and 168).

{¶19} "[4.] The trial court committed revisable error by not transporting Father from prison in order to allow him to be present and participate in the adjudicatory and dispositional hearings. (4/21/10 Adjudicatory Hearing, T.p.p. 2-3, 5/17/2011 Dispositional Hearing, T.p.p. 55).

Final Appealable Order

{¶20} The assignments of error raised by Mr. Wilson in this case present us with a rather unusual procedural posture. On the one hand, Mr. Wilson asks us to review several issues regarding the adjudicatory hearing. On the other hand, he, the *appellant*, claims this court lacks jurisdiction to review those claims. He contends there was no final, appealable order regarding the March 29, 2011 and April 28, 2011 judgment entries adjudicating the children as abused and/or dependent.

{¶21} Mr. Wilson claims a lack of final appealable order on the ground that the trial court adopted the magistrate's decisions adjudicating the children as abused and/or dependent without issuing a "separate and distinct" entry.

{¶22} The record reflects that the trial court's order upon the magistrate's March 29, 2011 and April 28, 2011 decisions consisted of a one-sentence entry appearing at the end of the documents containing the magistrate's decision. It read, "Upon independent review, the Court adopts the Magistrate's Decision as the Order of the court and orders that it be entered as a matter of record. So ordered."

{¶23} This court and several other districts have established that a judgment entry which adopts a magistrate's decision but fails to enter judgment through a "separate and distinct" entry, does not constitute a final, appealable order. *Condron v. City of Willoughby Hills*, 11th Dist. No. 2007-L-015, 2007-Oho-5208, ¶29, citing *In re Castrovince*, 11th Dist. No. 96-P-0175, 1996 Ohio App. LEXIS 6226, *4-5 (Aug. 16, 1996). In order to be a final, appealable order, the trial court, in adopting the magistrate's decision, must enter "a judgment that is a straight forward statement of the holding. * * * [T]he inclusion of the magistrate's decision by reference without more does not satisfy this requirement." *Castrovince* at *4.

{¶24} Accordingly, we agree with Mr. Wilson that the trial court's entries regarding the children's adjudication were not "separate and distinct," and therefore not final, appealable orders. However, that fact is immaterial here because a judgment entry issued after an adjudicatory hearing is a not final appealable order unless it is accompanied by an order of disposition. *See,* e.g., *In re K. M.*, 3d Dist. Nos.17-11-15, 17-11-16, and 17-11-17, 2011-Ohio-3632, ¶22. Were Mr. Wilson to have taken an appeal from these judgments, we would not have a final appealable order for review.

{¶25} However, Mr. Wilson's notice of appeal indicates he appealed from the court's judgment awarding the temporary custody. The Supreme Court of Ohio, in *In re*

Murray, 52 Ohio St.3d 155 (1990), made it clear that such an order is final and appealable:

{¶26} "An adjudication by a juvenile court that a child is 'neglected' or 'dependent' as defined in R.C. Chapter 2151 followed by a disposition awarding temporary custody to a public children services agency pursuant to R.C. 2151.353 (A)(2) constitutes a 'final order' within the meaning of R.C. 2505.02 and is appealable to the court of appeals pursuant to R.C. 2501.02." *Id*. at syllabus.

{¶27} Thus, because Mr. Wilson appeals from the trial court's disposition awarding temporary custody, we have the jurisdiction to entertain this appeal. The first assignment of error is without merit.

{¶28} Having resolved the final, appealable order issue, we now proceed to the merits of Mr. Wilson's appeal. He presents two claims: (1) he was not properly served by the juvenile court; and (2) his rights were violated because he was neither transported for participation at the adjudicatory hearing, nor represented by counsel. We address the service issue first.

Service

{¶29} The jurisdiction of a juvenile court does not attach until proper notice of the proceedings has been provided to the parties. *In re Cowling*, 72 Ohio App.3d 499, 502 (9th Dist.1991). A number of rules and statutes govern the service of process for juvenile proceedings.

{¶30} Juv.R. 16(A) states that, unless otherwise provided, "summons shall be served as provided in Civil Rules 4(A), (C), and (D), 4.1, 4.2, 4.3, 4.5 and 4.6." Civ.R. 4.1 describes the methods of service permitted within the state (except for service by

publication) and provides that service shall be made by certified or express mail, or, if requested, by personal or residential service.

{¶31} R.C. 2151.29 also governs service for juvenile proceedings. It states:

{¶32} "Service of summons, notices, and subpoenas, prescribed by section 2151.28 of the Revised Code, shall be made by delivering a copy to the person summoned, notified, or subpoenaed, or by leaving a copy at the person's usual place of residence. If the juvenile judge is satisfied that such service is impracticable, the juvenile judge may order service by registered or certified mail. If the person to be served is without the state but the person can be found or the person's address is known, or the person's whereabouts or address can with reasonable diligence be ascertained, service of the summons may be made by delivering a copy to the person personally or mailing a copy to the person by registered or certified mail."

{¶33} Here, the record reflects that on February 25, 2011, the juvenile court sent a copy of the agency's complaint, by certified mail, to Mr. Wilson at London Correctional Institution. The summons notified him that an adjudicatory hearing regarding his children was to be held on March 22, 2011. A signed receipt was returned to the clerk of court on March 22, 2011, and the docket indicates the certified mail was successfully served on February 28, 2011.

{¶34} On appeal, Mr. Wilson does not contest that he received service by way of certified mail. Rather, he claims R.C. 2151.29 requires the trial court to make a finding that personal service, i.e., having a process server hand the notice to the person, was impracticable before the court can effectuate service by certified mail.

{¶35} Mr. Wilson's contention is not supported by the case law. The courts have always recognized the validity of service by certified mail. *See, e.g*., *In re D.P.*, 8th Dist. Nos. 86271 and 86272, 2006-Ohio-937, ¶20; *In the Matter of Winland*, 5th Dist. No. CT2008-0030, 2008-Ohio-6476, ¶25. Furthermore, our reading of R.C. 2151.29, which states "if the juvenile judge is satisfied that such service is impracticable, the juvenile judge may order service by registered or certified mail," does not indicate the juvenile judge must issue a separate order for service.

{¶36} Mr. Wilson cites *In re S. S.,* 9th Dist. No. 10CA0010, 2010-Ohio-6374. That case, however, does not support his claim. There, the agency served the summons on the mother by ordinary mail. The court invalidated the service because the summons was served on the mother by regular mail, "as opposed to personal delivery, residential delivery, registered mail, certified mail, or express mail." *Id*. at ¶24.

{¶37} In any event, personal jurisdiction may be obtained by service of process, voluntary appearance, or waiver. *Maryhew v. Yova*, 11 Ohio St.3d 154, 156 (1984). The record reflects Mr. Wilson acknowledged his "full knowledge of the summons issued" in an affidavit filed with the trial court, and he also participated, through counsel, at the March 22, 2011 adjudicatory hearing. Finally, an objection to personal jurisdiction is waived by a party's failure to assert a challenge to such jurisdiction at its first appearance in the case. *McBride v. Coble Express, Inc.*, 92 Ohio App.3d 505, 510 (3d Dist.1993). Mr. Wilson never objected to personal jurisdiction at the proceedings below and, therefore, he has waived the claim.

{¶38} The second assignment of error is without merit.

Whether a Biological Father's Rights Were Violated When He Was Neither Present Nor Represented at the Adjudicatory Proceeding

{¶39} The third and fourth assignments of error concern whether Mr. Wilson's rights as a biological parent were violated when he was neither present nor represented by counsel at the adjudicatory hearing. We address these assignments together.

{¶40} The record reflects that an initial adjudicatory hearing took place on March 22, 2011, at which Mr. Wilson was represented by Attorney Farwell. The hearing, however, was continued for further hearing so the court could provide proper notice to the biological father of Child 4.

{¶41} In the meantime, the relationship between Mr. Wilson and his attorney deteriorated. On April 4, 2011, Attorney Farwell filed a motion to withdraw as counsel. She stated she had been discharged by Mr. Wilson, who was dissatisfied with her representation. Furthermore, Mr. Wilson had filed several pleadings pro se and failed to communicate with her regarding these filings. The record indicates Mr. Wilson himself also moved the court to remove counsel because he was unhappy that he had not been provided with the case plan for his review through the discovery procedure.

{¶42} The case plan, submitted on March 22, 2011 by the agency, revealed that Mr. Wilson had indicated to the agency that he would like to be a part of his children's lives, and that Mr. Wilson had provided the agency with names of potential relatives with whom the children could reside until he is released from prison. The case plan required him to contact the agency upon release from prison in 2014, to discuss the role he would play in the children's lives and to determine appropriate case plan objectives.

{¶43} On April 4, 2011, the magistrate granted counsel's motion to withdraw. At a hearing next day, the magistrate noted for the record that "apparently the relationship between Mr. Wilson and his counsel of record dissolved and she's been permitted leave

to withdraw. He's now unrepresented. As to whether he gets another lawyer or not remains to be seen. He's got to re-apply to the court and we don't keep appointing attorneys to people who just keep causing grief with their attorneys, so he may or may not be represented the next time it comes up."

{¶44} At the April 21, 2011 adjudicatory hearing, Mr. Wilson was neither present nor represented by counsel.

{¶45} The record does not reflect Mr. Wilson received any notice that he needed to take some further action to have new counsel appointed, until *after* the April 21, 2011 adjudicatory hearing. In a May 6, 2011 judgment entry, the trial court overruled Mr. Wilson's objection to the magistrate's April 18, 2011 decision which had refused to transport him or allowing telephone/video attendance at the proceedings. In that entry, the court noted: "If Mr. Wilson requests new counsel, in writing, the Court will consider the request." This is the first indication that the court advised Mr. Wilson he would not have new counsel appointed until he made such a request. The record reflects that at the May 17, 2011 dispositional hearing, Mr. Wilson was represented by Attorney Neil Agarwal.

{¶46} We begin with the recognition that "[a]n individual does not have an absolute right to be present in a civil case to which he is a party." *In the Matter of Joseph P.*, 6th Dist. No. L-02-1385, 2003-Ohio-2217, ¶52, citing *In re Sprague*, 113 Ohio App.3d 274 (12th Dist.1996). More specifically, prisoners have no constitutional right to be personally present at any stage of the judicial proceedings. *Mancino v. Lakewood*, 36 Ohio App.3d 219, 221 (8th Dist.1987).

{¶47} However, we also recognize that the "[f]undamental liberty interest of natural parents in care, custody and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745 (1982), paragraph one of the syllabus.

{¶48} Several of our sister districts have held that the failure to transport a parent from the prison to a permanent custody hearing does not violate a parent's due process rights, when: "(1) the parent is represented at the hearing by counsel, (2) a full record of the hearing is made, and (3) any testimony that the parent wishes to present could be presented by deposition." *Joseph* at ¶52, citing *In the Matter of Leo D., Deandre E., and Desandra E*., 6th Dist. No. L-01-1452, 2002-Ohio-1174, citing *In re Frasher*, 9th Dist. No. 18100, 1997 Ohio App. LEXIS 3746 (Aug. 20, 1997) . Although these cases involve permanent custody proceedings, we find them equally applicable to adjudicatory or temporary custody proceedings.

{¶49} Finally, a trial court's decision as to whether to allow an incarcerated individual to be transported for appearance at a civil action is within the sound discretion of the trial court. *Mancino* at ¶221. *See also State ex rel. Vanderlaan v. Pollex*, 96 Ohio App.3d 235, 236 (6th Dist.1994) ; *Joseph* at ¶51 (a trial court has the discretion to decide whether to proceed with the hearing without having an incarcerated parent conveyed); *In the Matter of R.D., A.D., and E.D.*, 2d Dist. No. 08-CA-26, 2009-Ohio-1287, ¶12 .

{¶50} As this court recently stated, the term "abuse of discretion" is one of art, "connoting judgment exercised by a court, which does not comport with reason or the

record." *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11. As Judge Fain explained, when an appellate court is reviewing a pure issue of law, "the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Id.* ¶67.

{¶51} Here we do not fault the trial court for permitting Attorney Farwell to withdraw as counsel. However, the court abused its discretion in allowing the April 21, 2011adjudicatory hearing to take place without either Mr. Wilson's presence or representation by counsel. The court should have safeguarded his rights as a biological parent, either by making arrangements for his participation in the proceedings in some fashion, or by ensuring that he had counsel in place at the hearing. The trial court was not obligated to transport him to the proceeding, but his absence, coupled with a lack of legal representation to which he is entitled to pursuant to R.C. 2151.352, constituted a violation of his rights as a biological parent.

{¶52} We note that, although Mr. Wilson had provided the agency with names of potential relatives with whom the children could reside until he is released from

prison, it somewhat appears from the record that no appropriate relatives were willing to be temporary custodians. Therefore, the trial court, faced with the urgency of the children's placement and a lack of alternative placements, understandably decided to go forward with the adjudicatory hearing on April 21, 2011, after Mr. Wilson discharged his attorney on short notice. Our sanctioning of the proceedings in this case, however, will create a dangerous precedent that there is no violation of a biological parent's right when the parent is neither present nor represented by counsel at an adjudicatory or dispositional proceeding. We are unwilling to do so. We do recognize, however, the trial court may make a specific finding that a waiver of counsel could be inferred considering the totality of the circumstances, or, that the parent has expressly waived counsel. *See, e.g, In re C.H.*, 162 Ohio App.3d 602, 2005-Ohio-4183 (3d Dist.).

{¶53} The state has conceded the third and fourth assignments of error, and we find them well-taken.

{¶54} At the oral argument, we were advised by the agency's counsel that the agency had not filed a motion for a dispositional order 30 days prior to the expiration of the temporary dispositional order, and that, as a result, the temporary custody order would expire around February 24, 2012, a year after the complaint was filed, pursuant to R.C 2151.353(F). The agency's counsel appeared to claim that the trial court no longer has jurisdiction over this case due to the "sunset" provision of R.C. 2151.353(F), precluding a remand of this case.

{¶55} Pursuant to R.C. 2151.353 (F), "[a]ny temporary custody order * * * shall terminate one year after the earlier of the date on which the complaint in the case was filed * * *, except that, upon the filing of a motion pursuant to section 2151.415 of the

Revised Code, the temporary custody order shall continue and not terminate until the court issues a dispositional order under that section."

{¶56} R.C. 2151.415 provides that a public children services agency that has been given temporary custody shall file a motion no later than 30 days prior to the statutory "sunset" date, requesting a dispositional order, such as an order for the child to be returned home without any restrictions, for protective supervision, or for permanent custody. R.C. 2151.415(A).

{¶57} Regarding the appellee's counsel's claim, first, we note that appellate review is "limited to the record as it existed at the time the trial court rendered its judgment." *Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. Nos. 11AP-64 and 11AP-282, 2011-Ohio-5616, ¶13 (citations omitted). Appellee's counsel's representation at the oral argument is not proper evidence for our consideration, as our review is limited to the record transmitted to us from the trial court.

{¶58} Second, counsel's claim that the trial court automatically loses jurisdiction upon the "sunset" date is incorrect. In *In re Young Children*, 76 Ohio St.3d 632 (1996), the Supreme Court of Ohio addressed the question of whether a juvenile court loses jurisdiction to enter dispositional orders upon expiration of the "sunset" date pursuant to R.C. 2151.353(F); the court answered it in the negative. *Id.* at 636-637. When the sunset date expires, the juvenile court retains jurisdiction over the child and may make further dispositional order as it deems necessary to protect the child. *In re R.A.*, 172 Ohio App.3d 53, 2007-Ohio-2997 (3d Dist.), citing *In re Young* at 638.

{¶59} As the Supreme Court of Ohio explained in *In re Young*, such a holding "allows the juvenile court to assess each situation on its merits, and does not mandate

the return of children to a situation from which they originally needed protection solely because the agency charged with their care missed a filing deadline." *In re Young* at 638. The court therefore concluded that "when the sunset date has passed without a filing pursuant to R.C. 2151.415 and the problems that led to the original grant of temporary custody have not been resolved or sufficiently mitigated, courts have the discretion to make a dispositional order in the best interests of the child." *Id*. Contrary to the appellee's counsel's assertion, therefore, the trial court does not automatically lose jurisdiction upon the expiration of the "sunset" date, which is not part of the instant appellate record in any event.

{¶60} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, Juvenile Division, is reversed and the case is remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.