

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

IN THE MATTER OF:

K.P.R.

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CASE NO. CA2011-03-023

OPINION
11/28/2011

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 10-C01172

Tyler P. Webb, 5374 Cox-Smith Road, Suite A, Mason, Ohio 45040, guardian ad litem

Rittgers & Rittgers, Renee L. Crist, 12 East Warren Street, Lebanon, Ohio 45036, for
petitioner-appellee

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POWELL, P.J.

{¶1} The biological father of a 15-year-old boy asks this court to overturn a
decision of the Warren County Juvenile Court granting stepfather's request to have a set
schedule of visitation with the boy after the boy's mother died suddenly. We affirm the
juvenile court's visitation decision, finding the juvenile court had jurisdiction to consider the
visitation request and father waived his other arguments when he failed to object to the
magistrate's decision, but vacate the juvenile court's property order as being without

jurisdiction.

{¶2} According to the record, K.P.R. lived with his mother and stepfather, and father exercised parenting time. The boy's parents were never married and stepfather was part of the child's life for 13 years, and married to the child's mother for 11 years. Mother died suddenly in August 2010, while K.P.R. was visiting with father. The boy remained in father's home.

{¶3} In September 2010, stepfather filed a motion in juvenile court for custody or, in the alternative, for visitation. The juvenile court magistrate issued a 14-page decision that indicated stepfather was not seeking custody at that time, but wanted a set schedule for visitation. The magistrate noted that father said he did not oppose visitation, but didn't want a set schedule and wanted to control the amount of visitation. The magistrate awarded visitation for the stepfather in conformance with the juvenile court's "Basic Parenting Schedule, Basic I."

{¶4} While no order is part of the record provided to this court, it appears the court permitted father to take some of K.P.R.'s belongings from the stepfather's home after mother's death. The father also removed furniture from K.P.R.'s room at the same time. The magistrate ordered father to return to stepfather the bed, mattress, box springs, dresser with mirror, and nightstand.

{¶5} The juvenile court adopted the decision on the same day it was filed. Neither party objected to the magistrate's decision. This appeal was taken by father, raising six assignments of error for our review.

{¶6} The first question that this court must address is the consequence of father's failure to file objections to the magistrate's decision. Father's appellate counsel argues that father was precluded from filing objections with the juvenile court because the juvenile court adopted the magistrate's decision. The juvenile rules, as outlined below,

clearly indicate otherwise. We also note that the magistrate's decision contained a number of paragraphs at the end of the decision that outlined the procedures under Juv.R. 40.

{¶7} A party may file written objections to a magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Juv.R. 40(D)(4)(e)(i). Juv.R. 40(D)(3)(b)(i); see comparable rules of Civ.R. 53 and Crim.R. 19. A magistrate's decision is not effective unless adopted by the court. Juv.R. 40(D)(4)(a). If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision. Juv.R. 40(D)(4)(c).

{¶8} The court may enter a judgment either during the 14 days permitted by Juv.R. 40(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the 14 days have expired. Juv.R. 40(D)(4)(e)(i). If the court enters a judgment during the 14 days permitted by Juv.R. 40(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered. *Id.*

{¶9} Juv.R. 40(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 * * * unless the party has objected to that finding as required by Juv.R. 40(D)(3)(b)." This waiver under the rule embodies the long-recognized principle that the failure to draw the trial court's attention to possible error when the error could have been corrected results in a waiver of the issue for purposes of appeal. *In re C.P.*, Brown App. No. CA2010-12-025, 2011-Ohio-4563.

{¶10} This court previously ruled that unless the appellant argues a "claim of plain

error," appellant has waived the claimed errors not objected to below. See *State v. Shie*, Butler App. No. CA2007-02-038, 2008-Ohio-350, ¶45 (this court has construed a similar provision in Civ.R. 53 literally, and found that where a party fails to expressly raise a claim of plain error on appeal, we need not consider whether plain error exists); *In re D.R.*, Butler App. No. CA2009-01-018, 2009-Ohio-2805, ¶30 (appellant did not specifically object to the magistrate's foregoing finding and does not claim plain error here and is thereby precluded from raising this issue on appeal); *Allgeier v. Allgeier*, Clinton App. No. CA2009-12-019, 2010-Ohio-5313, ¶¶22-23, (by failing to raise the issue in his objection, or argue plain error in his brief, appellant is prohibited from challenging the court's custody determination for the first time on appeal); *In re C.P.*, 2011-Ohio-4563 at ¶35.

{¶11} Accordingly, father has waived most, but not all, of his assignments of error by failing to object to the magistrate's decision. Three of father's assignments of error—the first and sixth—challenge the subject matter jurisdiction of the juvenile court, and the fifth assignment of error will be incorporated into the first assignment of error. The issues raised in those assignments will be discussed below.

{¶12} Assignment of Error No. 1:

{¶13} "THE TRIAL COURT ERRED IN NOT DISMISSING THE STEP-FATHER'S MOTION FOR CUSTODY."

{¶14} In this assignment of error, father argues that juvenile court did not have jurisdiction over a case filed under the nonparent visitation statute of R.C. 3109.11 and because stepfather originally requested custody, jurisdiction did not extend to visitation only issues.

{¶15} It is axiomatic that subject-matter jurisdiction cannot be waived, cannot be conferred upon a court by agreement of the parties, and may be the basis for sua sponte dismissal. *Bureau of Support v. Brown*, Carroll App. No. 00AP0742, 2001-Ohio-3450.

Lack of subject-matter jurisdiction is not a waivable defense and may be raised for the first time on appeal. *Id.* Subject matter jurisdiction focuses on the court as a forum and on the case as one of a class of cases, not on the particular facts of a case or the particular tribunal that hears the case. *Id.*

{¶16} According to the record, stepfather filed a motion for custody, or in the alternative, for parenting time. Father argues that juvenile court is a court of limited jurisdiction, thereby possessing only those powers the Ohio General Assembly conferred upon it. Section 4(B), Article IV of the Ohio Constitution. Father's argument principally relies on a statute and an Ohio Supreme Court case.

{¶17} Specifically, father cites to R.C. 2151.23, which states, in pertinent part, that a juvenile court has jurisdiction to determine the custody of any child not a ward of another court of this state. He also relies on the Ohio Supreme Court case of *In re Gibson* (1991), 61 Ohio St.3d 168. In *Gibson*, a grandfather sought visitation with a child whose married parents were living, but had denied him visits. The *Gibson* grandfather tried unsuccessfully to argue that R.C. 2151.23 permitted a request for visitation to be addressed under the umbrella of "custody" matters.

{¶18} The *Gibson* court said visitation and custody are related but distinct concepts. The *Gibson* court found that in a case in which a nonparent (grandparent) sought only visitation, a juvenile court may not determine that issue pursuant to its authority to determine "custody" of children under R.C. 2151.23(A)(2). *Id.* at syllabus.

{¶19} The *Gibson* court further noted three statutes that permit nonparental visitation: R.C. 3109.051 (nonparent visits may be granted in cases involving divorce, dissolution of marriage, legal separation, annulment, or child support proceedings that involve a child); R.C. 3109.11 (nonparent visits may be granted in cases involving persons related to child's deceased parent); and "in one departure from the 'disruptive precipitating

event' principle, R.C. 3109.12 has been added to allow grandparent visitation in the case of a child * * * born to an unmarried woman." Id. at 170.

{¶20} The *Gibson* court found the circumstances in its case did not meet the criteria of R.C. 3109.12 and no "disruptive precipitating event" had occurred in its case to fall under R.C. 3109.11 or R.C. 3109.051.

{¶21} In the case at bar, *Gibson* does not preclude the juvenile court from hearing stepfather's motion for visitation as this case involves a "disruptive precipitating event," namely, mother's death. The juvenile court recognized that R.C. 3109.11 provided it the authority to consider stepfather's request for visitation.

{¶22} R.C. 3109.11 states, in pertinent part: "If either the father or mother of an unmarried minor child is deceased, the court of common pleas of the county in which the minor child resides may grant the parents and other relatives of the deceased father or mother reasonable companionship or visitation rights with respect to the minor child during the child's minority if the parent or other relative files a complaint requesting reasonable companionship or visitation rights and if the court determines that the granting of the companionship or visitation rights is in the best interest of the minor child. In determining whether to grant any person reasonable companionship or visitation rights with respect to any child, the court shall consider all relevant factors, including, but not limited to, the factors set forth in division (D) of section 3109.051 of the Revised Code. Divisions (C), (K), and (L) of section 3109.051 of the Revised Code apply to the determination of reasonable companionship or visitation rights under this section and to any order granting any such rights that is issued under this section."

{¶23} If stepfather qualifies as a "relative" under R.C. 3109.11, he could ask the juvenile court in this case to entertain his request for visitation. Father challenges in his fifth assignment of error whether stepfather has standing as a "relative" under R.C.

3109.11. Since the issue of whether stepfather is a "relative" capable of using R.C. 3109.11 to invoke the jurisdiction of juvenile court, we will address the issue of whether stepfather is a "relative" for purposes of the statute. See *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, fn. 4, 1998-Ohio-275 (term "jurisdiction" has different meanings depending upon the context in which it is used and the subject matter to which it is directed; standing is jurisdictional only in limited cases involving administrative appeals, where parties must meet strict standing requirements in order to satisfy the threshold requirement for the administrative tribunal to obtain jurisdiction).

{¶24} The Ninth Appellate District in *Goeller v. Lorence*, Lorain App. No. 06CA008883, 2006-Ohio-5807, found by using the term "relative," the legislature in R.C. 3109.11 had not differentiated between relationships by consanguinity and relationships by affinity. *Id.* at ¶16; Black's Law Dictionary (8 Ed.2004) 63, 322 ("affinity," in part, is a relationship by marriage and "consanguinity," in part, is relationship of persons of the same blood or origin); see *McFall v. Watson*, 178 Ohio App.3d 540, 2008-Ohio-5204; *In re R.V.*, 190 Ohio App.3d 313, 2010-Ohio-5050, ¶13-15 (paternal grandmother was relative of grandchildren's deceased mother by affinity and could seek visitation under visitation statute); *In re LaPiana*, Cuyahoga App. Nos. 93691, 93692, 2010-Ohio-3606 ("relative" includes persons related by consanguinity and persons related by affinity and relationships by affinity are generally those created by marriage, such as father- or mother-in-law, or stepparent [Rocco, P.J., dissenting on a separate issue]); see *In re Sadie Elizabeth S.*, Fulton App. No. F-05-028, 2006-Ohio-2928, ¶78 (standing issue did not arise when step-grandparent moved for visitation).

{¶25} It appears from the record that stepfather is related by affinity, as the spouse of the child's mother. Father now argues that stepfather is a former relative because stepfather's wife is deceased. This argument is rejected on the basis of *Goeller*, which

indicated that the widow of the child's parent who remarried was still related by affinity as that person was still the deceased parent's widow. See *Id.* at ¶12, 13 (death did not sever relationship by affinity with spouse; stepparent had standing as a relative to request visitation even though he remarried after the death of his spouse, the child's mother). In this case, stepfather is the deceased parent's widow. Therefore, stepfather had standing to move for visitation.

{¶26} Accordingly, stepfather is a relative who could request visitation under R.C. 3109.11 and the juvenile court had jurisdiction to consider the motion. Father's first and fifth assignments of error are overruled.

{¶27} Assignment of Error No. 2:

{¶28} 'THE TRIAL COURT ERRED IN GRANTING PARENTING TIME PURSUANT TO OHIO REVISED CODE §3109.51(D).'

{¶29} Assignment of Error No. 3:

{¶30} "THE COURT DID NOT GIVE THE PARENT'S WISHES SUFFICIENT WEIGHT IN ALLOWING PARENTING TIME WITH A STEP-FATHER."

{¶31} Assignment of Error No. 4:

{¶32} "THE COURT ERRED IN THE AMOUNT OF PARENTING TIME IT AWARDED TO THE STEP-FATHER."

{¶33} Based on father's failure to raise these issues in objections to the magistrate's decision and his failure to claim plain error on appeal, father waives any error for his second, third, and fourth assignments of error and those assignments of error are overruled.

{¶34} Assignment of Error No. 6:

{¶35} "THE JUVENILE COURT ERRED IN DECIDING PROPERTY ISSUES."

{¶36} Father argues that the juvenile court had no jurisdiction to determine

"property settlements" in this visitation case. This assignment of error is based on the juvenile court's order that father return furniture he removed from the child's room at mother and stepfather's home after the death of the mother.

{¶37} Father again cites to R.C. 2151.23, which defines juvenile court jurisdiction, for his argument that the court had no authority to order that property be turned over to him in the first place and also does not have jurisdiction to order that the furniture be returned to stepfather.

{¶38} First, we note the original order is not part of the record provided to this court. However, we rely on two cases to assist this court in finding that the juvenile court did not have jurisdiction over the property at issue.

{¶39} In the case of *Miller ex rel. Lafountain v. McMichael*, Paulding App. No. 11-03-08, 2003-Ohio-6713, ¶11, the appellant asked the juvenile court to determine, among other issues, whether compensation for the use of decedent's furniture was an asset of decedent's estate. The Third Appellate District found that probate court had exclusive jurisdiction to decide questions of title to claimed assets of the estate and the appellant's additional requests "have to do with the disposition of [deceased's] property, and, thus, are matters for the probate court to determine."

{¶40} The appellate court said there was no authority granting a juvenile court jurisdiction to determine matters of decedent's estate. "Thus, while the Paulding County Probate Court would have had jurisdiction to determine whether Appellee's support arrearages were an asset of Miller's estate, the Paulding County Juvenile Court lacked such jurisdiction. Accordingly, the judgment in this case must be vacated." [Footnotes and internal citations omitted.] *Id.* at ¶12.

{¶41} In *Matter of Gerken* (Nov. 9, 1990), Wood App. No. WD-90-9, 1990 WL 174324, the Sixth Appellate District did not find it was "within a juvenile court's jurisdiction

to order that the personal property of an abused child, held by another, be returned to such child. A cause of action for wrongfully held property, while certainly recognized as a valid claim for which relief can be granted in this state, must be brought in the court having jurisdiction over such action."

{¶42} In the case at bar, we could not locate any authority giving the juvenile court jurisdiction to order the disposition of property from mother and stepfather's home. Father's sixth assignment of error is sustained, and the juvenile court's order to return the furniture to stepfather is vacated.

{¶43} Judgment affirmed as to the juvenile court's visitation order and vacated as to the order requiring father to return furniture to stepfather.

RINGLAND and HENDRICKSON, JJ., concur.