

[Cite as *In re B.S.*, 2011-Ohio-47.]

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

IN THE MATTER OF: : CASE NO. CA2010-05-007  
B.S. : OPINION  
 : 1/10/2011  
 :  
 :

APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS  
JUVENILE DIVISION  
Case No. 20084235

Gray W. Bennett, 200 West Main Street, Eaton, Ohio 45320, for appellant

Andres D. Lucia, P.O. Box 122, Troy, Ohio 45373, for appellee

Ann Ratcliff, 722 Rockhurst Circle, Troy, Ohio 45373, Guardian Ad Litem

**YOUNG, P.J.**

{¶1} Appellant appeals the decision of the Preble County Court of Common Pleas, Juvenile Division, returning custody of her grandson, B.S., to appellee, the child's biological mother (Mother).

{¶2} B.S. was born in August 2006. Appellant is his paternal grandmother (Grandmother). The record indicates that B.S. was removed from his home, where his father and Mother were running a meth lab, when he was an infant, was placed in

the temporary custody of Grandmother and her husband in February 2007, and was adjudicated a dependent child in July 2007. Grandmother subsequently moved for legal custody of B.S. By entry filed on February 5, 2008, the trial court granted legal custody of B.S. to Grandmother, increased Mother's visitation, and modified the temporary custody of the Preble County Job and Family Services, Children's Services Division (the Agency), to protective supervision for no less than six months. The entry further stated:

{13} "That mother \*\*\* may petition the Court at the appropriate time for return of custody of the child upon 'change of circumstances', which shall include substantial completion of all case plan objectives and/or compliance with all community control sanctions previously imposed[.]"

{14} In November 2008, Mother moved to have legal custody of her son returned to her. The motion stated that since the February 2008 entry, "there has been a change of circumstances \*\*\* justifying a change of custody in the best interest of the minor child. [Namely, Mother] has complied with all of the case plan objectives, has complied with all community control sanctions previously imposed and has regained custody of two other minor children."

{15} The motion further stated: "On or about April 14, 2008, [the Agency] petitioned this Court for an order terminating the protective supervision and indicated that such protective supervision was no longer necessary as two other minor children had been placed into the legal custody of the Mother. The Agency's motion further stated that the Mother 'has maintained full-time employment, housing and provisions of the children's needs as well as demonstrated increased parenting skills.'" A hearing was held on the motion in June and August 2009.

**{¶16}** On March 12, 2010, based upon the evidence presented and the language of the February 2008 entry, the magistrate returned legal custody of the child to Mother. Grandmother filed objections to the magistrate's decision. Specifically, Grandmother argued the magistrate should have applied R.C. 3109.04(E)(1)(a) in its change of circumstances analysis, and not the change of circumstances set forth in the February 2008 entry. The juvenile court overruled Grandmother's objections as follows:

**{¶17}** "[T]he paternal grandmother (her son, the father, is in prison on felony charges) received custody from the mother with the mother's consent by agreed entry. [The grandmother] now wants to retain custody with the benefit of the standard 'change of circumstances' requirement, despite the agreed entry stating, specifically, what [the mother] had to do to receive custody of the child back. The arguments were not convincing to the Magistrate or the Court in light of the progress made by the mother to date, and considering the parties' agreed entry."

**{¶18}** Grandmother appeals, raising three assignments of error.

**{¶19}** Assignment of Error No. 1:

**{¶110}** "THE TRIAL COURT ERRED IN THAT THE MAGISTRATE FAILED TO PROPERTY [SIC] APPLY THE LAW IN THIS CHANGE OF CUSTODY MATTER."

**{¶111}** In determining whether there was a change of circumstances warranting the return of B.S. to Mother, the magistrate declined to apply R.C. 3109.04(E)(1)(a) as urged by Grandmother and instead, applied the change of circumstances as defined in the February 2008 entry (Mother's substantial completion of all case plan objectives and/or compliance with all community control sanctions previously imposed). The magistrate stated:

{¶12} "Here, there was an entry filed in the dependency case wherein the parties spelled out what would constitute a 'change of circumstances' in this specific case. \*\*\* Thus, it seems that the parties agreed to use a different standard in this case. As both parties relied on the provisions contained in the agreed entry, the Court is not now inclined to ignore those provisions."

{¶13} Thereafter, the magistrate focused primarily on the change of circumstances regarding Mother. Upon finding several changes of circumstances in Mother, including the changes of circumstances set forth in the entry, and two changes of circumstances in the child (he was older and doing better health wise), the magistrate proceeded to a lengthy and detailed analysis of the best interest of the child. Finding it was in B.S.'s best interest to return custody to Mother, and that any harm that may result would be outweighed by the benefits to be achieved, the magistrate granted Mother's motion for return of custody. The juvenile court affirmed the magistrate's decision.

{¶14} On appeal, Grandmother argues the magistrate applied the wrong test when it relied on the change of circumstances standard included in the February 2008 entry. Grandmother asserts that pursuant to either R.C. 3109.04(E)(1)(a) or 2151.42, the magistrate was statutorily required to only consider changes of circumstances in either the child or Grandmother before proceeding to a consideration of the best interest of the child.

{¶15} Grandmother first argues the magistrate erred in not applying R.C. 3109.04(E)(1)(a) and cites our decision in *Cravens v. Cravens*, Warren App. No. CA2008-02-033, 2009-Ohio-1733, in support of her argument. We disagree.

{¶16} R.C. 3109.04(E)(1)(a) states in relevant part that:

{¶17} "The court shall not modify a prior decree *allocating parental rights and responsibilities* for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's *residential parent, or either of the parents* subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child." (Emphasis added.)

{¶18} R.C. 3109.04(E)(1)(a) governs the modification of a prior order allocating parental rights and responsibilities. Thus, by its very language, R.C. 3109.04(E)(1)(a) only applies to a modification of a custodial order between the two parents of a child, whether or not the child's parents are married.<sup>1</sup> The case at bar involves custodial proceedings in juvenile court between a parent and a nonparent. R.C. 3109.04(E)(1)(a), therefore, does not apply here. Likewise, our decision in *Cravens* does not apply as the case involved a custodial dispute between the mother and father of a child.

{¶19} Grandmother also argues the magistrate erred in not applying R.C. 2151.42, which provides:

{¶20} "(A) At any hearing in which a court is asked to modify or terminate an order of disposition issued under [R.C.] 2151.353, 2151.415, or 2151.417 \*\*\*, the

---

1. When a juvenile court enters a decision regarding the allocation of parental rights and responsibilities pursuant to R.C. 2151.23 and 2151.353, it must do so in accordance with R.C. 3109.04. *In re Poling* (1992), 64 Ohio St.3d 211, paragraph two of the syllabus. R.C. 2151.353(A)(3) authorizes a juvenile court to award legal custody of an adjudicated dependent child to either parent in the disposition phase of the dependency proceedings. When exercising its jurisdiction in child custody proceedings, the juvenile court is required to do so in accordance with the provisions of R.C. 3109.04, dealing with the allocation of parental rights and responsibilities. R.C. 2151.23(F)(1); *In re Cloud* (May 19, 1997), Butler App. No. CA96-01-002.

court, in determining whether to return the child to the child's parents, shall consider whether it is in the best interest of the child.

{¶21} "(B) An order of disposition issued under [R.C. 2151.353(A)(3), 2151.415(A)(3), or 2151.417] granting legal custody of a child to a person is intended to be permanent in nature. A court shall not modify or terminate an order granting legal custody of a child unless it finds, based on facts that have arisen since the order was issued or that were unknown to the court at that time, that a change has occurred in the circumstances of the child or the person who was granted legal custody, and that modification or termination of the order is necessary to serve the best interest of the child."

{¶22} We note that Grandmother argues the application of R.C. 2151.42 for the first time on appeal. 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 N.E.*, Butler App. No. CA2009-12-300, 2010-Ohio-1815, ¶8, citing *In re Etter* (1998), 134 Ohio App.3d 484, 492. The objections made under this rule must be "specific" and must "state with particularity all grounds for objection." Juv.R. 40(D)(3)(b)(ii). "The failure to file specific objections is treated the same as the failure to file any objections." *In re D.R.*, Butler App. No. CA2009-01-018, 2009-Ohio-2805, ¶ 29.

{¶23} Although Grandmother filed objections to the magistrate's decision, she challenged the magistrate's decision solely under R.C. 3109.04, and not under R.C. 2151.42. Further, she does not claim plain error here. She is therefore precluded from raising this issue on appeal and from challenging the juvenile court's adoption of the magistrate's finding. Juv.R. 40(D)(3)(b)(ii), (iv); *In re D.R.* at ¶30.

{¶24} We next consider whether the magistrate erred in applying the change of circumstances as defined in the February 2008 entry.

{¶25} Parents have a fundamental right to the custody and care of their children. See *Bragg v. Hatfield*, 152 Ohio App.3d 174, 2003-Ohio-1441. "In custody cases between a parent and a nonparent, the overriding principle 'is that natural parents have a fundamental liberty interest in the care, custody, and management of their children,' which is protected by due process." *In re Christian S.*, Erie App. No. E-06-066, 2007-Ohio-5750, ¶25, quoting *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, ¶16. "Where a person accepts the custody of a child by virtue of an agreement with the parents of the child, the contract may be such, and the care and support may be furnished for such a length of time and under such circumstances as to estop the parents from denying that they have relinquished or forfeited their natural right to the custody of the child." *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 66.

{¶26} We turn to the February 2008 entry granting legal custody of B.S. to Grandmother to determine its impact. That is, whether under the specific circumstances of this case, the entry represented a contractual relinquishment of Mother's paramount right to custody, or whether Mother merely consented to a temporary custody of B.S. to Grandmother.

**{¶27}** "When examining a written instrument, the cardinal purpose is to ascertain and give effect to the intent of the parties. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Purvis v. Hazelbaker*, 181 Ohio App.3d 167, 2009-Ohio-765, ¶13 (internal citations omitted.); *In re Christian S.*, 2007-Ohio-5750 at ¶30.

**{¶28}** The February 2008 entry granted "legal custody" of B.S. to Grandmother. "Legal custody" is defined as "a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities." R.C. 2151.011(B)(19).

**{¶29}** "Temporary custody" is defined as "legal custody of a child who is removed from the child's home, which custody may be terminated at any time at the discretion of the court or, if the legal custody is granted in an agreement for temporary custody, by the person who executed the agreement." R.C. 2151.011(B)(53). Thus, "'temporary custody' is, by definition, a form of 'legal custody.'" A crucial difference between the two, however, is that 'legal custody' contemplates a more permanent custodial status for the children vis-à-vis the custodian." *In re Congrove* (Apr. 4, 2000), Ross App. No. 99 CA 2498, 2000 WL 356336, at \*3.

**{¶30}** Upon reviewing the February 2008 entry, we find that, notwithstanding the use of the term "legal custody," the entry did not contemplate a long-lasting

custodial status for B.S. vis-à-vis Grandmother. Rather, the entry is akin to a grant of "temporary custody" to Grandmother. See *In re Christian S.*, 2007-Ohio-5750.

{¶31} The entry provides in pertinent part:

{¶32} "[Grandmother's attorney and Mother's attorney] did articulate to the Court the parties' agreement for the placement of legal custody with [Grandmother and her husband] with further agreement for expanded visitation to mother. It was also agreed that the Agency, upon the parties' agreement and the GAL's recommendation, would retain protective supervision for a minimum of six months from this date.

{¶33} "The Court did confirm with [Grandmother and her husband] their understanding of legal custody, including the mother's residual rights and responsibilities and the *right of mother to petition the Court upon 'change of circumstances' for the return of the child to her custody, which the Court did indicate it would likely approve at the appropriate time.* [Grandmother and her husband] did indicate their understanding of same. The Court did further confirm with [Grandmother and her husband] their understanding that mother was simply, by agreeing to the change of legal custody, that she would not contest the grandparents' motion.

{¶34} "The Court did confirm with [Mother] her understanding of legal custody, including her residual rights and responsibilities and *her right to petition the Court upon 'change of circumstances' for return of the child to her custody, which the Court did indicate it would likely approve at the appropriate time.* [Mother] did indicate her understanding of same. The Court did further confirm with [Mother] her

understanding that she was simply, by agreeing to the change of legal custody, waiving her right to contest the grandparents' motion.

{¶35} \*\*\*\*

{¶36} **"IT IS THE ORDER OF THE COURT**, and the *Court does hereby approve of and adopt the parties' agreement* as follows:

{¶37} "1. That heretofore [Grandmother and her husband] *shall have legal custody and continuous physical placement of the child, pending future court orders;*

{¶38} \*\*\*\*

{¶39} "4. That the Agency's temporary custody is hereby modified to an order of protective supervision, which the Agency shall retain over the child for a minimum period of not less than six months;

{¶40} "5. That *mother may petition the Court at the appropriate time for return of custody of the child upon 'change of circumstances,' which shall include substantial completion of all case plan objectives and/or compliance with all community control sanctions previously imposed[.]*" (Emphasis added.)

{¶41} The award of custody of B.S. to Grandmother in the February 2008 entry was clearly temporary both in its denomination (as evidenced by the language used in the entry) and in terms of the length of time elapsing between the award and Mother's motion for return of custody filed nine months after the entry. *In re Custody of Carpenter* (1987), 41 Ohio App.3d 182, 185. As worded, the entry shows it was understood and agreed by the parties that Grandmother would have temporary custody of B.S. only until such time Mother would substantially complete her case plan objectives and/or comply with her community control sanctions; meanwhile, the

child would continue to live with and be cared for by Grandmother (and not by foster parents who would be strangers).

{¶42} Grandmother has asserted that contrary to the magistrate's decision, the parties had agreed that any change of custody would be governed by statute and not by the entry, and refers to a February 5, 2008 hearing transcript. However, such "agreement" is not reflected in the entry, and there is no evidence in the record that Grandmother challenged the lack of statutory reference in the entry after the entry was filed. If the "agreement" was reached during a February 5, 2008 hearing, Grandmother has failed to file a transcript of the hearing. See *Aurora v. Belinger*, 180 Ohio App.3d 178, 2010-Ohio-6772 (an appellant has the duty to ensure that the record or whatever parts thereof that are necessary for the determination of the appeal are filed with the appellate court).

{¶43} We note that under R.C. 2151.42(A), a juvenile court needs only consider whether the modification or termination of a disposition order issued under R.C. 2151.353 is in the best interest of the child. By contrast, under R.C. 2151.42(B), a juvenile court must also find a change of circumstances in either the child or the legal custodian before it can modify or terminate a disposition order issued under R.C. 2151.353(A)(3). That latter provision governs awards of legal custody and states, in pertinent part, that:

{¶44} "A person \*\*\* shall be *awarded legal custody of the child only if the person identified signs a statement of understanding for legal custody* that contains at least the following provisions: (a) [t]hat it is the intent of the person to become the legal custodian of the child and the person is able to assume legal responsibility for the care and supervision of the child; (b) [t]hat the person understands that legal

custody of the child in question is intended to be permanent in nature and that the person will be responsible as the custodian of the child until the child reaches the age of majority." (Emphasis added.)

{¶45} The foregoing provisions were not included in the February 2008 entry, and in fact are inconsistent with the language of the entry. There is no evidence in the record of a "statement of understanding for legal custody" signed by Grandmother as set forth in R.C. 2151.353(A)(3).

{¶46} In light of all of the foregoing, we find that the magistrate did not err in applying the change of circumstances as defined in the February 2008 entry. The first assignment of error is overruled.

{¶47} Assignment of Error No. 2:

{¶48} "THE TRIAL COURT'S DECISION IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶49} An appellate court reviews a juvenile court's custody determination for an abuse of discretion. *In re H.H.*, Butler App. No. CA2010-02-042, 2010-Ohio-4407, ¶11, citing *In re Brown* (2001), 142 Ohio App.3d 193. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶50} Grandmother's assignment of error asserts the juvenile court's decision returning custody of B.S. to Mother was against the manifest weight of the evidence. An appellate court will not reverse a judgment as being against the manifest weight of the evidence where the judgment is supported by some competent, credible evidence going to all essential elements of the case. *In re H.H.*, 2010-Ohio-4407 at ¶12.

**{¶51}** The child's guardian ad litem was appointed in January 2007 following the removal of B.S. from the house where his father and Mother were running a meth lab. Along with B.S., Mother's two older children from a different relationship were also removed. The Agency developed a case plan; Mother pled guilty to child endangering. Initially, Mother did not meet the case plan objectives and failed some drug tests. However, around February 2008, Mother finally admitted having a substance abuse problem and started complying with the case plan. By the time she moved for the return of B.S. to her in November 2008, Mother had completed all of the case plan objectives and complied with all of her community control sanctions. Specifically, Mother completed her case plan objectives in the spring of 2008, was successfully terminated from community control in August 2008, ten months early, and regained custody of her two older children in June 2008. There are no concerns Mother has a substance abuse problem.

**{¶52}** Mother works for Skyline Chili and was promoted to shift lead. According to her supervisor, Mother has perfect attendance, is always on time if not early, and "does her job and everybody else's." Before she and her two older children moved in her fiancé's house, Mother lived independently in an apartment for a year. Mother gives her fiancé money every month to help out with household expenses. Her fiancé does not help her financially with her two older children. These children are well integrated and are very close to Mother's fiancé; together, the four of them are a family. Mother and the two children have a close bond. Mother's fiancé has been employed by the same company for 25 years.

**{¶53}** When placed with Grandmother in early 2007, and for a year thereafter, B.S. had extensive upper respiratory problems requiring breathing treatments. Now

older, B.S. is doing much better health wise; he still requires daily breathing treatments but does not need the additional breathing treatment as frequently. Mother knows how to and has given him breathing treatments. Grandmother expressed her concern that Mother smokes. However, Grandmother smokes as well. Mother testified she only smokes outside; she does so even when she does not have B.S. The child's guardian ad litem, a non smoker, testified she never smelled smoke in Mother's house.

**{¶54}** In April 2009, following a weekend visitation at Mother's house, B.S. came back with two injuries on his ankle consistent with cigarette burns. Mother testified no one is allowed to smoke around the child. That weekend, she had noticed the injuries but did not know how it had happened. She denied injuring the child. The results of investigations by both the Agency and the Preble County Sheriff's Department regarding the injuries were inconclusive. Grandmother was unsatisfied with the results of the investigations. Thereafter and during the pendency of the custody proceedings, Grandmother filed three motions to suspend or otherwise limit Mother's parenting time.

**{¶55}** Grandmother testified she was opposed to Mother receiving custody of B.S. because there was no bonding between Mother and B.S.; further, there was a lack of understanding or concern by Mother as to the child's needs and the seriousness of his medical issues. Grandmother was the only witness testifying about the lack of bonding between Mother and B.S. Mother's work supervisor, the child's guardian ad litem, and Mother's brother and mother all testified there was a bond between Mother and B.S. Likewise, reports regarding supervised visitation between Mother and B.S. at a "visitation house" indicated a bond between Mother

and the child. However, Grandmother was unconvinced by the reports. Mother's fiancé testified that the bond between Mother and B.S. was impressive, especially considering they had not been able to spend much time together. He also testified he was starting to develop a bond with B.S. There is a close bond between B.S. and his two siblings.

**{¶156}** With the exception of Grandmother, no one was concerned about the child's health or well being if custody was to be returned to Mother. Mother's fiancé testified Mother is very protective of B.S. Grandmother faulted Mother for not attending medical appointments and hospitalizations and for not taking a larger part in the child's medical treatment. However, Mother testified she was not given much information or was told after the facts.

**{¶157}** The guardian ad litem recommended that custody of B.S. be returned to Mother. The guardian ad litem also testified Mother never abandoned B.S. Mother testified she agreed to let Grandmother have custody of B.S. in February 2008 so that Mother could have longer visitation each week. Mother agreed Grandmother provided better care for B.S. than he would have received in a foster home. The record shows Mother's determination and drive to regain custody of all of her children and to correct her past mistakes. Mother testified that as soon as her two older children were returned to her, she went to see her attorney to gain custody of B.S. Grandmother testified B.S. loves his mother.

**{¶158}** In light of all of the foregoing, we find that the decision of the juvenile court returning custody of B.S. to Mother is not against the manifest weight of the evidence and was not an abuse of discretion. The second assignment of error is overruled.

**{¶159}** Assignment of Error No. 3:

**{¶160}** "THE TRIAL COURT FAILED TO COMPLY WITH OHIO RULE OF CIVIL PROCEDURE 53 IN RULING ON DEFENDANT'S OBJECTIONS."

**{¶161}** Civ.R. 53(D)(4)(d) provides in relevant part that "If 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."

**{¶162}** Grandmother argues the juvenile court did not undertake an independent review as required under Civ.R. 53(D)(4)(d) because the court filed its first entry denying her objections before the transcript of the 2009 hearings was completed and before the memorandum in support of the objections was filed.

**{¶163}** The record shows that Grandmother filed her objections on March 15, 2010; the same day, she filed a request for preparation of the transcript of the proceedings. On April 16, the juvenile court overruled the objections. On April 20, upon realizing "it had not reviewed the transcript of the proceedings before the Magistrate which were filed on the 19<sup>th</sup> day of April, 2010," the juvenile court sua sponte suspended its previous entry and noted it would rule on the objections after reviewing the transcripts. On April 26, the juvenile court granted Grandmother's request for a 14-day extension; as a result, Grandmother had until May 3 to file a memorandum in support of her objections.

**{¶164}** On the morning of May 3, having "had an opportunity to review the whole record including the transcript" of the 2009 hearings, the juvenile court overruled Grandmother's objections. Grandmother's memorandum in support of her

objections was filed later that day. On May 6, upon reviewing Grandmother's memorandum, the juvenile court overruled Grandmother's objections.

{¶65} "A party alleging error by the trial court under Civ.R. 53 has an affirmative duty to demonstrate that the trial court failed to conduct an independent review of the magistrate's findings." *In re Taylor G.*, Lucas App. No. L-05-1197, 2006-Ohio-1992, ¶20, citing *Mahlerwein v. Mahlerwein*, 160 Ohio App.3d 564, 2005-Ohio-1835. An appellate court generally presumes the regularity in the proceedings below. *In re Taylor G.* at ¶21.

{¶66} Contrary to Grandmother's assertion, simply because the objections were prematurely overruled by the juvenile court is insufficient to affirmatively demonstrate the court failed to conduct an independent review of the magistrate's findings. While the juvenile court twice prematurely ruled on Grandmother's objections (on April 16 and May 3), each time it recognized its mistake in doing so. In its third and final entry (May 6), which was filed *after* the court had reviewed both the transcript of the proceedings and Grandmother's memorandum, the juvenile court overruled the objections. An affirmative duty requires more than a mere inference, it requires Grandmother to provide the reviewing court with facts to rebut the general presumption. *Id.* Here, Grandmother has failed to do so.

{¶67} The third assignment of error is accordingly overruled.

{¶68} Judgment affirmed.

BRESSLER and RINGLAND, JJ., concur.