

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: L.D. : APPEAL NO. C-170678
TRIAL NO. F12-000911Z

:

: *OPINION.*

Appeal From: Hamilton County Juvenile Court

Judgment Appealed from is: Affirmed and Cause Remanded

Date of Judgment Entry on Appeal: December 28, 2018

Gieske Law Offices, LLC, and Krista Gieske, for Appellant Mother,

The Law Offices of Andrew Ice and Andrew Ice, for Appellee Father.

CUNNINGHAM, Presiding Judge.

{¶1} Appellant mother challenges the judgment of the Hamilton County Juvenile Court adopting the magistrate's decision awarding legal custody of her minor child, L.D., to the child's father.

{¶2} L.D. was born in June 2004. She was diagnosed with autism at age three. Her parents were never married. Mother had been L.D.'s legal custodian since birth. Father and mother had a long and contentious relationship regarding L.D.'s care. Between 2012 and the spring of 2017, father had filed three contempt motions against mother complaining of her failure to comply with the court's prior parenting-time orders.

{¶3} By April 2017, father's concerns about mother's care of L.D. and mother's frequent interference with his parenting time, led father to move the juvenile court for a change in custody and an award to him of legal custody over L.D. Mother was served with father's motion and with notice of a June 6, 2017 hearing on the motion. Mother failed to appear, and the hearing was continued until August 10, 2017. Although properly served with notice of the continued hearing, mother again failed to appear. The magistrate held a full hearing on the custody motion, including receiving testimony from father and admitting numerous exhibits documenting L.D.'s lack of progress at school, numerous instances of her unexcused school tardiness, mother's inability to provide appropriate medical care for L.D., and mother's interference over 60 times with father's parenting time. Father testified that he would better be able to provide medical care and appropriate schooling for L.D. if she lived with him.

{¶4} In his written decision, the magistrate found that mother had engaged in repeated violations of father's court ordered parenting time, and that she had engaged in conduct detrimental to L.D. Based upon those findings, the magistrate determined that it was in L.D.'s best interests, under R.C. 3109.04(F), to grant father's motion and award legal custody to him.

{¶5} Appearing pro se, mother timely filed objections to the magistrate's decision on August 21, 2017. In the objections, mother contested the veracity of father and of his girlfriend, and challenged only the magistrate's factual findings. But mother did not file a transcript of all the evidence submitted to the magistrate in support of her objections as required by Juv.R. 40(D)(3)(b)(iii).

{¶6} The hearing on mother's objections was continued from October 30 until November 3, 2017. Despite receiving notice of the objections hearing, mother again failed to appear. Instead, she telephoned the juvenile court on the day of the hearing and made what the court construed to be an oral motion for a continuance requesting additional time to procure a transcript of the proceedings. The juvenile court denied the motion. It reviewed mother's objections and the magistrate's decision. The court overruled mother's objections, adopted the magistrate's decision as to custody, and entered its own judgment granting father's motion and awarding sole legal custody to father on November 11, 2017. In its judgment allocating custody, the juvenile court did not address mother's right to continuing contact, or parenting time, with L.D. as required by R.C. 3109.04(A)(1).

{¶7} Mother appealed raising four assignments of error. Juvenile court orders transferring legal custody from one parent to the other are immediately appealable under R.C. 2505.02(B)(2). *See In re E.N.*, 1st Dist. Hamilton No. C-

170272, 2018-Ohio-3919, ¶ 20. For clarity, we will address mother's assignments of error in temporal order.

{¶8} In her third assignment of error, mother contends that the juvenile court abused its discretion in denying her oral motion for a continuance to procure a transcript of the proceedings. Mother's motion for a continuance was first made to the juvenile court by telephone on the day of the objections hearing. The juvenile court overruled mother's oral motion noting that she had a history of failing to appear for court proceedings, and that due to her ongoing financial stress, mother would not be able to provide transcripts within "a reasonable amount of time."

{¶9} It is well established that a trial court has supervisory control over its own docket and is vested with broad discretion in determining whether to grant or deny a motion for a continuance. *See Brown v. Bowers*, 1st Dist. Hamilton No. C-070797, 2008-Ohio-4114, ¶ 13. Thus we will not reverse the juvenile court's ruling on mother's motion for a continuance unless the court abused its discretion. *See id.*; *see also State ex rel. Buck v. McCabe*, 140 Ohio St. 535, 537, 45 N.E.2d 763 (1942).

{¶10} Here, the record certified for our review indicates that mother had timely filed her objections on August 21, 2017. Since the objections challenged the magistrate's factual findings, mother was required to file a transcript of all the evidence submitted to the magistrate within 30 days after filing her objections, unless that period was extended in writing by the juvenile court for good cause. *See Juv.R. 40(D)(3)(b)(iii)*; *see also In re Spencer*, 1st Dist. Hamilton No. C-070321, 2008-Ohio-2844, ¶ 10.

{¶11} Mother first requested an extension to obtain a transcript on the day of the hearing, 74 days after filing her objections. Mother's history of failing to appear for court proceedings was well documented in the record. And the juvenile court's

conclusion that, due to her financial situation, mother would not be able to provide transcripts within a reasonable period is not rebutted anywhere in the record.

{¶12} Our review of the record convinces us that the juvenile court’s decision denying mother’s oral motion for a continuance was supported by a sound reasoning process and thus will not be disturbed on appeal. *See Brown*, 1st Dist. Hamilton No. C-070797, 2008-Ohio-4114, at ¶ 13; *see also AAAA Ents., Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). The third assignment of error is overruled.

{¶13} In her second assignment of error, mother argues that the juvenile court abused its discretion in failing to consider the requisite statutory factors and determine that a change of circumstances had occurred prior to awarding custody of L.D. to father.

{¶14} Here, without a transcript of proceedings before the magistrate or further evidentiary proceedings in the objections hearing, the juvenile court was limited to an examination of whether the magistrate had properly applied the law to his factual findings. *See Juv.R. 40(D)(3)(b)(iii)*; *see also In re A.S.*, 8th Dist. Cuyahoga No. 101339, 2014-Ohio-4936, ¶ 6; *In re Adoption of S.J.M.H.*, 1st Dist. Hamilton No. C-130683, 2014-Ohio-3565, ¶ 33 (construing identical language in Civ.R. 53(D)(3)(b)(iii)). And on appeal, this court is limited to determining if the juvenile court abused its discretion in applying the applicable law to the magistrate’s findings of fact. *See State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 654 N.E.2d 1254 (1995); *see also In re Spencer*, 1st Dist. Hamilton No. C-070321, 2008-Ohio-2844, at ¶ 11; *In re Adoption of S.J.M.H.* at ¶ 33.

{¶15} While the juvenile court did not cite to the changed-circumstances section of R.C. 3109.04(E) in its entry, based upon its review of the magistrate’s

findings, the court concluded that mother's repeated and ongoing violations of the court's prior order mandating father's parenting time was "conduct detrimental" to L.D. On the state of this record, this finding was sufficient to support a change of L.D.'s environment as described in R.C. 3109.04(E)(1)(a)(iii). Thus we hold that, in light of harmful changes in L.D.'s environment, the juvenile court's decision adopting the magistrate's decision and granting father's motion to award him legal custody of L.D. was supported by a sound reasoning process and was not an abuse of its discretion. *See AAAA Ents., Inc.*, 50 Ohio St.3d at 161, 553 N.E.2d 597. The second assignment of error is overruled.

{¶16} In her first assignment of error, mother asserts that the juvenile court's failure to allocate parenting time to her in its entry designating father the residential parent and legal custodian of L.D. constituted plain error. Mother acknowledges that, as she failed to raise this issue in her objection to the magistrate's decision, she has forfeited all but plain error. *See Juv.R. 40(D)(3)(b)(iv)*.

{¶17} But this is simply not the kind of error that, if left uncorrected, "would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *See Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997); *see also In re E.N.*, 1st Dist. Hamilton No. C-170272, 2018-Ohio-3919, at ¶ 27. This is particularly so where R.C. 3109.051 permits a parent to move the juvenile court to make a "just and reasonable" determination of parenting time that is in the child's best interest. Thus the juvenile court did not commit plain error and the first assignment of error is overruled.

{¶18} But we note that in entering its judgment, the juvenile court did not carry out its statutory obligation, under R.C. 3109.04(A)(1), to address "the right of

the parent who is not the residential parent to have continuing contact” with L.D. *See In re E.N.* at ¶ 13.

{¶19} In her fourth assignment of error, mother argues that the cumulative effect of the juvenile court’s errors denied her a fair trial. This assignment of error is overruled because the record certified to us on appeal does not reveal that the juvenile court erred in any fashion that was prejudicial to mother, but, instead, demonstrates that the magistrate and the juvenile court conducted the proceedings in a patient and thoughtful manner. Having found no error in the proceedings, we overrule the fourth assignment of error.

{¶20} Having overruled each of mother’s assignments of error, we affirm the judgment of the juvenile court designating father as the residential parent with legal custody of L.D. But we remand this matter to the juvenile court to address mother’s right to continuing contact with L.D. as required by R.C. 3109.04(A)(1). *See In re E.N.*, 1st Dist. Hamilton No. C-170272, 2018-Ohio-3919, at ¶ 13 and 47.

Judgment affirmed and cause remanded.

ZAYAS and MYERS, JJ., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.