

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

: O P I N I O N
: CASE NO. 2009-T-0119

IN THE MATTER OF: N.L.

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2005 JS 290.

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 Kristin Allison).

Debora K. Witten, Witten & De Matteis, 173 West Market Street, Warren, OH 44481 (For Appellee Russell K. Lichty).

Jonathan P. Morgan, J.P. Morgan, Esquire, Ltd., 173 West Market Street, Warren, OH 44481 (Guardian ad litem).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Kristin Allison, n.k.a. Kristin Eberhard,¹ appeals from the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, adopting the magistrate's decision granting custody to appellee, Russell K. Lichty. For the reasons discussed below, we reverse and remand.

{¶2} Although never married, Eberhard and Lichty had one child, N.L., d.o.b December 13, 2004. The parties have a tumultuous relationship; however, they

1. We will refer to appellant as "Eberhard."

reached a shared parenting agreement in 2007. This shared parenting plan was modified in 2008. Approximately four months later, Lichty filed a motion to terminate the shared parenting plan. After hearing three days of testimony, the magistrate, in a decision dated August 21, 2009, recommended Lichty to be the residential and legal custodian of N.L. That same day, the trial court adopted the magistrate's recommendation.

{¶3} On October 6, 2009, Eberhard filed objections to the magistrate's decision. Eberhard claimed that she was never served a copy of the August 21, 2009 magistrate's decision or the subsequent judgment entry of the trial court. Eberhard attached a copy of the trial court docket as well as an affidavit from her trial counsel averring to the same. In her objections, Eberhard further requested additional time to obtain the transcript of the hearing and supplement her objections.

{¶4} The trial court addressed Eberhard's October 6, 2009 objections and issued its ruling on October 13, 2009, again affirming the magistrate's decision.

{¶5} Eberhard filed an appeal and now asserts the following five assignments of error for our review:

{¶6} "[1.] The trial court abused its discretion in designating father residential parent and legal custodian of the parties' minor child.

{¶7} "[2.] The trial court erred in failing to make a reasonable and liberal companionship order that was similar to what the parties had been operating under prior to the custody change.

{¶8} “[3.] The trial court abused its discretion in overruling the objections seven days after filing without an independent review or without additional hearing and without ruling on a motion for new trial or findings of fact and conclusions of law.

{¶9} “[4.] The trial court erred in relying upon but not allowing the guardian to be cross-examined on his report.

{¶10} “[5.] The trial court erred in holding a child support hearing in December, then ordering child support backdated until June when the parties continued to operate under the shared parenting plan through the Fall, and no request was made by father for child support.”

{¶11} We shall first address Eberhard’s third assigned error. Eberhard asserts the trial court abused its discretion in adopting the magistrate’s decision without affording her the opportunity to file a transcript of the proceedings. In her objections to the magistrate’s decision, filed October 6, 2009, Eberhard requested additional time to obtain the transcripts of the hearing and to supplement her objections pursuant to Civ.R. 53.

{¶12} Seven days later, in a judgment dated October 13, 2009, the trial court again adopted the magistrate’s decision. The trial court stated the following:

{¶13} “The Court conducted an independent review of the record, the Motion and the Magistrate’s Decision in dispute. Based on that review,

{¶14} “IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

{¶15} “1) The Objections are overruled on the Merits, and further;

{¶16} “2) All orders previously issued by the Magistrate to remain effective.”

{¶17} Recently, in *Haverdick v. Haverdick*, 11th Dist. No. 2010-T-0040, 2010-Ohio-6256, at ¶23, this court reversed the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, for not allowing the appellant a reasonable time to prepare a transcript so that she could support her objections to a magistrate's decision. In *Haverdick*, the trial court issued an identical judgment entry to the judgment in this case noting that it had conducted an independent review of the record. *Id.* at ¶11-14. First, this court determined that the trial court "failed to meet its obligation under the Civil Rules [Civ.R. 53(D)(4)(d)] and thus the trial court's adoption of the magistrate's decision [was] defective as a matter of law." *Id.* at ¶16. Second, this court held that "the trial court erred in ruling on [the] appellant's objections without allotting her the requisite opportunity to obtain transcripts." *Id.* at ¶17.

{¶18} Like the appellant in *Haverdick*, Eberhard requested additional time to allow her to obtain the transcript so that she may supplement her objections to the magistrate's decision. Instead of allowing Eberhard the 30 days in which to obtain the transcripts of the hearing, as prescribed by Civ.R. 53(D)(3)(b)(iii),² the trial court overruled her objections seven days after they were filed. Moreover, the trial court, in denying Eberhard's objections before the record was filed, was unable to conduct an independent review as required by law. Accordingly, Eberhard's third assignment of error is well-taken.

2. "Objection to magistrate's factual finding; transcript or affidavit. An 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." Civ.R. 53(D)(3)(b)(iii).

{¶19} Under Eberhard's fourth assigned error, she claims that the trial court abused its discretion when relying upon the guardian ad litem's report, filed July 15, 2009, without allowing the parties an opportunity to cross-examine the guardian ad litem.

{¶20} In its October 13, 2009 judgment entry, the trial court noted that it had given complete consideration to the report of the guardian ad litem and that its decision "is in agreement with the recommendations of the guardian ad litem."

{¶21} Recently, in *Allen v. Allen*, 11th Dist. No. 2009-T-0070, 2010-Ohio-475, at ¶40, we held that the Trumbull County Court of Common Pleas, Domestic Relations Division, abused its discretion "by taking the guardian ad litem's report into consideration without allowing the parties an opportunity to cross-examine the guardian." We determined that "(t)he due process violation *** can be cured by remanding [the] matter to the trial court to hold an evidentiary hearing on the guardian ad litem's report." *Id.* at ¶40, quoting *In re Kangas*, 11th Dist. No. 2006-A-0010, 2006-Ohio-3433, at ¶38. As the trial court clearly relied upon the guardian ad litem's report in this case without giving the parties the opportunity to cross-examine him, we find Eberhard's fourth assignment of error with merit.

{¶22} Additionally, Eberhard claims that the guardian ad litem and opposing counsel share office space. Eberhard argues that this arrangement, depending upon when the parties began contemplating the office sharing, may raise a question of conflict or at least an appearance of impropriety. Upon remand, Eberhard's counsel will have the opportunity to cross-examine the guardian ad litem regarding the nature and inception of this arrangement.

{¶23} Eberhard's first, second, and fifth assignments of error are not yet ripe for review as the trial court has not properly completed a full, independent review of the record and did not have an opportunity to consider her objections.

{¶24} For the reasons discussed above, the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is reversed and this matter is remanded to the trial court for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.