[Cite as *In re K.L.S.*, 2012-Ohio-2563.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN RE: K.L.S. AND M.S.S.	:	**O P I N I O N**
	:	**CASE NO. 2011-T-0077**
	:	

Appeal from the Trumbull County Court of Common Pleas, Juvenile Division, Case No. 2006 JS 800.

Judgment: Affirmed.

Benjamin Joltin, Benjamin Joltin, L.L.C., 3855 Starr Centre Drive, Ste. A, Canfield, OH 44406 (For Appellant-Katie Shimko).

Robert C. Kokor, 394 State Route 7, S.E., P.O. Box 236, Brookfield, OH 44403 (For Appellee-Robert Smith).

Laura O. Berzonski, P.O. Box 251, Cortland, OH 44410 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Appellant, Katie Shimko, appeals the Judgment Order of the Trumbull County Court of Common Pleas, Juvenile Division, approving the Magistrate's Decision to grant custody of the minor children to appellee, Robert J. Smith. The issues before this court are whether the juvenile court erred in not requiring the magistrate to provide findings of fact/conclusions of law and whether the transfer of the children's custody to Smith was in their best interest. For the following reasons, we affirm the decision of the court below.

{¶2} On February 12, 2007, Robert Smith filed a Complaint for Allocation of Parental Rights and Responsibilities with respect to K.L.S. and M.S.S. The Complaint identified Smith and Shimko as the children's biological parents and sought an order designating Smith as their residential parent and legal custodian. As a basis for custody, the Complaint alleged Shimko's "erratic and violent actions" and her removal of the children to Arizona without notice to Smith.

{¶3} On March 13, 2007, Attorney Laura Berzonski was appointed guardian ad litem for the children.

{¶4} Several hearings were held on the merits of Smith's Complaint, concluding on January 29, 2010.

{¶5} On June 10, 2010, a Magistrate's Decision was issued, ordering that the minor children, K.L.S. and M.S.S., "be placed with their father, Robert J. Smith, until further Order of this Court." The Decision contained the following findings:

> **{¶6}** Robert J. Smith, the Father, and Katie Shimko, the Mother, were involved in a relationship from 2002 until June 2006. As a result of this relationship, two children, [K.L.S.], born 9/14/2003, and [M.S.S.], born 03/03/2005 were born. Originally, the parents appeared to cooperate with the parenting of the minor children, but problems arose when the Mother relocated to Arizona in January 2007. Since that time, the Father's visitation with the children has been sporadic. The Father has only visited with the children a few times in the past 3 years. He testified he has made trips to Arizona to bring the children back for visitation and the Mother refused.

Father produced receipts and boarding passes as evidence of these trips. Any visits the Father did have were short in duration. The Father is married with a new child, and is a homeowner.

{¶7} It should also be noted that all extended family, including Maternal and Paternal Grandparents, reside in Ohio. The visitation with them has also been minimal with visitation occurring approximately twice a year.

{¶8} The Mother testified she relocated to Arizona for better opportunities and school. Upon arriving, she moved in with her boyfriend. She stated they have moved on a few occasions. In June 2007, she moved back to Ohio because she missed her family and an agreement for visitation was drafted. She left and returned to Arizona before the agreement was signed. She testified that she did not allow the children to go with the Father when he flew to Arizona to get them because the Father had not called to inform her he was coming. She offered to have him over to the house to visit, but he did not show. She testified there have been other visits with the children and the Father, including Christmas holiday 2008. Currently, the Mother is not married, unemployed, and attending classes online.

{¶9} At this time, the Court finds it is in the best interest of the minor children to reside with their Father in Ohio. The current living arrangement in Arizona is suspect. The Mother and boyfriend have

> hinted to one day getting married and buying a home, but have provided nothing to the Court as to when this may occur. Further, the Court was concerned that when the Mother did return for Court hearings she did not bring the children with her. Instead of having the children return to visit with their Father and extended family, she left the children in the care of her boyfriend in Arizona. When given an opportunity to allow all families to see the children, the Mother fails to make it happen. The Court feels that allowing this alienation to continue would seriously impact the children's relationship with their Father and extended families.

{¶10} Also on June 10, 2010, the juvenile court entered a Judgment Order, approving the Magistrate's Decision and ordering the minor children to be placed in Smith's custody until further court order.

{¶11} On June 18, 2010, Shimko filed a Request for Findings of Fact and Conclusions of Law, a Motion to Set Aside and Request for Evidentiary Hearing, and a Motion for Stay. The common basis for these Motions was that the Magistrate's Decision was "clear error," in that it failed to set forth the requisite findings of fact and conclusions of law and "was contrary to the testimony and recommendation of the guardian-ad-litem."

{¶12} On June 24, 2010, Shimko filed Objections to the Magistrate's Decision. The basis for her objections was identical to the argument raised in the prior motions, i.e., it was "clear error" for the magistrate "to modify custody without * * * requisite

findings of fact and conclusions of law," and the decision "was contrary to the testimony and recommendation of the guardian-ad-litem."

{¶13} On June 25, 2010, the juvenile court issued an Interim Order following a hearing on Shimko's Motions. The court noted that "[t]he record does not indicate a request for transcript nor an affidavit of evidence." The court held that the Magistrate's Decision issued on June 10, 2010, "included a statement of facts which on their face are sufficient findings of fact to sustain an Order of Change of Custody." Shimko's request for stay was denied and Smith was given the right of immediate possession of the children as custodial parent. The court granted Shimko "leave until July 18, 2010, to produce a transcript of the proceedings," and reserved "the opportunity after the transcript is produced to direct a more extensive set of findings of fact and conclusions of law."

{¶14} On July 23, 2010, Shimko filed a Request for Hearing. As grounds for the request, Shimko asserted that "arguments need to be heard due to the fact that a review of the record shows that a complete transcript of the previous proceedings could not be produced due to the fact that said hearings were erased," and "[o]nly one of the four previous days of testimony could be transcribed."

{¶15} On August 31, 2010, the juvenile court issued an Order that "Counsel for both parties shall brief the Court regarding the issue of a lack of a trial transcript within 14 days."

{¶16} On November 10, 2010, following the submission of the parties' briefs on the transcript issue, the juvenile court issued a Judgment Order. The Order instructed Shimko, on or before December 15, 2010, to file "a copy of the transcript for the portion

of the record that can be transcribed," and to file "a copy of the statement of proceedings" in accordance with Appellate Rule 9(C) and the Local Rules of Appellate Procedure. Smith was ordered, on or before January 15, 2011, to file "either approval of said statement of the proceedings or objections to the same, together with proposed amendments to said statement." Finally, the Order provided that, on or before February 1, 2011, counsel for the parties "will meet to resolve differences in the statements of the proceedings, and if they cannot resolve the same, will schedule a hearing before Magistrate [H.] to resolve differences."

{¶17} On December 30, 2010, Shimko, with leave of the juvenile court, filed an Instanter Statement of Trial Proceedings.

{¶18} On March 18, 2011, Smith, with leave of the juvenile court, filed a Rule 9(C) Statement.

{¶19} On June 22, 2011, the juvenile court issued a Judgment Order, overruling Shimko's Objections to the Magistrate's Decision. The court's ruling was based on "an independent review of the record, the Rule 9(C) Statements of the Parties, the Motion, and the Magistrate's Decision in Dispute."

{¶20} On July 21, 2011, Shimko filed her Notice of Appeal. On appeal, Shimko raises the following assignments of error:

{¶21} "[1.] The trial court erred in adopting the Magistrate's Decision that failed to comply with Appellate Rule 9(C)."

{¶22} "[2.] The trial court erred in approving and adopting the Magistrate's decision without mandating the magistrate to provide * * * detailed findings of fact and conclusions of law."

{¶23} "[3.] The trial court erred in adopting the Magistrate's decision that was incorrect as a matter of law."

{¶24} Under the first assignment of error, Shimko argues the juvenile court erred and abused its discretion by failing "to prepare and file an approved statement of fact[s]," in accordance with Appellate Rules 9(C) and 10(B)(3).

{¶25} This court has held: "Settlement by the court is required * * * when there are objections, proposed amendments, or disagreements between the parties. Approval as contemplated by Appellate Rule 9(C) means that, whether or not settlement is required, the trial court must determine the accuracy and truthfulness of a proposed statement of evidence or proceedings and then approve it. Independent of any agreement or disagreement between the parties, the trial court has the responsibility, duty, and authority under Appellate Rule 9(C) to delete, add or otherwise modify portions of a proposed statement of the evidence or proceedings so that it conforms to the truth and is accurate before it is approved." *Aurora v. Belinger*, 180 Ohio App.3d 178, 2008-Ohio-6772, 904 N.E.2d 916, ¶ 35 (11th Dist.), citing *Joiner v. Illuminating Co.*, 55 Ohio App.2d 187, 380 N.E.2d 361 (8th Dist.1978), syllabus.

{¶26} Shimko relies upon the case of *Spencer v. Blankenship*, 4th Dist. No. 03CA2882, 2004-Ohio-1738, wherein the court of appeals reversed the trial court where the parties submitted conflicting statements of fact and the court did not resolve the conflicts between them. *Id.* at ¶ 14. The court of appeals determined it was "unable to make an effective review on appeal," and remanded the matter "to the trial court to either hold a hearing and submit a settled and approved Rule 9(C) statement, or to hold a new trial." *Id.* at ¶ 2; *Belinger* at ¶ 47.

{¶27} Under the facts of the present case, the juvenile court's failure to approve an App.R. 9(C) statement of evidence does not compromise our ability to review Shimko's assigned errors. Accordingly, the failure to do so does not constitute reversible error.[1]

{¶28} The Ohio Civil Rules mandate that "[a]n objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii).[2] "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. * * * 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." Civ.R. 53(D)(3)(b)(iii).

{¶29} In the present case, Shimko failed to file the transcript or, more significantly, an affidavit of evidence with the trial court as required by Civ.R. 53(D)(3)(b)(iii). Instead, on July 23, 2010, Shimko filed a Request for Hearing, in which she advised the court that a complete transcript of the proceedings was unavailable.

{¶30} The juvenile court ultimately instructed Shimko to file a statement of the proceedings in "Compliance with the format, information, and form required by Ohio Appellate * * * Rule 9(C)," and Smith to file his approval or objections thereto, "together

1. Although Shinko sets forth this assignment of error as a matter of the trial court's discretion, we review a trial court's compliance with its legal duty under Appellate Rule 9 as a question of law. *State v. Dickard*, 10 Ohio App.3d 293, 295, 462 N.E.2d 180 (8th Dist.1983).

2. Proceedings in the Trumbull County Court of Common Pleas, Juvenile Division, are governed by the Family Court Local Rules. Family Court Local Rule 32.04 provides: "A Decision of a Magistrate may be appealed to the Judge following the procedures set forth in Civil Rule 53(D)(3)(b) and/or Juvenile Rule 40(D)(3)(b) and stating with particularity the parties' objections, and attaching a copy of the Magistrate's Decision to the Objection."

with proposed amendments to said statement." Shimko was also instructed to file a partial transcript of that portion of the hearing that was available. The parties were thereupon to resolve any differences in the statement of proceedings or schedule a hearing with the magistrate to resolve such differences.

{¶31} Neither party strictly complied with this Judgment Order. Shimko did not file a partial transcript.[3] Smith did not file proposed amendments to Shimko's statement of the proceedings. There is no record of any meeting between the parties to resolve differences in their respective statements or of recourse to the magistrate to resolve such differences.

{¶32} Shimko's expectation that the juvenile court would "approve a final statement of fact" is in vain. The custody hearings in this matter were held before the magistrate, not the court. Accordingly, the court is singularly incapable of resolving the differences in the parties' statements of proceedings. For this reason, it was incumbent upon Shimko to either submit an affidavit of evidence directly to the magistrate, as mandated by Civ.R. 53(D)(3)(b)(iii), or comply with the court's November 10, 2010 Judgment Order, instructing the parties to resolve the matter themselves or refer to the magistrate for resolution. Shimko's failures in these respects are not grounds for reversing the judgment of the lower court.

{¶33} The first assignment of error is without merit.

{¶34} In her second assignment of error, Shimko argues the juvenile court erred by not requiring "the magistrate to issue a more detailed finding of fact." Shimko relies

3. A transcript of the proceedings held on January 29, 2010, was filed with the juvenile court on August 2, 2011 (after the Notice of Appeal), rendering it irrelevant for the purposes of appeal. *Condron v. Willoughby Hills*, 11th Dist. No. 2007-L-015, 2007-Ohio-5208, ¶ 38 ("an appellate court's review is strictly limited to the record that was before the trial court, no more and no less") (citation omitted).

on her Request for Findings of Fact and Conclusions of Law, filed pursuant to Ohio Civil Rule 52, and case law. *Schaeffer v. Schaeffer*, 1st Dist. Nos. C-020721, C-020722, C-020723, C-030255, and C-030385, 2004-Ohio-2032, ¶ 34 ("[a]lthough Civ.R. 52 applies when findings are requested by the parties, the absence of such a request does not obviate the court's statutory obligation [under R.C. 3109.04] to make findings, and without such findings we cannot be reasonably sure that the trial court went through the appropriate legal analysis * * * before modifying the existing custody decree").

{¶35} Ohio Civil Rule 52 provides that a party may request findings of fact and conclusions of law "not later than seven days after the party filing the request has been given notice of the court's announcement of its decision." *See also* Civ.R. 53(D)(3)(a)(ii) ("a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party * * * within seven days after the filing of a magistrate's decision"); Juv.R. 40(D)(3)(a)(ii) (the same).

{¶36} In the present case, Shimko's Request for Findings was untimely filed on June 18, 2010, eight days after the issuance of the Magistrate's Decision and the juvenile court's Judgment Order approving thereof. On June 25, 2010, the court implicitly denied Shimko's request, observing that the Magistrate's Decision "included a statement of facts which on their face are sufficient findings of fact to sustain an Order of Change of Custody." Given Shimko's untimely Request, there was no error in the court's failure to grant the Request.

{¶37} Shimko further argues that the juvenile court "did not even recite the [R.C. 3109.04(F) best interest] factors as required by law." However, this court has held "a trial court is required to consider the statutory factors; it is not necessary for the trial

court to set forth its analysis as to each factor in its judgment entry so long as it is supported by some competent, credible evidence." *Smith v. Smith*, 11th Dist. No. 2009-T-0064, 2010-Ohio-3051, ¶ 10. It has similarly been held that, while "the trial court was not required to make express findings of fact without a Civ.R. 52 motion before it * * *, there should be some indication in the judgment entry that the trial court considered the best interests of the children pursuant to R.C. 3109.04(F) when it allocated parental rights and responsibilities." *Wilk v. Wilk*, 8th Dist. No. 96347, 2011-Ohio-5273, ¶ 12.

{¶38} In the present case, the magistrate adequately described the basis for his conclusion that it was in the children's best interest to grant custody to Smith, noting the greater stability of Smith's living arrangements and the greater likelihood of the children maintaining relationships with Smith and their extended families in Smith's custody.

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

{¶40} In the third assignment of error, Shimko asserts that the magistrate's decision granting Smith custody of the minor children is against the manifest weight of the evidence.

{¶41} "In custody disputes between unmarried parents, 'the court must determine custody based on the best interests of the child pursuant to R.C. 3109.04(B)(1).'" (Citation omitted.) *In re Fair*, 11th Dist. No. 2007-L-166, 2009-Ohio-683, ¶ 39; *In re Byrd*, 66 Ohio St.2d 334, 421 N.E.2d 1284 (1981), paragraph two of the syllabus (in cases involving illegitimate children, "the court shall determine which parent shall have the legal custody of the child, taking into account what would be in the best interests of the child").

{¶42} As Shimko is aware, "[i]f the appellant intends to present an assignment of error on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of proceedings that includes all evidence relevant to the findings or conclusion." App.R. 9(B)(4). Accordingly, the "failure [to file a transcript of the magistrate hearings or a statement of the evidence] precludes [an] appellant from contesting the lower court's findings or conclusions as being unsupported by the evidence or contrary to the weight of the evidence." (Citation omitted.) *Waszkowski v. Lyons*, 11th Dist. No. 2008-L-077, 2009-Ohio-403, ¶ 17; *Dickard v. Waller*, 11th Dist. No. 2011-L-071, 2012-Ohio-1131, ¶ 31, citing *Maynard v. Landon*, 5th Dist. No. 2006-CA-0015, 2007-Ohio-2813, ¶ 22 ("[t]he failure to file a complete transcript or its equivalent is generally fatal to an appeal based on the manifest weight of the evidence").

{¶43} As noted under the first assignment of error, the failure to produce a transcript or statement of the evidence so as to enable this court to effectively review the best interest determination was not the fault of the juvenile court.

{¶44} Shimko's argument on appeal is that the relevant best interest factors contained in R.C. 3109.04(F)(1) favor an award of custody to her. She does not contend that the findings made by the magistrate are not supported by competent or credible evidence, although she acknowledges that there was conflicting testimony on certain issues. Shimko claims she consistently produced the children for visitation when ordered to do so. The magistrate did not determine otherwise, but nevertheless concluded that Shimko sought to restrict visitation to the minimum required. The

reasons cited by the magistrate in support of this conclusion are not disputed. Shimko does not dispute that it was she who relocated with the children to Arizona or that she has changed residences several times, including a temporary return to Ohio. Shimko does not dispute the magistrate's findings regarding her relationship or employment status. Since the findings contained in the Magistrate's Decision are legally sufficient to sustain the award of custody to Smith, we will not consider Shimko's arguments that the general weight of the evidence favors her retention of custody, particularly in the absence of a transcript or statement/affidavit of evidence. *See generally Hearn v. Broadwater*, 105 Ohio App.3d 586, 588, 664 N.E.2d 971 (11th Dist.1995) ("[r]egardless of whether a transcript has been filed, the trial judge always has authority to determine if the referee's findings of fact are sufficient to support the conclusions of law drawn therefrom").

{¶45} The third assignment of error is without merit.

{¶46} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, Juvenile Division, approving the grant of custody of the minor children to Smith, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.