Franklin County Ohio Court of Appeals Clerk of Courts- 2018 May 03 12:10 PM-16AP000891

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
[C.J., Jr.,	:	No. 16AP-891 (C.P.C. No. 16JU-13594)
B.F.,	:	(ACCELERATED CALENDAR)
Appellant].	:	
In the Matter of:	:	
[C.J., Jr.,	:	Nos. 17AP-162 and 17AP-191
P.G.,	:	(C.P.C. No. 15JU-232)
Appellant].	:	(ACCELERATED CALENDAR)

M E M O R A N D U M D E C I S I O N

Rendered on May 3, 2018

Goldwater Institute, and *Aditya Dynar*; *Wegman, Hessler & Venderburg*, and *Christopher A. Holecek*, for Guardian ad litem B.F.

Bricker & Eckler LLP, Jennifer A. Flint and *S. Courter Shimeall*; *Gila River Indian Community* and *Thomas L. Murphy*, for appellee Gila River Indian Community. *Yeura Venters*, Public Defender, and *Timothy E. Pierce*, for appellee Father.

Giorgianni Law LLC and *Paul Giorgianni*, for appellant Mother.

Michael DeWine, Attorney General, *Eric E. Murphy* and *Michael J. Handershot*, for Amicus Curiae Attorney General.

Law Office of Jeffrey M. Gamso and *Jeffrey M. Gamso*, for Amici Curiae National Congress of American Indians and National Indian Child Welfare Association.

ON APPLICATION FOR RECONSIDERATION

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TYACK, J.

{¶ 1} Appellees, Gila River Indian Community ("GRIC"), and Father, C.J., Sr., have filed applications for reconsideration of our March 13, 2018 decision in *In re C.J.*, 10th Dist. No. 16AP-891, 2018-Ohio-931. In their applications, they raise five issues for consideration:

> 1. No written objections were filed to the magistrate's decision pursuant to Juv.R. 40;
>
> 2. No timely appeal was taken from the judgment in case No. 15JU-232;
>
> 3. Failure to fully consider jurisdiction of the tribal court;
>
> 4. Failure to fully consider the burden of proof in transferring jurisdiction to the tribal court;
>
> 5. Failure to fully consider the effect of the mother, S.R.'s death on the motion to transfer jurisdiction to the tribal court.

{¶ 2} When presented with an application for reconsideration filed pursuant to App.R. 26, an appellate court must determine whether the application "calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Columbus v. Hodge*, 37 Ohio App.3d 68 (10th Dist.1987). Reconsideration will be denied where the moving party simply seeks to "rehash the arguments [the party] made in its appellate brief." *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App.3d 117, 127 (10th Dist.1992). An appellate court will not grant " '[a]n application for reconsideration * * * just because a party disagrees with the logic or conclusions of the appellate court.' " *State v. Harris*, 10th Dist. No. 13AP-1014, 2014-Ohio-672, ¶ 8, quoting *Bae v. Dragoo & Assoc., Inc.*, 10th Dist. No. 03AP-254, 2004-Ohio-1297, ¶ 2.

{¶ 3} In their first issue, appellees argue that appellants, the guardian ad litem ("GAL") and the attorney for the mother, S.R., assigned as error on appeal findings and conclusions of the magistrate without making written objections to the magistrate's decision as required by Juv.R. 40(D)(3). Appellees contend that the absence of written objections to the magistrate's December 22, 2016 decision results in waiver of all but plain error.

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{¶ 4} Juv.R. 40(D)(3)(b)(i) provides in pertinent part that "[a] party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period."

{¶ 5} Juv.R. 40(D)(3)(b)(iv) provides in pertinent part 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 or conclusion as required by Juv.R. 40(D)(3)(b)."

{¶ 6} Appellees' argument is unavailing for three reasons. First, this court entered an emergency stay of the proceedings in juvenile court before the time for filing written objections had run. Second, the trial court held a hearing on oral objections to the magistrate's decision and ruled on the merits before the magistrate issued her written decision. Third, plain error affected the outcome of the proceeding, and the lack of written objections does not waive plain error.

{¶ 7} By way of background, the magistrate conducted a hearing on December 15, 2016 with respect to both case Nos. 15JU-232 and 16JU-13594 in which she declared case No. 15JU-232 null and void, dismissed the case in its entirety, granted the motion to change jurisdiction, dismissed the remaining motions including the objections to the transfer of jurisdiction, terminated the wardship of C.J., Jr. and terminated the temporary court commitment to the Franklin County Children Services ("FCCS"). *In re C.J.* at ¶ 28. The magistrate then proceeded on the GAL's complaint in case No. 16JU-13594, granting a temporary order of custody to the GRIC, and discussing plans for GRIC to transport C.J., Jr. to Arizona, and setting the matter for a final hearing on February 3, 2017. *Id.* at ¶ 29.

{¶ 8} The GAL immediately objected at the conclusion of the magistrate's reading of her decision on the record. *Id.* at ¶ 30. Later in the day on December 15, 2016, the trial court heard the matter based on the oral objections and a request for a stay from the GAL. *Id.* at ¶ 30; 126. The trial court indicated its view that the tribal court rightfully had exercised exclusive jurisdiction over the proceedings, but that, as a practical necessity, it needed to award temporary custody to FCCS until December 28, 2016. *Id.* at ¶ 126.

{¶ 9} On December 16, 2016, the trial court signed an entry continuing the temporary order of custody of C.J., Jr. with FCCS until December 28, 2016, at which time

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the temporary custody order would terminate, and custody would proceed pursuant to the tribal court order. *Id.* at ¶ 31. A second order was filed on December 28, 2016, extending the temporary custody with FCCS until December 29, 2016 to suit the travel arrangements of GRIC and, at that time, terminating custody with FCCS and otherwise giving full faith and credit to, and enforcing the tribal court's ex parte order. *Id.* at 31.

{¶ 10} The magistrate issued her written decision on December 22, 2016, making all of her orders effective as of December 15, 2016. The trial court adopted the decision of the magistrate on December 22, 2016, the same day as the magistrate's written decision. *Id.* at ¶ 28.

{¶ 11} On December 28, 2016, the GAL filed a motion in this court for an emergency stay and, the next day, on December 29, 2016, this court granted a stay of the December 16, and 28, 2016 trial court orders granting custody of C.J., Jr. to GRIC. *Id.* at ¶ 32. On the same day as this court granted the stay, the GAL filed a timely notice of appeal. *Id.* at ¶ 33.

{¶ 12} At the time this court's stay went into effect, the 14 days allowed for filing written objections to the magistrate's decision had not yet run. Moreover, the trial court had conducted a hearing, considered the oral objections, and ruled on the merits all before the magistrate issued her written decision. The need for written objections was moot because the matter had been ruled on by the trial court based on oral objections, this court then stayed the proceedings, and a timely notice of appeal was filed. Filing written objections after the court of appeals entered a stay would have been a vain act.

{¶ 13} Even if there were a need for written objections, the juvenile court's errors amounted to plain error. The plain error doctrine implicates errors in the judicial process where the error is apparent on the face of the record and is prejudicial to the appellant. *Skydive Columbus Ohio, LLC v. Litter*, 10th Dist. No. 09AP-563, 2010-Ohio-3325, ¶ 13. Plain error exists where it has a determinative effect on the outcome of the case. *In re C.M.*, 10th Dist. No. 07AP-933, 2008-Ohio-2977, ¶ 50. Plain error seriously affects the basic fairness, integrity, or public reputation of the judicial process itself. *Uretsky v. Uretsky*, 10th Dist. No. 02AP-1011, 2003-Ohio-1455, ¶ 7. The plain error doctrine is utilized in a civil case to prevent a manifest miscarriage of justice. *Cleveland Elec. Illum. Co. v. Astorhurst Land Co.*, 18 Ohio St.3d 268, 275 (1985).

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{¶ 14} Here, the juvenile court transferred jurisdiction to a tribal court that lacked personal jurisdiction over the child and his mother. *In re C.J.* at ¶ 95-97. The juvenile court erroneously believed that the tribal court had exclusive jurisdiction over the matter. *Id.* at ¶ 83; 132. The juvenile court ignored the mother's absolute parental veto over transferring jurisdiction. *Id.* at ¶ 84; 133. The juvenile court did not consider the best interests of the child. *Id.* at ¶ 88. Individually and collectively, this amounted to plain error.

{¶ 15} In their second issue, appellees argue that this court erroneously reversed a judgment from which no timely appeal was taken.

{¶ 16} The only realistic way to view the juvenile proceeding that had two case numbers was to view them as one case. *Id.* at ¶ 61. As discussed above, the GAL filed a timely appeal on December 29, 2016. *Id.* at ¶ 60.

{¶ 17} In their third issue, appellees argue that this court failed to fully consider the issue of personal jurisdiction and their arguments regarding membership-based jurisdiction.

{¶ 18} Appellees raise issues outside the record concerning a telephonic appearance before the tribal court by the mother which we cannot consider because no transcript or recording of the conference is part of the record on appeal. We also considered and rejected the argument that the tribal court could exercise citizenship based on personal jurisdiction over the child. *Id.* at ¶ 96-97.

{¶ 19} Fourth, appellees argue that this court failed to fully consider the issue of the burden of proof in demonstrating good cause to deny transfer and actually reversed the burden of proof.

{¶ 20} Our decision noted that the juvenile court did not consider the issue of good cause. *Id.* at ¶ 89. Under 25 U.S.C. 1911(b), the trial court was required to transfer proceedings to the tribal court, "in the absence of good cause to the contrary," and "absent objection by either parent." *In re C.J.* at ¶ 133. Because the mother objected to the transfer of jurisdiction, it was unnecessary for this court to address the issue of good cause or for that matter, the burden of proof as to that issue. *Id.*

{¶ 21} Fifth, appellees argue that the mother's death during the pendency of this appeal rendered moot the issue of the mother's objection to the transfer of jurisdiction.

{¶ 22} Pursuant to App.R. 29, we granted the motion of the GAL to substitute Paul Giorgianni as the party/representative for the mother, S.R. *Id.* at ¶ 52-53. In addition, we decide appeals based on the record before us and, at the time the juvenile court rendered its erroneous decision, the mother had exercised her absolute veto to the transfer and objected to the requested transfer of jurisdiction. *Id.* at ¶ 13; 123.

{¶ 23} Appellees' application for reconsideration does not point out an obvious error in our decision. Based on the foregoing, we deny appellees' application for reconsideration.

Application for reconsideration denied.

BROWN, P.J., concurs.
LUPER SCHUSTER, J., concurs in judgment only.

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