

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: D.G. :
: Hon. Julie A. Edwards, P.J.
: Hon. W. Scott Gwin, J.
: Hon. Sheila G. Farmer, J.
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: Case No. 09-CA-25
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:
: OPINION

CHARACTER OF PROCEEDING: Civil appeal from the Guernsey County
Court of Common Pleas, Juvenile Division,
Case No. 08JG00609

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: March 31, 2010

APPEARANCES:

For Appellant Mother

LINDSEY K. DONEHUE
213 N. 8th Street
Cambridge, OH 43725

For Appellee Father

JACQUELINE TRESL
1500 Cowden Road
New Concord, OH 43762

Gwin, J.

{¶1} Arabia B., the mother of D.G., a minor child, appeals a judgment of the Court of Common Pleas, Juvenile Division, of Guernsey County, Ohio, which terminated the shared-parenting agreement she had entered into with appellee George G., the child's father, and granted appellee sole custody of D.G. Appellant assigns seven errors to the trial court:

{¶2} "I. IT WAS IMPROPER FOR THE TRIAL COURT TO GRANT APPELLEE'S MOTION TO TERMINATE SHARED PARENTING BECAUSE THE FILING OF THE MOTION TWENTY-NINE MINUTES BEFORE THE SCHEDULED HEARING VIOLATED OHIO RULE OF JUVENILE PROCEDURE RULE 22 (E).

{¶3} "II. BECAUSE THE TRIAL COURT IMPROPERLY GRANTED THE MOTION TO TERMINATE SHARED PARENTING, THE TRIAL COURT USED THE WRONG FACTORS IN DETERMINING THE BEST INTEREST OF THE CHILD.

{¶4} "III. EVEN IF THE MOTION TO TERMINATE SHARED PARENTING WAS NOT INCORRECTLY GRANTED THE TRIAL COURT FAILED TO PROPERLY APPLY O.R.C. 3109.04(E)(1)(a).

{¶5} "IV. THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION BY TERMINATING THE SHARED PARENTING PLAN WHEN APPELLEE WAS NOT FOLLOWING THE PLAN AND EXERCISING HIS PARENTING TIME PRIOR TO THE FILING OF THE MOTION TO TERMINATION.

{¶6} "V. THE TRIAL COURT MADE SIGNIFICANT ERRORS OF FACT AND LAW THAT PROVIDE A LEGITIMATE BASIS FOR REVERSAL.

{¶17} “VI. THE TRIAL COURT IMPROPERLY RELIED UPON THE WRITTEN PSYCHOLOGICAL EVALUATION WHICH GROSSLY MISSTATED CRITICAL FACTS AND EVIDENCE AND WAS CONTRADICTORY TO COURTROOM TESTIMONY.

{¶18} “VII. THE TRIAL COURT’S HOLDING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶19} Appellant and appellee were divorced in October, 2007. At the time of the divorce, they entered into a shared-parenting plan. Each parent would have equal parenting time, and each had similar incomes, so they agreed they would each provide support in-kind and neither party would pay child support.

{¶10} In July 2008, appellant moved the domestic relations court to terminate the shared-parenting agreement and name her as residential parent and legal custodian of the child. She also requested child support be calculated and ordered. In August, 2008, appellee also filed a motion for change in the allocation of parenting time in the domestic relations court.

{¶11} On October 15, 2008, the parties met with the magistrate in chambers prior to the start of the hearing on the motions. At that time, appellee’s counsel stated she believed appellant and her new husband, the child’s step-father, were abusing D.G. The magistrate informed the parties if there was any question of child abuse, the Guernsey County Children’s Services must be called to investigate the allegations.

{¶12} On October 17, 2008, appellee filed a motion for custody and alcohol evaluation in the Guernsey County Juvenile Court. The motion inaccurately stated that the domestic relations court magistrate had ordered the matter certified to juvenile court. In fact, the domestic relations court had not yet done so.

{¶13} On October 23, 2008, the domestic relations court sustained appellant's motion for an ex parte order to terminate the shared-parenting plan and granted appellant sole custody of DG. The juvenile court subsequently advised appellant that because appellee brought his motion in juvenile court, appellant had to re-file her motion in the juvenile court. However, because appellee had already complied with the domestic relations court order and had delivered D.G. to appellant, appellant chose not to re-file her motion in juvenile court but only filed a notice of appearance.

{¶14} The juvenile court ordered D.G. to be examined by psychologist Dr. Gary Wolfgang, and appellee moved the court to order interviews with appellant and appellee as well. During this time, Guernsey County Children's Services completed its investigation and found the allegations of abuse to be unsubstantiated.

{¶15} The juvenile court conducted a hearing on April 20, 2009. On April 24, 2009, the juvenile court filed an entry stating the domestic relations court had never certified the matter to juvenile court. Shortly thereafter, the domestic relations court agreed to relinquish jurisdiction because the juvenile court had completed several pre-trials and an entire day of testimony. Appellant and appellee agreed the juvenile court should be the court to render a decision.

{¶16} Before addressing the merits of the case, we must determine if the juvenile court had jurisdiction over the case. In the case of *In Re: Poling, et al, Alleged Dependent Minors*, 64 Ohio St. 3d 211, 1992-Ohio-144, 594 N.E. 2d 589, the Ohio Supreme Court reviewed the issue of child custody jurisdiction. The Supreme Court held:

{¶17} “(1) Pursuant to R.C.2151.23 (A) the juvenile court has jurisdiction to determine the custody of a child alleged to be abused, neglected, or dependent, when that child is not the ward of any court of the state. This jurisdiction includes children subject to a divorce decree granting custody pursuant to R.C. 3109.04.

{¶18} “(2) When a juvenile court makes a custody determination under R.C.2151.23 and R.C.2151.353 it must do so in accordance with R.C 3109.04. (R.C. 2151.23(F)(1), construed and applied.)” Syllabus by the court.

{¶19} In the *Poling* case, the Franklin County Court of Common Pleas, Domestic Relations Division, made an original custody determination as part of a divorce decree. Subsequently, the Franklin County Children’s Services filed a neglect and dependency action in Franklin County Juvenile Court. The juvenile court made a temporary order of custody to Children’s Services, which in turn placed the children in the physical custody of their father. The prosecution dismissed the neglect count and the juvenile court found by clear and convincing evidence the children were dependent. Ultimately, the juvenile court awarded custody of the children to their father with visitation to the mother.

{¶20} On appeal, the court of appeals reversed, finding the juvenile court had jurisdiction to terminate the temporary custody of Children’s Services, but did not have jurisdiction to change the order of custody and grant custody to the father. The Supreme Court disagreed. The Court found under the plain language of R.C. 2151.23, a juvenile court has exclusive original jurisdiction over allegations of abuse, neglect, or dependency. The court found a child who is the subject of a domestic relations custody

order is not a ward of the domestic relations court, and thus, the juvenile court had jurisdiction to determine the custody of the child.

{¶21} The Supreme Court acknowledged this may generate some confusion because the domestic relations court also has continuing jurisdiction over the children pursuant to R.C. 3109.04.

{¶22} In *McDaniel v. McDaniel*, Warren App. No. CA2006-12-142, 2007-Ohio-4220, the 12th Dist. Court of Appeals also delved into the interrelation between the domestic relations court's jurisdiction and the juvenile court's jurisdiction over minor children. The court found initially the domestic relations court had exclusive jurisdiction over the custody and support issues in the divorce case. However, when the allegations involving abuse began, the juvenile court also obtained exclusive jurisdiction on the abuse issue. The court found this meant the domestic relations court and the juvenile court could have "overlapping" jurisdiction.

{¶23} In *McDaniel*, the domestic relations court certified the matter to the juvenile court for proceedings on the parenting issues, which vested the juvenile court with exclusive jurisdiction. Eventually, the juvenile court did not proceed on the abuse allegations. However, the Appeals Court found the juvenile court did not lose jurisdiction to decide the parenting issues, and could not return the matter to the domestic relations court. While the Revised Code permits the domestic relations court to certify an issue to the juvenile court, there is no provision whereby the juvenile court can return the matter to domestic relations court. *Id* at paragraph 19, citation deleted.

{¶24} In *Heisler v. Heisler*, Hocking App. No.09-CA-12, 2010-Ohio-98, the child's parents were divorced in Hocking County. Some time later, the Fairfield County Juvenile

Court found the child to be delinquent because of truancy. The Hocking County court did not certify the matter to Fairfield County, but dismissed the mother's motion to modify child support for lack of jurisdiction. The Court of Appeals reversed, finding the Fairfield County Juvenile Court and Hocking County Domestic Relations Court had concurrent jurisdiction over the matter. Because Hocking County retained jurisdiction, the Juvenile Court had the authority to determine custody, but not child support issues. If Hocking County had certified the matter to Fairfield County, the Fairfield County court would have had jurisdiction over all issues involving the allocation of parental rights, including child support. *Id.* at paragraphs 21-22.

{¶25} We find the juvenile court and domestic relations court here had concurrent jurisdiction over the custody issue once the allegation of abuse had been made.

{¶26} Finally, we must determine whether the motion to terminate the shared parenting agreement and modify custody because of alleged child abuse properly invoked the jurisdiction of the juvenile court. The appropriate way to invoke the jurisdiction of the juvenile court is by the filing of a complaint. However, appellee's motion for custody sets out the allegations of abuse in some detail and contains the same information a complaint should. We find the captioning of the matter as a motion rather than a complaint is not fatal.

{¶27} The motion was not served as a complaint in compliance with the Civil Rules. However, both parties appeared in juvenile court, litigated the matter without objection, and ultimately agreed the juvenile court should proceed. Although subject matter jurisdiction cannot be waived, personal jurisdiction can, and here, was waived.

{¶28} We conclude the juvenile court had subject matter and personal jurisdiction over the matter, and could enter judgment accordingly.

I

{¶29} In her first assignment of error, appellant argues the court should not have sustained appellee's motion to terminate shared parenting because the motion was filed 29 minutes before the scheduled hearing. Pursuant to Ohio Juv. R. 22, pretrial motions must be filed 7 days prior to the hearing or 10 days after the notice of appearance of counsel. Appellant argues appellee filed his motion at 8:31 a.m. on April 20, 2009, and the scheduled hearing was to begin at 9:00 a.m. the same day.

{¶30} At the outset of the hearing, the court reviewed the procedural history of case. The court found appellee had filed a motion in October of the previous year asking that appellee be named residential legal custodian of the child. Counsel advised the court he had filed a motion to terminate the shared parenting plan that morning. Appellant informed the court she had no knowledge of the filing of the motion to terminate and had not been served. Appellant's counsel asserted she had no way to prepare and could not adequately represent her client. The court stated because the parties were now present, it would proceed with the hearing, and if necessary, could later reconvene the hearing. The court advised appellant if she had some additional evidence to present, she should advise the court at the end of the hearing. At the close of the hearing, appellant rested her case, and did not ask the court to schedule another hearing.

{¶31} We find appellant did not preserve this issue, because she did not ask the court for further time even though the court invited her to do so.

{¶32} The first assignment of error is overruled.

II

{¶33} In her second assignment of error, appellant argues the trial court applied the wrong statutory factors in modifying the parties' rights and responsibilities. Appellant asserts the court applied R.C. 3109.04, which applies to modification of parental rights and responsibilities, while it should have applied the factors contained in R.C. 3109.51, applicable to decisions establishing parental rights and responsibilities.

{¶34} R.C. 3109.04 (E)(2)(c) states:

{¶35} "The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children. If modification of the terms of the plan for shared parenting approved by the court and incorporated by it into the final shared parenting decree is attempted under division (E)(2)(a) of this section and the court rejects the modifications, it may terminate the final shared parenting decree if it determines that shared parenting is not in the best interest of the children."

{¶36} In *Poling*, supra, the syllabus by the Supreme Court directed the juvenile court to make a custody determination utilizing the factors in R.C. 3109.04. We find the trial court applied the proper statute.

{¶37} The second assignment of error is overruled.

III

{¶38} In her third assignment of error, appellant argues the trial court failed to properly apply the factors in R.C. 3109.04(E). She asserts the statute requires a trial court to find a change of circumstances, and then make the required findings of the change of custody is in the child's best interest. Appellee responds the court need not make a finding of change of circumstances.

{¶39} Our standard of reviewing a juvenile court's custody determination is the abuse of discretion standard. *Davis v. Flickinger*, 77 Ohio St. 3d 415, 416-17, 1997-Ohio-260, 674 N.E.2d 1159. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude was unreasonable, arbitrary or unconscionable. See, e.g., *Blakemore v. Blakemore* (1983) 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140. A trial court is best suited to determine the credibility of testimony and integrity of evidence. *Miller v. Miller* (1988), 37 Ohio St. 3d 71, 523 N. E.2d 846. A reviewing court will not reverse the findings of a trial court when the award of custody is supported by substantial credible and competent evidence. *Davis*, supra at 418.

{¶40} Appellant argues the court erred in finding the remarriage of both parents to others was a significant change in circumstances. Appellant cites us to *Bonner v. Deselm-Bonner*, Guernsey App. No. 06-CA-15, 2007-Ohio-2173. In *Bonner*, this court reviewed a case wherein a trial court declined to find a change in circumstances because one of the parents had remarried. Although the father argued the new step-father had a poor relationship with the children, the trial court found there was

insufficient testimony to support this, and we agreed. We conclude *Bonner* is distinguishable from the case at bar.

{¶41} In its judgment entry of July 1, 2009, the trial court made findings of fact and conclusions of law. The court found appellant and appellee were both in new relationships, and appellant had one child with her new spouse and was pregnant a second time. The court found the child interacts better with appellee and his new wife than with appellant and her new husband. The court found the child was more at ease with appellee in his home than with appellant in her home. The court found appellant and her husband have some negative personal qualities, and appellee does so as well. The court found appellee was more inclined to honor and facilitate the court's order regarding parenting rights.

{¶42} The court discussed the role of appellant's new husband in the discipline of the child. The court expressed the concern that if the child remained with the appellant, the child would be adversely affected by the existence of the step-siblings. The court also cited Dr. Wolfgang's evaluation of the parties' parenting style. Dr. Wolfgang found appellant's home was overly and unnecessarily negative in tone and substantially divergent from the approach being used successfully in appellee's home.

{¶43} Appellant also asserts the trial court failed to make a finding that terminating the shared-parenting plan is in the child's best interest, and nor did the court find the harm likely to be caused by the change in environment outweighs the benefits of the change.

{¶44} Appellant concedes the court correctly stated it cannot terminate the shared parenting plan unless it finds the termination is in the child's best interest and

unless it finds the harm likely to be caused by the change in environment outweighs the benefits of the change. Because the court correctly articulated the statutory requirements prior to making its findings, we presume the court followed the law. The trial court's findings clearly indicate the court is convinced it is in the child's best interest to terminate the shared-parenting plan, and that the environment in appellee's home will be better for the child's well-being than that of appellant's home.

{¶45} The third assignment of error is overruled.

IV

{¶46} In her fourth assignment of error, appellant argues the court abused its discretion in terminating the shared-parenting plan because appellee did not comply with the plan while it was in effect. Appellee replies appellant did not offer any convincing evidence appellee did not comply with the shared-parenting plan except for a short period of time in which the parties agreed between themselves to temporarily change their arrangement.

{¶47} We find the record does not demonstrate the trial court abused its discretion. Accordingly, the fourth assignment of error is overruled.

V

{¶48} Appellant asserts the trial court made erroneous fact findings, from which it drew incorrect conclusions. The court found appellant and her new husband had one child and were expecting another, and expressed concern this could negatively affect D.G.'s role in the blended family. Appellant asserts she has learned appellee's new wife was pregnant at the time of the hearing, but the record before us is silent on this issue.

She also states although the court found appellant is not employed, she is in fact employed.

{¶49} This court cannot reverse a trial court's determination absent a finding of abuse of discretion. We find no abuse of discretion here.

{¶50} The fifth assignment of error is overruled.

VI

{¶51} In her sixth assignment of error, appellant argues the court improperly relied on the written psychological evaluation from Dr. Wolfgang, which grossly misstated critical facts and evidence and was contradictory to his courtroom testimony.

{¶52} Dr. Wolfgang testified extensively at the hearing. In his testimony, he corrected several mistakes and misleading statements in his written report. His explanation and elaboration on the written report comprises some fifty pages of the transcript.

{¶53} Given the extent to which the written report was reviewed at trial, this court cannot find the trial court relied on solely the doctor's written report rather than on the written report in conjunction with his testimony.

{¶54} The sixth assignment of error is overruled.

VII

{¶55} In her seventh assignment of error, appellant argues the trial court's holding is against the manifest weight of the evidence. A reviewing court will not disturb the trial court's decision as against the manifest weight of the evidence if the decision is supported by some competent, credible evidence. *C.E. Morris Co. v. Foley Construction*

Co. (1978), 54 Ohio St.2d 279. We may not substitute our judgment for that of the trier of fact. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748.

{¶56} We find there is sufficient competent and credible evidence contained in the record to support the trial court's determination.

{¶57} The seventh assignment of error is overruled.

{¶58} For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, of Guernsey County, Ohio, is affirmed.

By Gwin, J.,

Edwards, P.J., and

Farmer, J., concur

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER

