[Cite as *In re A.B.*, 2010-Ohio-2227.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93693

In Re: A.B.
A Minor

Appeal by: O.T.

JUDGMENT:
AFFIRMED

Appeal from the Cuyahoga County Court
of Common Pleas, Probate Division
Case No. 2008 NCH 139590

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED: May 20, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Petitioner-appellant O.T.[1] ("father") appeals from the decision of the Cuyahoga County Probate Court that denied his application to change the name of his minor daughter, A.B.

{¶ 2} Father filed the application for a name change on August 18, 2008. A.B.'s mother filed a brief in opposition to the application. Father filed a brief in support of his application for the name change. On May 13, 2009, the magistrate conducted a hearing on the application; however, the parties waived the appearance of a court reporter and consequently no transcript was made of this proceeding. On May 22, 2009, the magistrate's decision was issued, including factual findings, law, and, inter alia, a recommendation to deny the application to change the child's name.

{¶ 3} Father objected to the magistrate's decision on the following grounds:

{¶ 4} "1. The manifest weight of the evidence as presented by Plaintiff's Brief and Exhibits attached thereto, including, but not limited to the fact that plaintiff was acquitted after trial of the charge issued in December 2006, was improperly overlooked and not considered by the Magistrate. Only the alleged facts as presented by Defendant were considered in the Magistrate's decision.

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[1]The parties are referred to herein by their initials or title in accordance with this Court's established policy regarding non-disclosure of parties.

{¶ 5} "2. The Magistrate improperly disregarded the controlling law cited in Plaintiff's Brief, as set forth IN RE WILLHITE, (1999), 85 Ohio St.3rd, [sic] which superseded the 1978 case cited by the Magistrate, in which plaintiff met every standard to have his daughter's name changed, and was cited by Plaintiff in his brief, therefore the Magistrate erred by not using the standards set forth in that case in reaching his Decision."

{¶ 6} Father did not support his objections with either a transcript of evidence or an affidavit of evidence as provided by Civ.R. 53(D)(3)(b). Therefore, the only evidence in the record is contained in the briefs the parties submitted in support of or in opposition to the application for name change.

{¶ 7} On June 29, 2009, the Probate Court issued a judgment entry indicating that "[a]fter carefully reviewing the file, including the Magistrate's Decision, the Court finds that the objection is not well-taken and should be overruled for the reason that Objector's argument that the Magistrate did not properly consider evidence or improperly disregarded controlling law are without merit." The Probate Court's order, in addition to adopting the magistrate's decision, contains its own factual findings and application of the relevant law.

{¶ 8} The substantive facts pertaining to resolution of this matter will be discussed within the context of the assigned error the Father has presented for our review, which states:

{¶ 9} "I. The trial court failed to take into proper consideration the facts and law relating to a particular matter. An abuse of descretion [sic] was

exercised. Evidence was weighted [sic] improperly against the facts stated as the basis for the trial courts [sic] decision."

{¶ 10} At the outset, we note that Ohio law provides that "[i]f the mother of the child was married at the time of either conception or birth or between conception and birth, the child shall be registered in the surname designated by the mother, and the name of the husband shall be entered on the certificate as the father of the child. * * *" R.C. 3705.09(F)(1). In this case, mother designated that the child be registered in her maiden surname and properly entered Father's name on the birth certificate.

{¶ 11} Father, who was the party moving for the name change of the minor, bore the burden of showing the name change would be in the child's best interest. *Bobo v. Jewell* (1988), 38 Ohio St.3d 330, 528 N.E.2d 180; *In re Willhite* (1999), 85 Ohio St.3d 28, 706 N.E.2d 778.

{¶ 12} We review the trial court's decision to adopt the magistrate's decision by applying the abuse of discretion standard. "An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Dancy v. Dancy*, Cuyahoga App. No. 82580, 2004-Ohio-470, ¶11, citing *State v. Clark* (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331 (other citations omitted). "In order to find an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead

passion or bias." Id., citing *Nakoff v. Fairview Gen. Hosp*. (1996), 75 Ohio St.3d 254, 256, 662 N.E.2d 1.

{¶ 13} The undisputed facts we have derived from the record include: the father and mother married each other in Nevada in 2005. The couple moved to California later that year. Mother informed father of her pregnancy in December of that year. Father described his reaction as "more stunned and suspicious than thrilled." Days after disclosing the pregnancy to father, mother came to stay in Cleveland for a period of weeks. After mother had returned to California, a domestic violence dispute arose between mother and father in February 2006. The parties disagree as to the facts surrounding this event.

{¶ 14} The parties agree that mother admitted herself to a domestic violence crisis shelter for three weeks during her pregnancy. The couple's child was born August 14, 2006 and given her mother's surname. The birth certificate does identify father as the child's parent. Mother sought and obtained a protection/restraining order against father on September 20, 2006; however, provisions were made to allow father visitation with the child.

{¶ 15} The record documents various efforts by father towards visitation and there is evidence of difficulties with it. Each party presents a differing version of events as to the cause of or reasons for the visitation problems. On a date in 2007, father took the child to Michigan and was charged with interference with custody as a consequence. Father ultimately pled guilty to interference with custody and was placed on probation.

{¶ 16} The parties' divorce was finalized in 2008.

{¶ 17} Father has provided very little financial assistance to his child. Mother and child both presently reside in Louisiana with mother's side of the family (who bear the same surname as the child). Besides father, the father's side of the family has exhibited no interest in developing a relationship with the child.

{¶ 18} Many of the above facts, as well as others, were set forth in the magistrate's decision, which recommended that the application for name change be denied.

{¶ 19} Father objected to the magistrate's decision in two respects: (1) his belief that the magistrate improperly overlooked or did not properly consider the evidence he submitted with his brief; and (2) that the magistrate allegedly disregarded controlling law; specifically, *In re Willhite* (1999), 85 Ohio St.3d 28, 706 N.E.2d 778.

{¶ 20} In addressing objections, Civ.R. 53(D)(3)(b) directs the Probate Court as follows:

{¶ 21} "(d) Action on objections. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an *independent review* as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party

demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate." Civ.R. 53(D)(4)(d) (emphasis added).

{¶ 22} The record clearly reflects that the Probate Court undertook an independent review of the file and evidence before overruling father's objections.

{¶ 23} Both the magistrate and the court applied the precedent of *In re Willhite* in order to determine whether reasonable and proper cause had been established and warranted the requested name change. In doing so, they "consider[ed] the best interest of the child in determining whether reasonable and proper cause ha[d] been established * * *." As required, the following factors were cited and considered by the magistrate as well as the court: "the effect of the change on the preservation and development of the child's relationship with each parent; the identification of the child as part of a family unit; the length of time that the child has used a surname; the preference of the child if the child is of sufficient maturity to express a meaningful preference; whether the child's surname is different from the surname of the child's residential parent; the embarrassment, discomfort, or inconvenience that may result when a child bears a surname different from the residential parent's; parental failure to maintain contact with and support of the child; and any other factor relevant to the child's best interest." *In re Whillhite*, 85 Ohio St.3d at 32, citing *Bobo v. Jewell* (1988), 38 Ohio St.3d 330, 528 N.E.2d 180, paragraph two of the syllabus (other citation omitted).

{¶ 24} The pertinent facts the magistrate considered in denying the name change included "the age of the child, the limited contact between father and daughter, the lack of financial support or emotional support on the part of the father, and the acrimony that exists between the parents are all reasons to deny the application. The child is not in need of a driver's license, nor is the child enrolled in school. The child is of such a tender age that her identity through the use of her last name is certainly not imperative. Currently the child's name [is the mother's surname]. According to the mother's testimony she is deriving her support both emotionally and financially from [mother's] side of the family. Based on the testimony, it appears that the father's side of the family shows no interest in the child. It is for these reasons that the child's name should remain [A.B.]."[2] All of these findings fairly correlate to factors that *In re Willhite* sets forth for consideration in addressing a requested name change.

{¶ 25} In overruling father's objections, the Probate Court also applied the *In re Willhite* factors and concluded, based on the "facts and testimony presented," that father "failed to establish reasonable and proper cause to change the child's last name [from her mother's surname], [which has been] her name since birth and the name of her residential parent, who has supported her both emotionally and financially, to [the father's surname]. The change of name

[2]The magistrate's decision also found relevant that since birth the child has borne the surname of her mother whose guidance and support "has sustained the child" her whole life. The magistrate accepted the testimony that father had only seen his child on a handful of occasions, made three phone calls to contact the child, and has

should therefore be denied." These additional findings made independently by the Probate Court also correlate to the directives of *In re Willhite*.

{¶ 26} Consequently, father's objection that the magistrate or the court disregarded or improperly applied *In re Willhite,* was without merit and was properly overruled by the Probate Court.

{¶ 27} In his first objection, father maintained the magistrate wrongfully overlooked "the fact that plaintiff was acquitted after trial of the charge issued in December, 2006." However, the magistrate did not cite the charge as a basis for the recommendation to deny the name change; nor did the Probate Court. While the record contains evidence establishing a history of domestic disputes, acrimony, and violence between these parents, the evidence does not establish (nor did the court determine) who was the primary aggressor in these incidents. To the extent the magistrate's decision and the Probate Court's judgment recited that father faced multiple charges, including felony interference with custody, that is an accurate statement of facts that are not in dispute. In any case, and more importantly, none of that evidence was used as a basis to deny the name change.

{¶ 28} The facts that the magistrate and the Probate Court relied upon are supported by competent, credible evidence in the record. Where the magistrate based his recommendations upon his reliance on and assessment of testimony

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"provided, little or no, financial and emotional support for his daughter."

(or the credibility thereof), we are bound to accept these findings, since there is no transcript of the testimony in the record for our review. We cannot conclude on the basis of this record that the Probate Court abused its discretion when it adopted the magistrate's decision, overruled father's objections, and denied the application for name change.

{¶ 29} As previously set forth, Father did not support his objections with a transcript or with an affidavit of evidence as provided by rule. To the extent father attempts on appeal to assert additional factual findings as a basis of error in denying the name change, he has waived these arguments as set forth in Civ.R. 53(D)(3)(b), which states:

{¶ 30} "* * *

{¶ 31} "(ii) Specificity of objection. An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

{¶ 32} "(iii) 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 30 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.

{¶ 33} "(iv) Waiver of right to assign adoption by court as error on appeal. Except 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, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)."

{¶ 34} Based on the foregoing, father's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas, Probate Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR