

[Cite as *In re D.B.E.*, 2011-Ohio-44.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

D.B.E.

JUDGES:

Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 10 CA 12

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Juvenile Division, Case No. 09C227

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

January 10, 2011

APPEARANCES:

For Appellant

DAVID M. HUNTER
244 West Main Street
Loudonville, Ohio 44842

For Appellees John and Virginia Plant

BLAIR A. BOWER
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Wise, J.

{¶1} Appellant Tracy Ellis appeals the decision of Holmes County Court of Common Pleas, Juvenile Division, which dismissed her complaint for legal custody of her son, D.B.E., in favor of Appellees John and Virginia Plant, the child's paternal uncle and aunt, who are presently the child's legal custodians. The relevant facts leading to this appeal are as follows.

{¶2} On July 15, 2007, D.B.E.'s father and then-custodian, Ira Plant, passed away. At that time, appellant, D.B.E.'s mother, was in jail due to a probation violation. On July 24, 2007, the Holmes County Department of Job and Family Services ("HCDJFS") filed a complaint regarding D.B.E.'s status, alleging dependency.

{¶3} The trial court found D.B.E. to be a dependent child via a judgment entry on August 20, 2007, following an adjudicatory hearing. The court further ordered temporary custody to be maintained with HCDJFS, with placement to Sandra Whitley, the child's grandmother. Home studies were ordered, and at the dispositional hearing on September 10, 2007, the case was maintained status quo.

{¶4} As the case progressed, Sandra Whitley, John Plant, and Charles Plant (paternal grandfather) each filed motions for custody of D.B.E. A custody evidentiary hearing was conducted on May 16 and 20, 2008. The court excused HCDJFS from participating at that time.

{¶5} On July 25, 2008, the trial court issued a judgment entry ordering that legal custody of D.B.E. was granted to John and Virginia Plant, effective August 11, 2008.

{¶6} Both Sandra Whitley and D.B.E. thereafter filed notices of appeal. We affirmed the trial court's decision in both appeals. See *In re D.B.E.*, Holmes App.No. No. 08 CA 8, 2009-Ohio-1396; *In re D.B.E.*, Holmes App.No. No. 08 CA 10, 2009-Ohio-1397.

{¶7} On November 9, 2009, Appellant Tracy Ellis filed a complaint for custody in the Holmes County Juvenile Court. On March 26, 2010, Appellee Plant filed a motion to dismiss. On May 21, 2010, following an evidentiary hearing, the trial court granted the motion to dismiss, essentially finding that appellant had failed to demonstrate a change in circumstances to alter D.B.E.'s custody.

{¶8} Appellant thereafter timely filed a notice of appeal. She herein raises the following two Assignments of Error:

{¶9} "I. THE HOLMES COUNTY JUVENILE COURT ERRED WHEN IT GRANTED APPELLEE'S MOTION TO DISMISS.

{¶10} "II. THE HOLMES COUNTY JUVENILE COURT APPLIED THE WRONG LAW IN GRANTING APPELLEE'S MOTION TO DISMISS."

I., II.

{¶11} In her First and Second Assignments of Error, appellant contends the trial court erred as a matter of law by applying the "change in circumstances" prerequisite to her motion to regain custody of D.B.E. from the child's aunt and uncle. We agree.

{¶12} We first note that R.C. 2151.011(B)(19) defines legal custody to mean "a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter,

education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. * * *

{¶13} Accordingly, “an award of legal custody of a child does not divest parents of their residual parental rights, privileges, and responsibilities.” *In re M.J.M.*, Cuyahoga App.No. 94130, 2010-Ohio-1674, ¶ 11, quoting *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, ¶ 17. Our research indicates that at least one Ohio appellate court has determined, albeit in the context of post-decree proceedings, that where a motion to modify custody did not constitute an original custody determination, the trial court properly reviews a parent’s request for a custody modification against a non-parent custodian under the “change of circumstances” standard contained in R.C. 3109.04. See *Anderson v. Anderson*, Warren App. No. CA2009-03-033, 2009-Ohio-5636, ¶ 17, ¶ 19.

{¶14} However, in *Culp v. Burkhart*, Tuscarawas App.No. 04AP010006, 2004-Ohio-4425, this Court specifically held that a change of circumstances is not a prerequisite for a parent to regain legal custody of a child in juvenile court when the original relinquishment of legal custody “was not based on [the] unsuitability of the parent.” *Id.* at ¶ 16. *Culp* originally involved a court-approved private agreement between the child’s parents and the maternal grandmother as to child custody. *Id.* at ¶ 1. In the case sub judice, the custodial history commenced with a dependency complaint concerning D.B.E. filed by the Holmes County Department of Job and Family Services, which developed into a disposition of legal custody, pursuant to R.C. 2151.415(A)(3), to appellees. We note “dependency” is a statutory status finding that focuses on whether a child is receiving proper care and support. See *In the Matter of*

Smith (March 20, 1987), Seneca App.No. 13-85-38, 1987 WL 8146, citing *In re Bibb* (1980), 70 Ohio App.2d 117. As parental “unsuitability” is not a specific element of dependency under R.C. 2151.04, we find it proper to apply our rationale in *Culp* to the circumstances of this case. Moreover, in *In re Luman*, 172 Ohio App.3d 461, 875 N.E.2d 647, the Third District Court of Appeals aptly recognized: “A custody arrangement ordered pursuant to R.C. 2151.415(A)(3) is intended to be permanent, but the court retains jurisdiction over the child until the child reaches the age of 18. R.C. 2151.353(E)(1) and 2151.415(E). Because the juvenile court has continuing jurisdiction, it may amend its dispositional orders ‘on its own motion or the motion of the agency or person with legal custody of the child, * * * or any other party to the action.’ R.C. 2151.415(F).” *Id.* at ¶ 11.

{¶15} Accordingly, we hold the trial court erred in concluding that a change of circumstances demonstration was required for appellant to pursue her complaint for custody of D.B.E. under the facts and circumstances of this case.

{¶16} Appellant's First and Second Assignments of Error are therefore sustained.

{¶17} For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, Holmes County, Ohio, is hereby reversed and remanded for further proceedings consistent with this opinion.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

JUDGES

JWW/12/21

