

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

C.H.,

Plaintiff-Appellee,
v.

J.H.,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0034

Civil Appeal from the
Court of Common Pleas, Domestic Relations Division, of Columbiana County, Ohio
Case No. 2014-DR-252

BEFORE:

David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Reversed and Remanded.

Atty. C. Brooke Zellers, Zeller Law Offices, 166 North Union Avenue, Salem, Ohio 44460, for Intervenor-Appellant, Karen Hunter.

Dated: September 24, 2020

D'APOLITO, J.

{¶1} Appellant-Intervenor, Grandmother appeals the judgment entry of the Domestic Relations Division of the Columbiana County Court of Common Pleas denying her second motion to intervene as untimely. Grandmother filed her second motion to intervene in this divorce action, terminating the marriage of her son and his first wife, and determining the custodial rights over their children, B.H., and S.H, after the Magistrate granted Mother's third motion to reallocate parental rights.

{¶2} As the domestic relations court had sustained her first motion to intervene pursuant to Civ. R. 73(B)(3), we find that Grandmother was already a party defendant when she filed the second motion to intervene. Despite her status as a party, Grandmother was neither served with a copy of Mother's third motion to reallocate parental rights, nor provided notice of the hearing on the third motion to reallocate.

{¶3} Although captioned "Motion to Intervene," the motion first asserts that Grandmother is a necessary and indispensable party because she was granted custody of the children in the divorce decree. As a consequence, she asks the domestic relations court to vacate the Magistrate's judgment entry sustaining Mother's third motion to reallocate parental rights, and remand the matter to the Magistrate in order to conduct a new hearing on the third motion to reallocate. If the trial court finds that she was not a necessary party, she argues, in the alternative, that she should be permitted to intervene because she has acted in loco parentis for the children.

{¶4} Because Grandmother was a party, and she was not provided notice of the hearing and the right to be heard on the third motion to reallocate parental rights, we find that the domestic relations court abused its discretion when it overruled her motion to vacate the Magistrate's judgment entry and her request for a new hearing. Accordingly, the judgment entry of the domestic relations court overruling the second motion to intervene is reversed, and this matter is remanded for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

{¶5} During the initial divorce proceedings, neither Father nor Mother were found to be suitable as the residential parent. Father regularly abused alcohol, he had two OVI convictions, and he had compromised cognitive abilities due to a head injury. Further, Mother had accused Father of physical and sexual abuse, although her accusations were never substantiated.

{¶6} Mother had engaged in a campaign to convince the children that Father had sexually abused them, despite any physical evidence supporting her claims. In addition, and contrary to medical advice, Mother continued to breast-feed the children, who were ages five and two-and-a-half when the divorce decree was issued. The GAL reported that Mother used breast-feeding as an “incentive/disciplinary tool,” and that the children required extensive dental surgery as a result of “milk rot.”

{¶7} Grandmother filed her first motion to intervene after the guardian ad litem (“GAL”) requested the immediate removal of the children from Mother on the ground of parental alienation. At the time, Grandmother was a registered nurse with twenty-five years of experience. She worked a steady day shift and was in good physical health. Based on the recommendation of the GAL, the domestic relations court awarded primary custody of the children to Grandmother in the divorce decree in September of 2015.

{¶8} Mother filed three motions to reallocate parental rights in the following three years. Her first motion, which was filed two months after Grandmother was awarded custody, was resolved by an agreement between the parties that Father would become the residential parent and legal custodian.

{¶9} Mother’s second motion asserted that Father acted with an “air of superiority” because of his primary custody designation and acted as though Mother had no rights. The domestic relations court overruled Mother’s second motion finding that no change in circumstances had occurred.

{¶10} In the judgment entry overruling the second motion, the domestic relations court observed that Father had married his second wife in the interim between the first and second motions to reallocate. The domestic relations court further observed that her presence, as well as the presence of her two children, was a positive influence on Father

and B.H. and S.H. Grandmother was served with notice of the hearings on the first two motions to reallocate parental rights.

{¶11} Within days of the issuance of the judgment entry overruling Mother's second motion to reallocate parental rights, Father's second wife filed for divorce and for a domestic relations civil protection order against Father. Mother filed the third motion to reallocate parental rights roughly four months later.

{¶12} At the hearing on the third motion to reallocate, Father's now second-ex wife testified that she had misled the domestic relations court regarding Father's behavior at the previous hearing due to pressure from Father and his family. She further testified that Father and his family had convinced her that the situation with Mother was much worse than the situation with Father.

{¶13} According to her testimony, Father was prone to excessive drinking and violent outbursts. He was drunk at least two times per week. Specifically, she described three instances where Father was drunk and confrontational with her and the children. On one occasion, he brandished an unloaded shotgun and threatened to kill himself. On another occasion, he tried to force himself on her sexually while pretending to be someone who molested her as a child. On the third occasion, her young son intervened in an argument between the couple and Father "put [her son] on the ground, and started punching him." (4/3/19 Hrg Tr., 38.)

{¶14} Mother testified at the hearing on the third motion to reallocate that the children were afraid of Father and cried when they had to return to his custody. She further testified that the children had related the story about the unloaded shotgun.

{¶15} Mother observed that Father had moved four times without notifying her, and that he did not advise her of the children's medical appointments or school pageants. Midway through Mother's testimony, Father began to interject comments, and, at the behest of his counsel, voluntarily left the courtroom.

{¶16} The Magistrate sustained Mother's third motion to reallocate parental rights based on Father's consent to the domestic relations civil protection order, his denial of his alcohol abuse, and his repeated failure to notify the court of his relocation with his children. The Magistrate observed that Mother had "brought stability to her life," while Father had "blown it with his drinking and anger." (5/14/19 Mag. Dec., p. 4.) Effective at

the end of the 2019 school year, Mother was named primary residential parent and Father was awarded reasonable parenting time in accordance with Local Rule 9.4.

{¶17} Grandmother’s second motion to intervene was filed exactly three months later on August 14, 2019. The motion’s caption is a misnomer. Grandmother’s request to intervene is secondary to her argument that the Magistrate’s decision should be vacated because she was not served with notice of the hearing, despite the fact that she was a party to the divorce action. Grandmother writes:

[Grandmother] believes that she is a necessary and indispensable party based upon the prior proceedings and should have been afforded notice and opportunity to participate in these proceedings, and that because the other parties failed to do so, that the matter should be remanded back to the Magistrate for further proceedings. In the event that this honorable Court [sic] is not convinced as to her status as a party, then she respectfully begs this court leave to intervene so that she can provide another option for the placement of the children and requests the reappointment of the [GAL.]

(8/14/19 Mot. at p. 2.)

{¶18} Grandmother further argued that both Father, who had been living with her for the previous six months, and Mother had “significant issues, as [had] been shown through the prior proceedings in this case, that are detrimental and potentially harmful to the minor children and [Grandmother believed] it would be in their best interest for the children to be returned to her care as caretaker.” (Mot. at p. 2.) Grandmother also requested reappointment of the GAL. The GAL had acted on the children’s behalf in the three previous custody determinations, but, inexplicably, had not been reappointed for purposes of the third motion for reallocation of parental rights.

{¶19} When the second motion to intervene was filed, the domestic relations court had already adopted the Magistrate’s decision, but objections to the Magistrate’s decision were still pending. A non-oral hearing that had been scheduled for August 16, 2019 was continued to October 25, 2019, to allow additional time for the preparation of the hearing transcript.

{¶20} On August 27, 2019, the domestic relations court overruled Grandmother's motion to intervene finding that it was untimely, as the evidentiary hearing on the motion to reallocate parental rights had been held on April 3, 2019, and the Magistrate had issued his decision granting the motion and awarding custody to Mother on May 14, 2019. This timely appeal followed.

ANALYSIS

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT'S DENIAL OF [GRANDMOTHER'S] MOTION TO INTERVENE IS A VIOLATION OF [GRANDMOTHER'S] PROCEDURAL DUE PROCESS.

{¶21} Grandmother contends that she was denied procedural due process based on the domestic relations court's failure to notify her of the hearing. The right to procedural due process is found in the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502, ¶ 6. "Although the concept is flexible, at its core, procedural due process under both the Ohio and United States Constitutions requires, at a minimum, an opportunity to be heard when the state seeks to infringe a protected liberty or property right." *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846, ¶ 8, citing *Boddie v. Connecticut* (1971), 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

{¶22} Civ. R. 75, captioned, "Divorce," provides that Civ. R. 19 does not apply in divorce actions, however, subsection (B)(3) reads, "The court may make any person or agency claiming to have an interest in or rights to a child by rule or statute, including but not limited to R.C. 3109.04 and R.C. 3109.051, a party defendant * * *." The domestic relations court granted Grandmother's original motion to intervene pursuant to Civ R. 75(B)(3). As a consequence, we find that Grandmother was a party defendant when the third motion to reallocate was filed, and due process requires that she be served with a copy of the motion and the notice of hearing.

{¶23} In the motion, Grandmother asked the domestic relations court to vacate the Magistrate's judgment entry sustaining Mother's third motion to reallocate parental

rights, and remand the matter to the Magistrate in order to conduct a new hearing based on the violation of her right to due process. Because Grandmother was a party defendant, and received no notice of the hearing, we find that the trial court abused its discretion when it overruled the motion. Accordingly, Appellant's first assignment of error is sustained.

ASSIGNMENT OF ERROR NO. 2

**THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION IN DENYING
[GRANDMOTHER'S] MOTION TO INTERVENE.**

{¶24} Because we find that Grandmother was a party defendant, Grandmother's second assignment of error predicated upon the denial of her second motion to intervene is moot.

CONCLUSION

{¶25} For the foregoing reasons, the judgment entry of the domestic relations court overruling the motion to intervene is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas, Domestic Relations Division, of Columbiana County, Ohio, is reversed. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.