[Cite as *L.W. v. L.B.*, 2010-Ohio-2796.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

L.W.	Court of Appeals No. L-09-1309
Appellee	Trial Court No. 04-129738
v.	
L.B.	**DECISION AND JUDGMENT**
Appellant	Decided: June 18, 2010

* * * * *

Theodore Tucker, III, for appellee.

L.B., pro se.

* * * * *

SINGER, J.

{¶ 1} Appellant brings this accelerated appeal, challenging an order reallocating parenting time issued by the Lucas County Court of Common Pleas, Juvenile Division.

{¶ 2} On May 26, 2004, appellee, L.W., petitioned the court to establish parentage of her then two week-old son, J.W. Appellant, L.B., was named respondent. On July 6, 2004, appellant's parentage was established through an administrative order of

paternity following genetic testing. A child support order was established. Shortly thereafter, the trial court began a hearing on parental rights that continued intermittently for nearly two years.[1]

{¶ 3} At the outset, a guardian ad litem was appointed for the child. Counsel was appointed for each of the parties. Appellant requested and was granted parenting time with the child. In 2005, the court designated appellee the residential parent and ordered each party to have custody of the child "two days on, two days off and alternate weekends."

{¶ 4} On November 7, 2007, appellant filed a motion to reduce child support and to allocate to him the child tax exemption for his son. The court set a January 18, 2008 hearing date on the motion. On January 18, the court continued the matter for a February 25, 2008 hearing.

{¶ 5} Also on January 18, appellee filed a motion to confirm her designation as residential parent and "other relief." The "other relief" requested was modification of the shared parenting order. Appellee suggested that, due to changed circumstances, it would now be in J.W.'s best interest to modify the parenting schedule to the court standard schedule.

{¶ 6} After the February 25 hearing on appellant's motion, the magistrate, in a March 20, 2008 order, reduced appellant's child support and affirmed appellee as the child's residential parent. In a subsequent April 11 order, the magistrate denied

[1]During the course of these proceedings, appellant has been represented by four separate attorneys, appellee two.

appellant's request to be allocated the tax exemption for the child. The trial court rejected appellant's objections to the magistrate's decision.

{¶ 7} A hearing on appellee's January 18, 2008 motion for schedule modification was originally set for August 8, 2008, but was continued on appellant's motion until September 2. On September 2, 2008, the hearing date on appellee's motion was continued until October 30.

{¶ 8} At the October 30 hearing, appellee testified that a month earlier J.W. began attending preschool from 9:00 a.m. until 3:00 p.m., Monday through Thursday. This, according to appellee, makes the "two day on, two day off" schedule stressful to the child. Appellee requested the court modify the parenting time allocation to the standard court schedule.

{¶ 9} On November 7, 2008, the magistrate found the current schedule created "an unstable situation for the child" and this constituted a change in circumstances. The magistrate then concluded that it was in J.W.'s best interest to adopt the standard court schedule with extended summer visitation.

{¶ 10} Appellant filed a pro se objection to the magistrate's decision and requested transcripts from the hearings of February 25, September 2 and October 30, 2008. The trial court stayed consideration of appellant's objection pending delivery of the transcripts. On March 9, 2009, appellant advised the trial court that the court reporter had notified him that transcripts of the February 25 and September 2 hearings could not be located. Appellant requested that the portion of the order from the February 25 hearing designating appellee as "permanent custodial parent" be reversed.

{¶ 11} On November 24, 2009, the trial court overruled appellant's objections to the November 7, 2008 magistrate's decision and found objections to decisions from the February 25 and September 2, 2008 proceedings untimely. The court noted in its judgment that the September 2 proceeding was a scheduling hearing only and need not have been recorded.

{¶ 12} The court also noted that the February 25 hearing, which was to be electronically recorded, apparently was not. The court vacated the judgments from that hearing and ordered a rehearing on the issues of support modification and the child tax exemption. The court expressly denied rehearing of the designation of appellee as residential parent, because the issue was rendered moot by the October 30 contested child custody hearing.

{¶ 13} It is from this judgment that appellant now brings this appeal. In four assignments of error, appellant maintains that; 1) the trial court's inability to produce transcripts from the February 25 and September 2, 2008 hearings denied him due process, 2) the magistrate's lengthy delay in issuing two decisions on the same motion constituted double jeopardy and/or a due process violation, 3) the magistrate should have appointed a guardian ad litem for J.W. where neglect was alleged and 4) the trial court abused its discretion when it failed to adhere to statutory guidelines in considering a change of circumstances and the best interest of the child.

I. Due Process – Double Jeopardy

{¶ 14} We shall discuss appellant's first two assignments of error together.

{¶ 15} Regarding appellant's assertion that certain events in this proceeding constituted double jeopardy, this assertion is without merit. The Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee that no person may be put twice in jeopardy for the same criminal offense. These provisions are generally inapplicable in civil proceedings such as this matter. *Reiger v. Reiger*, 2d Dist. No. 21784, 2007-Ohio-2366, ¶ 12. The civil equivalent would be the doctrine of res judicata which bars relitigation of claims or issues, but the doctrine is limited to final judgments on the merits. *Grava v. Parkman Twp.*(1995), 73 Ohio St.3d 379, syllabus.

{¶ 16} With respect to appellant's assertion that he was denied due process of law, at a minimum, due process requires notice of a proceeding and an opportunity to be heard. *In re J.M.*, 12th Dist. No. CA2008-12-148, 2009-Ohio-4824, ¶ 60. Also encompassed in the phrase is the concept that a litigant should be afforded "fundamental fairness." *In re J.B.*, 10th Dist. Nos. 08AP-1108, 09AP-39, 08AP-1109, 08AP-1122, 2009-Ohio-3083, ¶ 12, citing *Lassiter v. Dept. of Social Serv. of Durham Cty., N. C.* (1981), 452 U.S. 18, 24.

{¶ 17} Appellant makes no allegation that he was not notified of any proceeding or that he was denied an opportunity to be heard in any proceeding. Rather, he contends that it was unfair for the court to rule on part of appellee's motion to confirm her as residential parent at the February 25 hearing, while delaying for nearly nine months consideration of the request to modify the parenting schedule.

{¶ 18} It is not clear that appellant's characterization of the February 25 hearing is accurate. Although there is a reaffirmation of appellee's status as residential parent, the substance of the magistrate's order is the modification of child support and the denial of appellant's request to reallocate the tax exemption. With respect to these last two items, the trial court has already ordered a rehearing in view of the missing transcript of the original hearing. There is little more remedy that we can afford than that which has already been granted. Moreover, appellant prevailed on the child support issue.

{¶ 19} The reaffirmation of appellee's status as residential parent changed nothing. The visitation schedule continued after the February hearing as it had before, as appellant wishes to return to now. Consequently, appellant suffered no prejudice from the delay between the assertion of the motion and the hearing on the issue.[2]

{¶ 20} Accordingly, appellant's first and second assignments of error are not well-taken.

II. Guardian ad litem

{¶ 21} In his third assignment of error, appellant insists that the trial court was obligated to provide a guardian ad litem for J.W. after allegations that the child was neglected. Appellant insists that "allegations of neglect were made" at the February 25 hearing for which no transcript is available. He also insists that appellee accused him of neglect when she testified at the October 30 hearing that J.W. "always comes home

[2]The trial court originally scheduled the hearing on the motion for August 2008. It was postponed on appellant's motion. The assertion in appellant's brief to the contrary is inaccurate.

hungry." With such allegations, appellant insists, the court was required to appoint a guardian ad litem.

{¶ 22} R.C. 2151.281(B) provides, "[t]he court shall appoint a guardian ad litem, subject to rules adopted by the supreme court, to protect the interest of a child in any proceeding concerning an alleged abused or neglected child and in any proceeding held pursuant [R.C. 2151.41.4]." See, also, Juv.R. 4(B)(5).

{¶ 23} According to appellant, the statute mandates the appointment of a guardian ad litem.

{¶ 24} "R.C. 2151.281 contemplates a case where the county children's services agency or other party files a complaint against the parent, alleging child abuse or neglect." *Truitt v. Truitt* (1989), 65 Ohio App.3d 133, 134. In this matter, children's services was not involved and neither parent made any formal complaint of abuse or neglect. Indeed, there is no record of any neglect or abuse allegation from the February 25 hearing and the testimony to which appellant directs our attention from the October 30 hearing does not seriously allege neglect or abuse.

{¶ 25} Moreover, at the outset of the case, the court did appoint a guardian ad litem who reported to the court that the parties were so fixated with punishing each other they seemed to ignore that which was best for the child. This guardian was subsequently reappointed, but neither party submitted the guardian's fee deposit as directed by the court. The court noted in the judgment appealed from that this is a private custody matter in which the parties are required to pay for their own counsel and the guardian fees.

{¶ 26} The juvenile court exercises jurisdiction over child custody matters pursuant to R.C. 2151.23(F)(1). That statute provides that such jurisdiction should be exercised in accordance with R.C. 3109.04. R.C. 3109.04 provides that the appointment of a guardian ad litem is within the juvenile court's sound discretion.

{¶ 27} In this matter, there was no allegation of abuse or neglect within the contemplation of R.C. 2151.281. As a result, the trial court was under no mandate to appoint a guardian ad litem. In its discretion, the court did appoint a guardian a second time, but conditioned that appointment on the parties paying the guardian's fees. Such a conditional appointment was within the sound discretion of the court. Accordingly, appellant's third assignment of error is not well-taken.

III. Statutory Guidelines

{¶ 28} In his final assignment of error, appellant asserts the trial court failed to comply with R.C. 3109.04(E) when modifying the prior allocation of parental rights. Appellee responds that appellant's reliance on R.C. 3109.04 is misplaced, because there was no modification of parental rights, only a modification of parenting time. For this, appellee insists, the controlling law is found in R.C. 3109.051.

{¶ 29} R.C. 3109.04(E) provides:

{¶ 30} "(E) (1) (a) The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential

parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

{¶ 31} "(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

{¶ 32} "(ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.

{¶ 33} "(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child."

{¶ 34} R.C. 3109.051(D) states, in material part:

{¶ 35} "(D) In determining whether to grant parenting time to a parent pursuant to this section * * *, in establishing a specific parenting time or visitation schedule, and in determining other parenting time matters * * * or visitation matters * * *, the court shall consider all of the following factors:

{¶ 36} "(1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons * * *;

{¶ 37} "(2) The geographical location of the residence of each parent * * *;

{¶ 38} "(3) The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;

{¶ 39} "(4) The age of the child;

{¶ 40} "(5) The child's adjustment to home, school, and community;

{¶ 41} "* * *

{¶ 42} "(7) The health and safety of the child;

{¶ 43} "* * *

{¶ 44} "(9) The mental and physical health of all parties;

{¶ 45} "(10) Each parent's willingness to reschedule missed parenting time * * *;

{¶ 46} "* * *

{¶ 47} "(13) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

{¶ 48} "* * *

{¶ 49} "(16) Any other factor in the best interest of the child."

{¶ 50} Appellee is correct in her assertion that there was no change in the designation of the residential parent or legal custodian. That designation was awarded to appellee in 2005 and never changed.

{¶ 51} There was, however, a significant modification in the allocation of parental responsibilities from these proceedings. The judgment from which appellant appeals

shifted from a shared parenting arrangement that provided for essentially equal periods of custody to one in which appellee is established as the principal caregiver with the overwhelming share of custodial time. The practical effect, then, is greater than a mere tweaking of parenting time. Moreover, the language employed in the magistrate's decision and in the judgment appealed from suggests that this was a proceeding under R.C. 3109.04 rather than R.C. 3109.05.

{¶ 52} To justify a change of custody pursuant to R.C. 3109.04(E), the court must find that, 1) there has been a change of circumstances for the child, the child's parent or parents, and 2) modification of parental rights and responsibilities is in the child's best interests. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 417. A finding of a change of circumstances should not be disturbed absent an abuse of discretion. In determining whether such a change is sufficient to warrant a custody change, the court must be afforded wide latitude. Id. at paragraphs one and two of the syllabus.

{¶ 53} An abuse of discretion is more than an error of law or a lapse of judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. A reviewing court should not reverse the decision of the trial court merely because it holds a different opinion of the witnesses or evidence submitted. *Davis* at 219.

{¶ 54} The trial court found that the friction between the parents, the fact that the child is now regularly attending school and the "two day on/two day off" arrangement now constituted an "unstable situation" for J.W. This, the court determined, was a

change of circumstance sufficient to warrant custody modification. There is competent, credible evidence in the record to support this finding.

{¶ 55} The court also concluded that such a change was in J.W.'s best interest. We cannot say that such a conclusion was arbitrary, unreasonable or unconscionable.

{¶ 56} Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 57} On consideration whereof, the judgment of the Lucas Court of Common Pleas, Juvenile Division is affirmed. It is ordered that appellant pay costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE