

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

In the Matter of: C.D.

Court of Appeals No. E-09-066

Trial Court No. 2008-JD-0053

DECISION AND JUDGMENT

Decided: December 3, 2010

* * * * *

Loretta A. Riddle, for appellant.

Kenneth E. Bogden, for appellee.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from the Erie County Court of Common Pleas, Juvenile Division, which was asked to release certain records regarding appellant's mental health to appellee pursuant to a discovery request in connection to a custody dispute over the parties' minor child. The trial court conducted an in camera inspection and subsequently

submitted a portion of the records requested to counsel for appellee. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, mother of the minor child, by and through counsel, sets forth the following sole assignment of error:

{¶ 3} "THE TRIAL COURT ERRED, ABUSED ITS DISCRETION AND PREJUDICED THE MOTHER WHEN THE COURT, WITHOUT HEARING OR NOTICE TO THE MOTHER OR HER ATTORNEY ORDERED, PURSUANT TO JUVENILE RULE 24, MOTHER'S CONFIDENTIAL RECORDS FROM THE ERIE COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES TO BE TURNED OVER TO NO ONE (INCLUDING MOTHER'S ATTORNEY) OTHER THAN FATHER'S ATTORNEY TO BE USED AGAINST MOTHER AT TRIAL."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. On February 27, 2009, the parties, parents of the subject minor child, entered into a shared parenting plan regarding custody of the child. On May 21, 2009, appellant filed a motion to change custody seeking to cease the shared parenting plan and obtain sole custody. In support, appellant issued various allegations of purported violent acts by appellee. In the course of the pending child custody litigation, appellee's counsel sought discovery pertaining to documentation of appellant's mental health issues.

{¶ 5} Appellee sought these records via a subpoena duces tecum issued on August 28, 2009, to the Erie County Department of Job and Family Services ("ECDJFS"). On August 31, 2009, ECDJFS filed a motion to quash asserting that the

records were confidential and not subject to disclosure. On September 3, 2009, the court issued a judgment entry addressing the motion to quash the subpoena.

{¶ 6} On October 29, 2009, the court issued two judgment entries. The first entry directed ECDJFS to submit the requested discovery with certain enumerated exceptions and relayed that the court would review the discovery in camera to ascertain which records could properly be conveyed during discovery. The second entry reflected that the court had reviewed the documents in camera and released a portion of the requested documents to counsel for appellee in connection to the pending custody litigation and on the basis on the in camera inspection. Appellant did not request copies of the records at issue after learning of this discovery determination by the court.

{¶ 7} On November 9, 2009, appellant filed an amended motion to strike while the matter was still pending in the trial court. It was denied. On November 20, 2009, a portion of the records that had been subpoenaed were delivered to the court and placed under seal. On January 22, 2010, a pretrial was held. Appellant and her counsel failed to appear at trial. Another attorney appeared and conveyed to the court that appellant's counsel refused to appear. Given the failure to appear and prosecute the case before the trial court, appellant's motion to change custody was denied on February 16, 2010. On April 29, 2010, the instant appeal was filed.

{¶ 8} In the single assignment of error, appellant argues that the trial court abused its discretion in permitting certain of appellant's confidential mental health records to be submitted to opposing counsel following an in camera inspection by the trial court in

response to appellee's discovery requests. An abuse of discretion connotes more than a mere error of law or judgment. It implies that the disputed trial court action was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1987), 5 Ohio St.3d 217, 219.

{¶ 9} More specifically, the determinative crux of this case is appellant's assertion that the trial court erred as a matter of law in "releasing subpoenaed documents to the father following an in camera inspection of the documents by the trial court." In support of this argument, appellant places emphasis on claims of no service of the document request to appellant and also on the fact that none of the documentation submitted for in camera inspection and/or ultimately produced to opposing counsel as part of discovery was automatically furnished to appellant.

{¶ 10} In response, we note both that appellant did not request copies of the relevant records even after becoming aware of the issue and, more significantly, none of the records were ever disseminated outside of the controlled and limited scope of discovery during the litigation. We also note that none of the records were ever utilized against appellant in any proceeding in the course of the litigation. On the contrary, appellant and her counsel elected to fail to attend, appear at, or proceed with the child custody trial.

{¶ 11} In response to appellant's assignment of error, appellee contends that the disputed discovery order was not a final, appealable order. Based upon our review and

consideration of that contention, we reject appellee's position that the matter was not final and appealable.

{¶ 12} Pursuant to R.C. 2505.02(B)(4), an order is a final appealable order if it satisfies each part of a three-part test: (1) the proceeding is a "provisional remedy"; (2) the order must both determine the action and prevent a judgment in the action in favor of the appealing party with respect to the provisional remedy; and (3) the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment. *State v. Muncie* (2001), 91 Ohio St.3d 440. The definition of a provisional remedy under R.C. 2505.02 includes the discovery of privileged matter.

{¶ 13} Relevant Ohio case law establishes that a discovery order entailing disclosure of confidential matters is treated the same as orders disclosing privileged matters. *Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195; see, also, *Delost v. Ohio Edison Co.*, 7th Dist. No. 07-MA-171, 2007-Ohio-5680.

{¶ 14} This approach stems from potential prejudicial dissemination of the information. While the record reflects no such prejudicial dissemination or usage of the mental health documents reviewed in camera by the court and some of which were determined to be discoverable, the related discovery orders are clearly final, appealable orders pursuant to both R.C. 2505.02(B)(4) and pertinent caselaw.

{¶ 15} Given our rejection of appellee's contention that the matter is not final and appealable, we must now determine whether the disputed discovery action was an abuse of discretion. We note that Ohio courts have consistently recognized the legitimacy of

usage of an in camera inspection in civil cases involving disputed discovery requests of confidential documents. *State v. Hart* (1988), 57 Ohio App.3d 4; *Henneman v. Toledo* (1988), 35 Ohio St.3d 214.

{¶ 16} In conjunction with this, we note that appellant elected not to request copies of the relevant records even after becoming aware of this discovery matter. In addition, the record reflects that none of the records were ever disseminated outside of the controlled parameters and limitations of the in camera discovery or utilized in any proceeding against appellant in the course of the litigation. Ultimately, appellant and her counsel declined to appear at the child custody trial. Rather, they elected to dispatch another attorney, Beverly Newell-Hancock, to convey that counsel refused to appear for trial.

{¶ 17} We have carefully reviewed and considered the record of evidence in this matter. We find that it fails to establish that the trial court's actions and orders in conducting an in camera inspection of a party's confidential mental health records in response to a discovery request and the subsequent furnishing of a portion of those records to counsel for the opposing party in the course of discovery connected to pending child custody litigation was arbitrary, unreasonable or unconscionable.

{¶ 18} On the contrary, the record reflects the placement of documents under seal. The record further reflects the documents were never disseminated outside of the discovery parameters or utilized in any proceeding against appellant. The record also reflects that appellant's counsel refused to appear at trial and sent another attorney to

relay trial counsel's refusal to attend to the court in apparent opposition to prior discovery actions that are expressly deemed proper by relevant caselaw. We find appellant's sole assignment of error not well-taken.

{¶ 19} On consideration whereof, the judgment of the Erie County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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