

[Cite as *In re Ballard*, 2003-Ohio-3233.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: RENARD, SARAH AND
REGGIE BALLARD

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C.A. Case No. 19511

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T.C. Case No. 95-0403/99-8720/
000-0227

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(Civil Appeal from Common Pleas
Juvenile Court)

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OPINION

Rendered on the 20th day of June, 2003.

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FAIN, P.J.

{¶1} This appeal arises from a child custody dispute initiated in juvenile court pursuant to R.C. 2151.23(A)(2). Appellant Renard Ballard contends that the trial court erred in awarding custody of his three children to their natural mother, appellee Beverly Dawkins. In support, he claims that the trial court erred in failing to determine whether a change in circumstances had occurred, and by failing to consider evidence of the mother’s prior abuse of a child. He also claims that the trial court erred by overruling his objections to the magistrate’s decision prior to the expiration of time for the filing of supplemental objections.

{¶2} We conclude that the trial court did err in failing to consider evidence regarding the alleged abuse by Dawkins. Accordingly, the judgment of the trial court is reversed, and this cause is remanded for further proceedings.

I

{¶3} Appellant Renard Ballard and Appellee Beverly Dawkins are the parents of six children.¹ Ballard and Dawkins were never married. In December, 1999, Dawkins filed a complaint with the Montgomery County Juvenile Court seeking custody of two of the children. Thereafter, in January, 2000, Ballard filed a complaint seeking custody of the third child.

{¶4} A Guardian Ad Litem was appointed to represent the children. The GAL recommended that custody be awarded to Dawkins. Following a hearing, the magistrate issued a decision granting custody of all three children to Dawkins. Ballard filed a general objection thereto. The trial court overruled Ballard’s objection and affirmed the decision of the magistrate. Ballard appeals. Dawkins has not filed

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Only three of the children are involved in this appeal.

an appellate brief.

II

{¶5} Ballard's First Assignment of Error states as follows:

{¶6} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN VIOLATING ITS PRIOR ORDER AND IGNORING APPELLANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS [SIC] OBJECTIONS, THUS DENYING APPELLANT DUE PROCESS AND VIOLATING OHIO RULE OF JUVENILE PROCEDURE 40."

{¶7} Ballard claims that the trial court ruled upon his objections to the magistrate's report without giving him the opportunity to file supplemental objections and a memorandum in support thereof.

{¶8} We have reviewed the record and find no merit to this argument. The magistrate's decision was filed March 18, 2002. Ballard timely filed a general objection to the decision, and sought additional time to obtain a transcript of the hearing and to file supplemental objections. From the record, it appears that after the transcript was filed on May 3, 2002, Ballard failed to file any supplemental objections. The trial court went so far as to place a telephone call to Ballard's counsel regarding the failure to file. The trial court then granted Ballard a filing extension until June 26, 2002. Ballard did not meet that deadline. The trial court then extended the time for filing to July 12, 2002. Again, Ballard did not file any supplemental objections. The trial court did not enter its order until July 25, 2002, well after the time for filing had expired.

{¶9} Given that the trial court granted Ballard ample opportunity to file supplemental objections, supplemental objections were never filed, and the trial court did not render a decision on the general objections until well after the filing deadline had expired, we conclude that the trial court did not err. Accordingly, the First Assignment of Error is overruled.

III

{¶10} Ballard's Second Assignment of Error provides as follows:

{¶11} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY

IGNORING STATUTORY CONSIDERATIONS PER ORC 2151.42(B).”

{¶12} Ballard contends that the trial court erred in giving custody to Dawkins without first determining whether a change of circumstances mandated such a change as required by R.C. 2151.42(B).²

{¶13} R.C. 2151.23(A)(2) gives juvenile courts exclusive jurisdiction "to determine the custody of any child not a ward of another court of this state[.]" *Vance v. Vance*, 151 Ohio App.3d 391, 396, 2003-Ohio-310. R.C. 2151.23(F) further provides that "[t]he juvenile court shall exercise its jurisdiction in accordance with section[] 3109.04 * * * of the Revised Code.”

{¶14} R.C. 3109.04(E)(1)(a) states that a court “shall not modify a prior decree allocating parental rights” unless it finds a change in circumstances. “Such a determination when made by a trial judge should not be disturbed, absent an abuse of discretion.” *Davis v. Flickinger*, 77 Ohio St.3d 415, 1997-Ohio-260, paragraph one of the syllabus. In this case, it is impossible to determine from the record before us whether there was a prior determination or agreement regarding the custody of these three children. The record contains testimony from Ballard and Dawkins to the effect that Ballard may have had custody by way of an agreed order or court order of two of the children. However, the record does not contain or exemplify any custody order. Moreover, it is not clear whether the custody order alluded to in the testimony may be contained in another case file.

{¶15} If in fact there was any type of prior custody determination that resulted in an award of custody to Ballard, then the trial court erred by failing to determine whether a change of custody was supported by a finding of a change of circumstances in accordance with R.C. 3109.04. If no prior custody determination was made, then the trial court did not err in treating this case as an original determination and proceeding solely on a best-interest-of-the-child standard. In any event, as stated, we cannot determine from this record whether this proceeding

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We note that Ballard cites R.C. 2151.42 as the statute relevant to this appeal. However, a reading of that statute clearly indicates that it is not applicable. The statutory section involving change of circumstances issues relevant to this appeal is found at R.C. 3109.04.

constituted an original custody determination or a hearing on a motion to modify custody. Therefore, and in view of our disposition of the Third Assignment of Error, below, we conclude that this matter must be remanded to the trial court.

{¶16} The Second Assignment of Error is sustained.

IV

{¶17} Ballard's Third Assignment of Error is as follows:

{¶18} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN EXCLUDING THE EVIDENCE OF MOTHER'S HISTORY OF CHILD ABUSE."

{¶19} Ballard contends that the trial court erred because it refused to admit or consider evidence concerning allegations of past child abuse committed by Dawkins. Ballard argues that this evidence is relevant to a determination of the best interest of the children.

{¶20} In this case, the trial court stated that it would not consider the evidence concerning the alleged child abuse because the alleged abuse had occurred prior to the date of the last hearing in the case. Again, the record does not make clear whether the prior hearing resulted in a determination of custody. In any event, we conclude that the trial court erred.

{¶21} In making a determination of a change of circumstances, pursuant to R.C. 3109.04(E), the trial court may not modify a custody decree unless it finds a change of circumstances "based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree". Thus, although the trial court would not necessarily abuse its discretion by excluding evidence of facts occurring prior to the last custody hearing in the case when considering whether a change of circumstances has occurred, once it finds that a change of circumstances has occurred, it must then consider whether a change of custody is in the best interest of the children. To that end, the trial court must consider, among other things, whether "**** there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child." R.C. 3109.04(F)(1)(h).

{¶22} Where an order modifying custody is based upon a claim of changed

circumstances, the trial court entering the order must find that there has been a change of circumstances since the last custody hearing. Because the trial court must also find that a modification of custody is in the best interests of the child, the trial court is obliged to hear otherwise admissible, probative evidence proffered concerning the best interests of the child before it may modify custody. For example, where a father has previously been awarded custody of a child, and now proposes to move, or has moved, to a distant state, uprooting the child in the process, a trial court might well find a change of circumstances since the last custody hearing. The trial court must then decide whether a modification of custody is in the child's best interest. In connection with that determination, it would certainly be competent to offer evidence that the mother had been convicted of killing the child's sibling, in a fit of rage, even though that fact had occurred before the date of the last custody hearing.³

{¶23} Ballard proffered evidence concerning possible abuse by Dawkins. There is also evidence in the record which indicates that Ballard had abused a child. The trial court erred by not considering this evidence on the issue of the best interests of the children, in accordance with the statute. Therefore, the Third Assignment of Error is sustained.

V

{¶24} Ballard's Second and Third Assignments of Error having been sustained, the judgment of the trial court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

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BROGAN and WOLFF, JJ., concur.

Copies mailed to:

J. Allen Wilmes

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This hypothetical situation is offered for illustrative purposes, only. We do not suggest that the abuse alleged in this case, if proven, can be equated with the hypothetical circumstances.

Anthony W. Sullivan
James S. Armstrong
Hon. Nick Kuntz