[Cite as *Noblet v. Noblet*, 2010-Ohio-3917.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

LEEANNA M. NOBLET (nka RAINES)	:	
	:	Appellate Case No. 2009-CA-28
Plaintiff-Appellant	:	
	:	Trial Court Case No. 1999-DR-176
v.	:	
	:	
JOSEPH WILLIAM ALLEN NOBLET	:	(Civil Appeal from Domestic
	:	Relations,
		Common Pleas Court)
	:	
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 20th day of August, 2010.

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FAIN, J.

{¶ 1} Plaintiff-appellant Leeanna M. Noblet, now known as Raines, (Raines) appeals from an order of the trial court construing prior visitation orders, and ordering overseas visitation between defendant-appellee Joseph William Allen Noblet and A.

N., the child of the parties. Raines contends that the trial court erred by overruling her motion for an in-camera examination of the child, and for the appointment of a guardian ad litem for the child, in accordance with R.C. 3109.04(B).

{¶ 2} We conclude that the trial court correctly determined that R.C. 3109.04(B) did not apply, since the issue before the trial court was neither the initial allocation of parental rights and responsibilities, nor a motion to modify that allocation, but was, instead, the proper construction of visitation orders already issued in the case. Accordingly, the order of the trial court from which this appeal is taken is Affirmed.

I

{¶ 3} The parties were divorced in 2001. At that time, Raines was a resident of Ohio; Noblet was a resident of Belgium. The decree included the following provisions pertaining to visitation with A. N., the parties' daughter:

{¶ 4} "***IT IS FURTHER ORDERED,*** Plaintiff [Raines] shall be designated custodial parent of the minor child. Husband [Noblet] shall exercise companionship with the parties['] minor child in the summers and holidays on the condition that he remain in Ohio with the child and present the Plaintiff with addresses and phone number as to where he and the child will be staying in Ohio. Defendant will give Plaintiff at least 30 days notice of his visits with the minor child.

{¶ 5} "***IT IS FURTHER ORDERED,*** upon the minor child reaching the age of **nine** years, the Defendant shall exercise three weeks summer companionship with the child in Belgium as long as he **accompanies** her **to and from** Belgium.

{¶ 6} "***IT IS FURTHER ORDERED*** upon the minor child reaching the age of **ten** years, the Defendant shall exercise three weeks summer companionship with the child in Belgium as long as the child, if unaccompanied, travels directly to and from Defendant's residence without any change in flights. If it is necessary for Plaintiff to travel with the child to meet the direct flight that takes the child to Defendant's residence, Defendant shall pay for Plaintiff's air or rail travel both ways." (Italics, bolding, and capitalization in original.)

{¶ 7} N. was born in September, 1998, so she became nine years old in September, 2007. Before that date, there were issues between the parties concerning visitation in Ohio, culminating in a magistrate's decision and order of the trial court in early 2005. Raines was of the view that this order superseded the provisions in the 2001 divorce decree concerning overseas visitation. Noblet was of the contrary view.

{¶ 8} On June 12, 2009, Noblet filed the motion resulting in the order from which this appeal is taken. The text of that motion, in its entirety, is as follows:

{¶ 9} "MOTION FOR EX PARTE ORDER AND PROSPECTIVE RELIEF

{¶ 10} "Defendant Joseph Noblet by and through his attorney, Ronald C. Tompkins, hereby Moves this Court as follows:

{¶ 11} "**BRANCH I**

{¶ 12} "To determine that the child is of sufficient age to travel to Belgium to see her father at his home. Plaintiff has incorrectly refused such visitation and Defendant will be irreparably harmed without adequate remedy at law, should such refusal be sustained. An affidavit in support is appended hereto and incorporated

herein as Exhibit A. A copy of a letter from Attorney Feinstein is appended hereto as Exhibit B. A copy of the a [sic] letter in response to Attorney Feinstein's letter is appended hereto as Exhibit C.

{¶ 13} "**BRANCH II**

{¶ 14} "This situation is capable of repetition while evading review, so Defendant Moves this Court for clarifying instructions addressed to Plaintiff and counsel, who do not interpret the Court's prior orders as entitling Defendant to this visitation.

{¶ 15} "**BRANCH III**

{¶ 16} "To award the Plaintiff [sic] actual attorney fees in the amount of $750.00, for Plaintiff's failure to co-operate, along with court costs."

{¶ 17} While Noblet's motion was pending, Raines moved for an in-camera interview of A. N., and for the appointment of a guardian ad litem for her. Raines later filed her response to Noblet's motion, in which she contended that:

{¶ 18} "The question here is whether the terms of the Magistrate's Findings and Recommendations file-stamped in this Court on January 26, 2005 (and the terms of which were in the nature of an agreement between the parties) were meant to replace the age-specific/overseas schedule of parenting time codified in the Judgment Entry – Decree of Divorce file-stamped in this Court on March 22, 2001, or meant only to modify that portion of the Judgment Entry – Decree of Divorce addressing Ohio visitation time. To resolve that dispute, Plaintiff suggests the Court look to the language of the Orders themselves, but with greater understanding of the motives of each party herein.

{¶ 19} " * * * *

{¶ 20} "WHEREFORE, Plaintiff prays that this Honorable Court find that the plain English meaning of the terms of the Magistrate's Findings and Recommendation file-stamped January 26, 2005 apply and that, therefore, Defendant's Motion to allow the child to be removed from the United States for parenting time be DENIED."

{¶ 21} The trial court issued the order from which this appeal is taken on July 2, 2009. The trial court found that the overseas visitation provisions in the original divorce decree were still in effect, and ordered visitation accordingly. The trial court also denied Raines's motion for an in-camera examination of the child and for the appointment of a guardian ad litem.

II

{¶ 22} Raines's assignments of error are as follows:

{¶ 23} "THE TRIAL COURT COMMITTED PLAIN ERROR OR, IN THE ALTERNATIVE, ABUSED ITS DISCRETION, BY NOT ALLOWING THE CHILD TO BE INTERVIEWED *IN CAMERA* PRIOR TO MAKING ITS DETERMINATION AS TO TRAVEL OUTSIDE OF THE UNITED STATES, AND AFTER A MOTION WAS FILED SEEKING SAME PURSUANT TO OHIO REVISED CODE §3109.04(B).

{¶ 24} "THE TRIAL COURT COMMITTED PLAIN ERROR OR, IN THE ALTERNATIVE, ABUSED ITS DISCRETION, BY NOT APPOINTING A GUARDIAN AD LITEM FOR THE MINOR CHILD UPON MOTION PRIOR TO MAKING ITS DETERMINATION AS TO TRAVEL OUTSIDE OF THE UNITED STATES, AND

AFTER A MOTION WAS FILED SEEKING SAME PURSUANT TO OHIO REVISED CODE §3109.04(B)."

{¶ 25} Raines relies upon R.C. 3109.04(B), which provides, in pertinent part, as follows:

{¶ 26} "(1) When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children. In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for purposes of resolving any issues related to the making of that allocation, the court, in its discretion, may and, upon request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

{¶ 27} "(2) If the court interviews any child pursuant to division (B)(1) of this section, all of the following apply:

{¶ 28} "(a) The court, in its discretion, may and, upon the motion of either parent, shall appoint a guardian ad litem for the child.

{¶ 29} " * * * * ."

{¶ 30} The very first sentence in Branch I of Noblet's motion, quoted in Part I, above – "To determine that the child is of sufficient age to travel to Belgium to see her father at his home." – suggests that his motion sought to modify the existing allocation of parental rights and responsibilities pertaining to visitation. Everything

else in his motion, in Raines's response to his motion, and in the trial court's order disposing of his motion, indicates that the issue framed by the parties and resolved by the trial court was not whether to modify an existing allocation of parental rights and responsibilities, but was, instead, what was the existing allocation, as it pertained to overseas visitation. This is clear from the entire text of the trial court's order from which this appeal is taken:

{¶ 31} "This matter came on for consideration per Defendant's motion to allow the child, [A. N.] to visit him in Belgium and to interpret the Court's prior order allowing said overseas visitation to take place.

{¶ 32} "The parties' Final Decree of Divorce in 2001 states that before the child is nine years of age, Defendant's summer and holiday visitation shall be in Ohio. When she is nine years of age, Defendant shall have summer visitation with her for three weeks in Belgium as long as he accompanies her to and from. At age ten, he shall have the same visitation time in Belgium, only that she shall travel unaccompanied as long as it is by direct flight.

{¶ 33} "After the Defendant filed a motion for contempt against Plaintiff, an agreed entry clarifying the visitation time while in Ohio was filed on January 26, 2005.

{¶ 34} "Plaintiff argues that this last entry did away with any overseas visitation time. The Court disagrees.

{¶ 35} "First, the Court believes that the plain language of the entry clearly addresses only the visitation time while in Ohio. At the time of Defendant's motion, the child was under the age of nine and therefore, Defendant only had visitation in Ohio. The 2005 entry clarified that visitation. Nothing in that entry states that the

overseas visitation is gone. The Court believes if Plaintiff felt so strongly at the time about getting rid of the overseas visitation, that she would have insisted on specific language in the agreement getting rid of it.

{¶ 36} "Plaintiff also argues why would she have agreed to the 2006 [sic] agreement without getting any benefit. Although this Court was not part of the negotiations, the Court believes that having a contempt motion, which possibly subjects you to jail time, withdrawn is a benefit.

{¶ 37} "For all these reasons, the Court finds that the language in the original decree as to overseas visitation is still in effect and Defendant shall have said visitation from July 20, 2009 to August 10, 2009, as requested in his May 29th, 2009 letter.

{¶ 38} "In regard to Plaintiff's motion for an In-camera interview and Guardian ad litem, the Court is not sure what purposes these will serve. It would appear the only issue before the Court is a denial of the overseas visitation due to a misunderstanding of prior orders. Now that that issue is resolved, there are no remaining issues before the Court. Therefore, the Plaintiff's motions for a Guardian ad litem and In-camera interview are denied."

{¶ 39} We conclude that the trial court reasonably deemed the issue pending before it to have been the proper construction of visitation orders already in effect, not the modification of existing visitation orders, and certainly not the initial allocation of parental rights and responsibilities. We conclude, therefore, that R.C. 3109.04(B), upon which Raines relies, does not apply.

{¶ 40} Raines argues that the trial court's order was for the purpose of

"resolving any issues related to the making of that allocation [the allocation of parental rights and responsibilities]," and therefore comes within the ambit of R.C. 3109.04(B). That would be an expansive interpretation of the language, because the issue of the proper construction of the existing orders allocating parental rights and responsibilities does not relate to the making of the allocation, but to the proper interpretation of an allocation that has already been made. The proper construction of prior orders of the trial court does not involve consulting the wishes of the child, or even a new determination of the child's best interest, unlike a trial court's determination whether to modify a prior order of visitation. We agree with the trial court that there is therefore no purpose to be served in holding an in-camera examination of the child (which, in turn, triggers the requirement of the appointment of a guardian ad litem, if either parent requests one). The child's in-camera comments are not testimonial in nature, not being subject to cross-examination, and cannot realistically be expected to aid the court in performing its duty of construing the court's prior orders.

{¶ 41} Noblet cites *Forrester v. Forrester*, Greene App. No. 2004 CA 81, 2005-Ohio-5230, a prior decision of this court, for the proposition that an in-camera examination of a minor child (and concomitant appointment of a guardian ad litem) is not required when the issue before the trial court is neither an initial allocation of parental rights and responsibilities nor a modification thereof. We agree with Noblet's interpretation of our holding in that case. See, id, ¶¶ 22 - 24. If anything, the argument for an in-camera examination in that case (*Forrester*) was even stronger than in this case, since in *Forrester*, supra, the issue, in the context of a

contempt motion, was the mother's alleged interference with the relationship of the father with his daughter. The child's in-camera observations would at least have had some relevance to that issue. Nevertheless, we concluded that the trial court in that case did not err when it declined to conduct an in-camera interview or appoint a guardian ad litem.

{¶ 42} We conclude that the trial court in the case before us did not err when it declined to conduct an in-camera interview of A. N., or to appoint a guardian ad litem for her. Both of Raines's assignments of error are overruled.

III

{¶ 43} Both of Raines's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and DINKELACKER, JJ., concur.

(Hon. Patrick T. Dinkelacker, First District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Mark M. Feinstein
Ronald C. Tompkins
Hon. Brett A. Gilbert