[Cite as *In re L.B.*, 2012-Ohio-2356.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN RE: L.B., A MINOR CHILD.	**:**	**O P I N I O N**
	:	**CASE NO. 2011-L-117**

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2010 CV 01845.

Judgment: Affirmed.

Joseph F. Salzgeber, P.O. Box 799, Brunswick, OH 44212 (For Appellant Michelle Comstock).

Thomas A. McCormack, McCormack Family Law, 1915 The Superior Building, 815 Superior Avenue, East, Cleveland, OH 44114 (For Appellee Kelly Burk).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Michelle Comstock, appeals the judgment of the Lake County Court of Common Pleas, Juvenile Division, granting judgment as a matter of law in favor of appellee, Kelly Burk. For the following reasons, we affirm.

{¶2} Comstock filed a complaint in the trial court alleging that she and Burk were involved in a committed, personal relationship. The relationship commenced in 1995 and continued until approximately November 2003. Comstock alleged the "relationship included the commitment to raise a child together. Thus, they arranged, on more than one occasion, and using funds primarily provided by Comstock, for Burk to

be artificially inseminated ('A.I.') through the use of medical professionals at Crio-Biology and the sperm donor bank at the Cleveland Clinic Foundation. Comstock was an active participant in the insemination of Burk."

{¶3} Burk gave birth to a child, L.B., on July 24, 2003. Comstock alleged that although she was present for the birth of L.B., Burk did not permit her to be added to his birth certificate. Comstock further alleged that since the parties separated, she has "consistently and continuously provided for [L.B.] as a co-parent or in the same manner that a parent would." Comstock alleged that she has provided financial support and emotional nurturing to L.B. and has participated in important decisions regarding his education, health care, religious upbringing, and extracurricular activities.

{¶4} In her complaint, Comstock asserted three separate claims for relief: (1) to be designated the legal parent pursuant to R.C. 3109.04; or, in the alterative, (2) to be granted the status of "shared parent," pursuant to R.C. 2151.23; or, in the alternative, (3) to be granted rights of contact and companionship, pursuant to R.C. 3109.051. Comstock attached a proposed "Shared Parenting Plan" to the complaint. Further, Comstock attached an affidavit, averring, inter alia, that she has provided for L.B. emotionally and financially and has participated in his appointments with various health-care providers. Comstock further averred that recently her contact with L.B. has been limited, "changing in accordance with Burk's caprice."

{¶5} Burk moved for dismissal or, in the alternative, summary judgment on May 20, 2011. The magistrate ordered that a responsive pleading shall be filed within 14 days.

{¶6} Comstock's counsel withdrew on May 21, 2011.

{¶7} A pretrial was held on July 8, 2011. As of that date, the magistrate recognized that a responsive pleading had not been filed. At the pretrial, Comstock's original trial counsel indicated that she would be appearing on her behalf, but she did not file a notice of appearance with the trial court.

{¶8} The magistrate, in a July 12, 2011 judgment entry, stated:

{¶9} "Upon consideration of the Motion to Dismiss or, in the alternative, for summary judgment and the attached affidavit, the Magistrate finds that summary judgment ought to be granted in this matter. The underlying complaint ought to be dismissed."

{¶10} Comstock filed objections to the magistrate's decision, which were overruled by the trial court. The trial court adopted the magistrate's decision.

{¶11} Comstock appealed and assigned the following error:

{¶12} The trial court erred by granting Defendant-Appellee biological mother's motion for summary judgment and dismissing the Application of Plaintiff-Appellant, biological mother's former partner, which sought, in the alternative, to formally establish either (1) parental rights of Plaintiff-Appellant with the minor child through proof of the existence of contract between the parties; (2) shared parenting of Plaintiff-Appellant with the minor child via the existence of said contract; or (3) companionship and visitation rights of Plaintiff-Appellant with the minor child.

{¶13} In order for a motion for summary judgment to be granted, the moving party must demonstrate:

{¶14} (1) [N]o genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996).

{¶15} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of facts, if any, * * * show that there is no genuine issue as to any material fact * * *." Civ.R. 56(C). Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner*, 67 Ohio St.3d 337, 340 (1993), quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

{¶16} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Civ.R. 56(E) provides:

{¶17} When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶18} Summary judgment is appropriate, pursuant to Civ.R. 56(E), if the nonmoving party does not meet this reciprocal burden.

{¶19} Appellate courts review a trial court's entry of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs*., 87 Ohio App.3d 704, 711 (4th Dist.1993). "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 383 (8th Dist.1997), citing *Dupler v. Mansfield Journal*, 64 Ohio St.2d 116, 119-120 (1980).

{¶20} In her motion to dismiss or, in the alternative, for summary judgment, Burk argued that, pursuant to the Ohio Supreme Court's decision of *In re Bonfield*, 97 Ohio St.3d 387, "only natural or adoptive parents can participate in a shared parenting agreement or be allocated parental rights." Burk noted that a party without any biological connection to the child is not a parent for purposes of R.C. 3109.04(A)(2). Second, Burk maintained that R.C. 3109.051(B)(1) is not applicable to the instant case, as R.C. 3109.051(B)(1) applies only in a "divorce, dissolution of marriage, legal separation, annulment, or child support proceedings that involves a child." Third, Burk acknowledged that according to *In re Bonfield*, *supra*, at ¶48, "[p]arents may waive their right to custody of their children and are bound by an agreement to do so."

{¶21} Burk attached to her motion an affidavit stating, inter alia, that she discussed with Comstock having a child but "made it clear to [Comstock] that the decision to have a child was [her] decision." Burk averred that even when asked by Comstock to sign a "writing granting [Comstock] legal rights" to L.B., she refused. Both

before the birth and after the birth of L.B., Comstock requested Burk to execute a written agreement assigning custodial rights to her, but each time Burk informed Comstock that she would not voluntarily relinquish any parental or custodial rights.

{¶22} On appeal, Comstock argues that a genuine issue of material fact exists regarding whether it is in the best interest of L.B. to have formal companionship and visitation established pursuant to R.C. 3109.051(B) and/or R.C. 2151.23. We disagree.

{¶23} Initially, we note that R.C. 3109.04 is not applicable to the instant fact pattern. In the case of *In re Bonfield*, *supra*, the Ohio Supreme Court reviewed a fact pattern involving partners in a same-sex relationship, Teri J. Bonfield and Shelly M. Zachritz. During their relationship, Teri adopted two children and also gave birth to three children, through anonymous artificial insemination. Shelly actively participated in both the decision to adopt and in the births of the children through artificial insemination. The Ohio Supreme Court recognized that, "[n]otwithstanding her role as the primary caregiver for their children, Shelly has no legally recognized rights with regard to [the children]." *Id*. at ¶7. The *Bonfield* Court found that Shelly was not within the "narrow class of persons who are statutorily defined as parents for purposes of entering a shared parenting agreement" and, therefore, did not qualify as a parent pursuant to R.C. 3109.04. *Id*. at ¶34. Likewise, Comstock is not a parent pursuant to R.C. 3109.04.

{¶24} Next, R.C. 3109.051(B) is also inapplicable to the instant scenario. This court, in *Parr v. Winner*, 11th Dist. No. 92-A-1759, 1993 Ohio App. LEXIS 3358, *4, stated that "R.C. 3109.051 allows a nonparent to move for visitation rights in a proceeding for divorce, dissolution, legal separation, annulment or child support. The statute does not include a custody proceeding." In the absence of one of the above-

mentioned events, the juvenile court would not have jurisdiction under R.C. 3109.051 to award visitation to Comstock, a nonparent.

{¶25} The Ohio Supreme Court, in *In re Perales*, 52 Ohio St.2d 89 (1977), discussed the standard to use in custody actions between a parent and a nonparent. The Court stated:

> **{¶26}** In an R.C. 2151.23(A)(2) child custody proceeding between a parent and a nonparent, the hearing officer may not award custody to the nonparent without first making a finding of parental unsuitability--that is, without first determining that a preponderance of the evidence shows that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child. *Id*. at syllabus.

{¶27} In her motion to dismiss or, in the alternative, for summary judgment, Burk presented an affidavit that averred she did not contractually relinquish her parental or custodial rights, and she has repeatedly refused to sign any agreement presented by Comstock. Further, Burk averred that Comstock had "no involvement in deciding where [L.B.] lives as [she] relocated based on [her] decision alone or where [L.B.] attended school."

{¶28} Comstock, as the nonmoving party, provided no evidence illustrating a genuine issue of material fact pursuant to Civ.R. 56(E); in fact, Comstock failed to file a response to Burk's motion. In addition to failing to file a response, Comstock, in her

petition, neither alleged that Burk contractually relinquished custody of L.B nor that Burk's conduct demonstrated relinquishment of custody. *See*, *e.g.*, *In re Mullen*, 185 Ohio App.3d 457, 2009-Ohio-6934, ¶11-12 (1st Dist.). There is simply no evidence in the record that demonstrates Burk as "unsuitable"; Burk continues to care for and support L.B. and has not contractually relinquished custody of him.

{¶29} As aptly stated by the Second District:

{¶30} [W]e know of no Ohio law that allows for 'relinquishment' to occur in a situation where a parent allows a non-parent to be a part of the child's life while that parent still maintains care and support. Under current Ohio law, there is nothing preventing a parent from terminating a relationship between a child and a non-parent who has no visitation rights. Despite the questionable motivation behind Jones' action of breaking the strong bond between Dvorak and Cheyenne preventing Dvorak from visiting with Cheyenne, Dvorak failed to provide evidence that Jones was 'unsuitable.' *In re Jones*, 2d Dist. No. 2000 CA 56, 2002-Ohio-2279, ¶31.

{¶31} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas, Juvenile Division, is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.