

[Cite as *In re Z.B.*, 2010-Ohio-3335.]

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

IN RE: Z.B.

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: C.A. CASE NO. 09-CA-42
: T.C. CASE NO. 2006-JH-71
: (Civil Appeal from
: Common Pleas Court)
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O P I N I O N

Rendered on the 16th day of July, 2010.

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GRADY, J.:

{¶ 1} This is an appeal from an order of the juvenile court that modified a prior order allocating parental rights and responsibilities for the care of a minor child, pursuant to R.C. 3109.04 (E) (1) (a) .

{¶ 2} Z.B. was born on August 12, 2002. His mother, Brandon

Burks, was designated Z.B.'s residential parent and legal custodian. Anthony Billing, Z.B.'s father, was granted rights of continuing contact with Z.B.

{¶3} On April 29, 2009, Billing filed a "Motion To Change Residential Parent." (Dkt. 1). The motion alleged that since the prior order of the court "there has been a change in circumstances and that it would be in the best interests of the minor child that Anthony Billing be named the residential parent of the child." No more particular grounds in support of those claims were alleged.

{¶4} The court appointed a Guardian Ad Litem ("GAL") for Z.B. for purposes of the proceeding on Billing's motion. The GAL filed a report on August 26, 2009, recommending that Billing be designated Z.B.'s residential parent. (Dkt. 21). The GAL cited Burks' failure to comply with the court's orders, her disparagement of Billing to Z.B., and the poor condition of Burks' household, compared with the better condition of Billing's household, in relation to Z.B.'s need for care.

{¶5} A final pretrial hearing was scheduled for August 26, 2009. On that day, the parties reached an agreement on all pending matters. Based on their agreement, the trial court entered an order on August 27, 2009 which, among other things, granted temporary custody of Z.B. to Billing. (Dkt. 22). The order also

stated: "An Agreed Entry shall be drafted by Attorney Edwards for review and approval on September 8, 2009, at 9:00 AM before the Court."

{¶ 6} On September 8, 2009,¹ the parties appeared before the trial court. Counsel for Billing presented an agreed "Order Modifying Custody And Support Of The Minor Child," designating Billing as Z.B.'s residential parent and legal custodian, which purported to reflect the agreement reached by the parties at the August 26, 2009 final pretrial hearing. Burks' attorney informed the trial court, however, that although Burks had entered into an agreement on August 26, 2009, she no longer agreed with the terms of that agreement. The trial court adopted the agreed order over Burks' objections. (Dkt. 23). Burks filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL COURT ERRED WHEN IT FAILED TO HOLD AN EVIDENTIARY HEARING AS TO ANTHONY BILLING'S MOTION TO CHANGE RESIDENTIAL PARENT."

¹ The transcript of the September 2009 hearing is dated September 29, 2009. However, both parties state in their briefs on appeal that the hearing occurred on September 8, 2009. Further, the order that the trial court issued as a result of the hearing is dated September 8, 2009. Therefore, we presume that the September 29, 2009 date on the transcript is a typographical error.

{¶ 8} Initially, Burks argues that the trial court abused its discretion by failing to hold an evidentiary hearing to determine the existence of a settlement agreement or its terms. "Where the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment." *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 1997-Ohio-380, syllabus. "In the absence of such a factual dispute, a court is not required to conduct such an evidentiary proceeding." *Id.* at 377, citing *Mack v. Polson Rubber Co.* (1984), 14 Ohio St.3d 34, Syllabus of the Court.

{¶ 9} The following exchange took place at the hearing on September 8, 2009:

{¶ 10} "THE COURT: Attorney Edwards, was it your understanding and your client's understanding on August 26th that there was an agreement as to all issues between these two parties including the child?

{¶ 11} "MR. EDWARDS: That was our understanding, Your Honor.

{¶ 12} "THE COURT: Attorney Feinstein, I understand you were not at that hearing.

{¶ 13} "MR. FEINSTEIN: Yes, Your Honor.

{¶ 14} "THE COURT: So if I may inquire of your client.

{¶ 15} "MR. FEINSTEIN: Of course. She has not been sworn in

yet, Your Honor.

{¶ 16} "THE COURT: Okay. Just a question. Miss Burks, you were in agreement at that hearing; is that correct?

{¶ 17} "MISS BURKS: I didn't want to agree [,] but yeah, I did.

{¶ 18} "THE COURT: You did at that hearing?

{¶ 19} "(No response heard)

{¶ 20} "THE COURT: And that was after discussion with your attorney, correct?

{¶ 21} "MISS BURKS: Yeah.

{¶ 22} "THE COURT: And that was an attorney that you retained, you hired?

{¶ 23} MISS BURKS: Yeah." (Tr. 3-4).

{¶ 24} Burks neither disputed the meaning of the terms of the August 26, 2009 settlement agreement nor contested the existence of the settlement agreement. Rather, she appeared to have a change of heart at some point between August 26 and September 8, 2009, and no longer wished to abide by the terms of the settlement agreement. On those facts, the trial court was not required to conduct an evidentiary hearing to determine the existence of a settlement agreement prior to entering a judgment enforcing the agreement. *Rulli*.

{¶ 25} Burks also argues that the trial court abused its

discretion by not holding an evidentiary hearing in order to make the statutory determinations required before custody can be modified. We agree.

{¶ 26} R.C. 3109.04 (E) (1) (a) provides:

{¶ 27} "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:

{¶ 28} "(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.

{¶ 29} "(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.

{¶ 30} "(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."

{¶ 31} In short, "[a] modification of the designation of residential parent and legal custodian of a child requires a determination that a 'change in circumstances' has occurred, as well as a finding that the modification is in the best interest of the child." *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, at syllabus.

{¶ 32} R.C. 3109.04(E)(1)(a) creates a presumption in favor of retaining the residential parent the court previously designated. In order to rebut that presumption, the court must make the change of circumstances and best interest determinations that section requires. Express findings are not mandated. Nevertheless, when the court modifies a prior order designating a residential parent, the record must exemplify a sufficient basis for the change of circumstances and best interest determinations which the court necessarily made.

{¶ 33} The court found that Burks had agreed on August 26, 2009, to a modification designating Billing the residential parent and legal custodial of Z.B. That finding satisfies division (i) of R.C. 3109.04(E)(1)(a). The further issue is whether the court determined that the required change of circumstances existed and

that a modification was in Z.B.'s best interest. The independent duty to make those determinations that R.C. 3109.04(E)(1)(a) imposes on the court is not resolved by the agreement the parties made.

{¶ 34} The record is devoid of any determination by the court concerning the issues of change of circumstances and best interest.

The modification the court ordered is consistent with the report and recommendation of the GAL. Civ.R. 75(B)(2) authorizes the court to appoint a GAL "[w]hen it is essential to protect the interests of the child." However, that appointment, in and of itself, is insufficient to demonstrate that the court adopted the facts and recommendations in the GAL's report to make the determinations necessary to rebut the presumption in favor of the residential parent that R.C. 3109.04(E)(1)(a) creates.

{¶ 35} The Twelfth and Fourth Districts have held that even if the parties to a custody dispute have entered into a voluntary settlement agreement with regard to custody, the trial court remains statutorily obligated to determine whether the change in custody was in the best interest of the child. *Liming v. Damos*, Athens App. No. 08CA34, 2009-Ohio-6490, at ¶13; *Seng v. Seng*, Clermont App. No. CA2007-12-120, 2008-Ohio-6758, at ¶10. *Liming* and *Seng* both involved shared parenting plans. However, R.C. 3109.04(F)(1)(a) applies to modifications of either residential

and shared parenting plans. We are persuaded that the holdings in *Liming and Seng* likewise apply here.

{¶ 36} The trial court made no reference to the GAL report in its September 8, 2009 order modifying custody, and did not otherwise find that a modification would be in Z.B.'s best interest. Instead, the court appears to have wholly relied on the agreement the parties made. "[I]n light of the lack of evidence before the court regarding the best interest of the child, as it had before it only the GAL report, an evidentiary hearing was clearly in order to ascertain exactly what the best interest of the child was as well as providing both parties with an opportunity to cross-examine the GAL regarding his report." *Riley v. Riley*, Portage App. No. 2002-P-0125, 2004-Ohio-5302, at ¶49. See also *Kelm v. Kelm*, Franklin App. No. 03AP-472, 2004-Ohio-1004, at ¶18 (holding that the trial court abused its discretion by failing to hold an evidentiary hearing and make the findings required by R.C. 3109.04(E) prior to modifying a shared parenting plan); *In re Logan* (Dec. 11, 1997), Cuyahoga App. No. 72514 (holding that an evidentiary hearing should be held when a party seeks a modification of custody).

{¶ 37} The trial court erred by modifying custody of Z.B. without making the determinations required by R.C. 3109.04(E)(1)(a) that a change had occurred in the circumstances

of the residential parent or the child and that the requested modification is necessary to serve the best interest of the child.

The assignment of error is sustained. The judgment of the trial court will be reversed and the cause is remanded for further proceedings consistent with this Opinion.

DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

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Hon. Lori L. Reisinger