

IN THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY, OHIO

JOSHUA PARKER, :
Petitioner-Appellee, :
-v- : Case No. 03CA23
MISTY CURTIS, :
Respondent-Appellant. : DECISION AND JUDGMENT ENTRY

APPEARANCES

COUNSEL FOR APPELLANT: Frederick C. Fisher, Jr., 311 Park
Avenue, Ironton, Ohio 45638
COUNSEL FOR APPELLEE: David Dillon, 112 South 3rd Street,
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_CIVIL APPEAL FROM COMMON PLEAS COURT, JUVENILE DIVISION
DATE JOURNALIZED: 12-23-03

ABELE, J.

{¶1} This is an appeal from a Lawrence County Common Pleas Court, Juvenile Division, judgment that granted the custody petition filed by Joshua Parker, petitioner below and appellee herein.

{¶2} The natural mother of the child, Misty Curtis, respondent below and appellant herein, raises the following assignment of error for review:

"THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S PETITION FOR CUSTODY, AS SUCH WAS DECIDED UNDER THE BEST INTEREST STANDARD AND NOT THE CHANGE IN CIRCUMSTANCES STANDARD."

{¶3} On March 25, 2002, appellee filed a "petition for

custody." In it, appellee alleged that he is the natural father of Jordan Isaac Curtis, born February 28, 2001, that the child has been in appellant's custody since birth, and that appellant has willfully denied him visitation with the child and is an unfit mother.

{¶4} On July 20, 2002, the magistrate awarded appellee temporary custody of the child pending the final hearing on his custody petition. On August 15, 2002, the trial court adopted the magistrate's recommendation without objection from appellant. On August 20, 2002, appellant filed a motion for a rehearing on appellee's contempt motion and requested the court to vacate its prior order granting appellee temporary custody. On August 23, 2002, the parties agreed to share custody of the child pending the final hearing.

{¶5} On April 28, 2003, and continuing on July 1, 2003, the court held a hearing regarding appellee's custody petition. At the hearing, the parties presented conflicting evidence. Appellant attempted to paint appellee as a disinterested father who verbally and physically abused her. Appellee presented evidence showing that appellant has been uncooperative regarding visitation, that she lives with a boyfriend who is physically abusive, that she cusses frequently in the child's presence, and that she has been convicted of shoplifting and obstruction of justice.

{¶6} On July 31, 2003, the trial court granted appellee's custody petition. The court specifically noted that appellant lives with a boyfriend who had been convicted of domestic violence.

The court thus determined that the child's best interests would be served by placing the child in appellee's custody. Appellant filed a timely notice of appeal.

{¶7} In her sole assignment of error, appellant argues that the trial court erred by awarding appellee custody without first finding that a change in circumstances had occurred. We disagree.

{¶8} Under R.C. 3109.04, the change of circumstances standard applies only when a prior decree allocating parental rights and responsibilities exists and a party has requested the court to modify the prior custody award. See, generally, Davis v. Flickinger (1997), 77 Ohio St.3d 415, 674 N.E.2d 1159; R.C. 3109.04(E)(1)(a). If, however, a prior decree regarding parental rights and responsibilities does not exist (i.e. initial custody determination), a court need only consider the best interests of the child. See, e.g., In re Ballard, Montgomery App. No. 19511, 2003-Ohio-3233; In re Mefford, Greene App. No. 2002CA37, 2003-Ohio-313; In re Shepherd (Mar. 19, 1999), Scioto App. No. 98CA2586. See, generally, In re Byrd (1981), 66 Ohio St.2d 334, 421 N.E.2d 1284.

{¶9} In the case at bar, a prior decree allocating parental rights and responsibilities does not exist. The trial court, therefore, was not first required to find a change in circumstances before awarding appellee custody. Instead, the court needed only to find that awarding appellee custody would serve the child's best interests.

{¶10} Moreover, to the extent that appellant asserts that the

trial court erred by determining that the child's best interests would be served by awarding appellee custody, we again disagree.

{¶11} We initially note that when "an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court." Bechtol v. Bechtol (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus; see, also, Davis, supra. Furthermore, a reviewing court should afford the utmost deference to a trial court's decision regarding child custody matters. See, e.g., Miller v. Miller (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846. Consequently, absent an abuse of discretion, a reviewing court will not reverse a trial court's decision regarding child custody matters. See, e.g., Bechtol, supra. When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. See, e.g., Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Moreover, deferring to the trial court on matters of credibility is "crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well." Davis, 77 Ohio St.3d at 419. Thus, reviewing courts should give great deference to trial court child custody decisions. Pater v. Pater (1992), 63 Ohio St.3d 393, 396, 588 N.E.2d 794.

{¶12} When allocating parental rights and responsibilities, R.C. 3109.04(F)(1) requires the trial court to consider the child's best interests. The statute provides:

"(F)(1) In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

"(a) The wishes of the child's parents regarding the child's care;

"(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

"(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

"(d) The child's adjustment to the child's home, school, and community;

"(e) The mental and physical health of all persons involved in the situation;

"(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

"(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

"(h) Whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the

victim in the commission of the offense; and 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;

"(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

"(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶13} In the case at bar, we do not believe that the trial court abused its discretion by determining that the child's best interests would be served by awarding appellee custody of the parties' child. The evidence presented at the hearing shows that appellee is gainfully employed and lives in a stable home. Appellant, on the other hand, is not employed and lives with her boyfriend who has committed domestic violence.

{¶14} We further observe that in the case sub judice, appellant did not file a Civ.R. 52 request for findings of fact and conclusions of law. Pursuant to Civ.R. 52, a trial court's judgment entry may be general unless one of the parties requests findings of fact and conclusions of law.¹ See Morrison v. Morrison (Nov. 15, 2000), Wayne App. No. 00CA0009; Wirt v. Wirt (Apr. 10, 1996), Wayne App. No. 95CA0041, unreported. Absent a Civ.R. 52 request for findings of fact, a reviewing court will presume that the trial court considered all the relevant statutory factors. Wangugi v. Wangugi (Apr. 12, 2000), Ross App. No. 99CA2531; see,

¹ Civ.R. 52 applies to custody proceedings. See State ex rel. Papp v. James (1994), 69 Ohio St.3d 373, 377; Werden v. Crawford (1982), 70 Ohio St.2d 122, syllabus.

also, Sayre v. Hoelzle Sayre (1994), 100 Ohio App.3d 203, 211-12, 653 N.E.2d 712. We therefore presume that the court properly considered and applied all of the relevant statutory factors.

{¶15} Accordingly, based upon the foregoing reasons, we overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J. & Kline, J.: Concur in Judgment & Opinion

For the Court

BY:

Peter B. Abele, Judge