[Cite as *Kier v. Kier* , 2007-Ohio-4190.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

SHASTA KIER nka MOTHERSHEAD,	:	
Plaintiff-Appellant,	:	Case No. 06CA35
vs.	:	**Released: July 27, 2007**
JEFFREY KIER,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	

APPEARANCES:

Kimberly J. McGuire-Haines, Hillsboro, Ohio, for Plaintiff-Appellant.

Carl Anthony Cramer, Dayton, Ohio, for Defendant-Appellee.

McFarland, P.J.:

{¶1} Plaintiff-Appellant appeals the decision of the Highland County Court of Common Pleas, Division of Domestic Relations, denying her motion for relief from judgment and her motion to modify parental rights and responsibilities. Appellant contends the trial court 1) erred to her prejudice in overruling Appellant's Motion for Relief from Judgment pursuant to Civil Rule 60(B); and 2) erred to her prejudice by denying Appellant's Motion to Modify Parental Rights and Responsibilities against the manifest weight of the evidence.

{¶2} We find the trial court did not abuse its discretion in denying Appellant's motion for relief under Civil Rule 60(B). As such, we overrule Appellant's first assignment of error. Further, we find the decision to deny Appellant's motion to modify custody was not against the manifest weight of the evidence. Though a change of circumstance occurred, the record shows by some competent, credible evidence that it was not in the best interest of the child to modify custody. As such, we also overrule Appellant's second assignment of error. Accordingly, we affirm the decision of the trial court.

I. Facts

{¶3} The Plaintiff-Appellant, Shasta Kier (nka Mothershead) and the Defendant-Appellee, Jeffrey Allen Kier, were married in July of 2000. The parties had one child from the marriage. At the time of the marriage, the Appellant was fifteen years old and the Appellee was eighteen. In April of 2004, the parties filed a Petition for Dissolution of Marriage, Separation Agreement and Visitation Schedule, stating the Appellee, Jeffrey, would be the sole residential parent and the Appellant, Shasta, would receive visitation.

{¶4} A notarized statement, signed by both parties, was attached to the dissolution petition. The statement reads "In one year (April 2005), if both parties agree and it is in the best [i]nterest of the minor child * * * the mother shall have the [c]hance to regain custody. With certain provisions for

Shasta M. Kier: A) Full time job, B) Mentally and physically able to care for the child, C) Has a stable home environment, D) Reliable transportation."

{¶5} The parties were granted a dissolution in June of 2004. Under the terms of the dissolution, Appellee was the sole residential parent and Appellant the visiting parent. Neither party had an attorney of record during the dissolution proceedings.

{¶6} In May of 2005, Appellant filed a Motion for Relief from Judgment and a Motion to Change Allocation of Parental Rights and Responsibilities. The magistrate appointed a guardian ad litem for the parties' minor child. After interviewing the parties and the child, the guardian ad litem submitted his report stating the Appellee should remain residential parent. After a two-day hearing, the magistrate overruled both of Appellant's motions. In September of 2006, the trial court filed an entry adopting the magistrate's decisions. On October 10, 2006, Appellant filed this appeal.

II. Assignments of Error

{¶7} 1. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN OVERRULING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO CIVIL RULE 60(B)."

{¶8} 2. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN DENYING APPELLANT'S MOTION TO MODIFY PARENTAL RIGHTS AND RESPONSIBILITIES WHERE THE TRAIL COURT FOUND THAT A CHANGE IN CIRCUMSTANCES DID OCCUR,

BUT THAT A CHANGE IN CUSTODY WOULD NOT BE IN THE BEST INTERESTS OF THE MINOR CHILD, AND THAT THE HARM LIKELY TO BE CAUSED BY A CHANGE WOULD NOT BE OUTWEIGHED BY THE ADVANTAGES OF THE CHANGE OF ENVIRONMENT TO THE MINOR CHILD. SUCH FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. First Assignment of Error

{¶9} In her first assignment of error, Appellant contends the trial court erred by not granting her relief from judgment under Civil Rule 60(B). This Rule states a court may relieve a party from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. Civ.R. 60(B).

{¶10} "A Civ.R. 60(B) motion for relief from judgment is addressed to the sound discretion of the trial court. Thus, a reviewing court should not reverse the ruling of a trial court on a Civ.R. 60(B) motion absent an abuse of discretion." *Atchison v. Atchison*, 4th Dist. No. 00CA2727, 2001-Ohio-2519,

at *3. The Supreme Court of Ohio defines abuse of discretion as "more than an error of law or of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable or arbitrary." Id., quoting *Franklin Cty. Sheriff's Dept. v. Serb* (1992), 63 Ohio St.3d 498, 589 N.E.2d 24. The fact that the reviewing court reaches a different conclusion than the lower court does not establish an abuse of discretion. Instead, the reviewing court must demonstrate that the lower court's decision was not justified and was clearly against reason, the evidence and plainly an injustice to the appellant. *Atchison* at *3; *Sinclair v. Sinclair* (1954), 98 Ohio App. 308, 57 O.O. 347, 129 N.E.2d 311.

{¶11} Appellant filed a motion pursuant to Civil Rule 60 (B) to reopen the dissolution, stating there was no meeting of the minds regarding the custody agreement. The trial court found Appellant was under the impression she would automatically receive custody one year after the final dissolution. She was under this impression because of a statement attached to the separation agreement, which was signed by both parties. The statement reads that, a year after the dissolution, "if both parties agree and it is in the best [i]nterest of the minor child * * * the mother shall have the [c]hance to regain custody."

{¶12} Appellant claims she was "clearly misled" by the statement, that Appellee tricked her into signing it. Appellant states she was very young and did not possess the necessary knowledge and confidence to enter into the agreement. She states she was unaware she could consult with an attorney during the dissolution hearing and, had she known she would not automatically regain custody after a year, she would not have entered into the custody agreement. Appellant claims, because of these factors, her consent was, in effect, not voluntary and she "unknowingly gave away her constitutional right to parent her minor child * * *." These arguments are not persuasive.

{¶13} Though neither Appellant nor Appellee was represented by counsel during the dissolution hearing, "[i]gnorance of the law is no excuse, and Ohio courts are under no duty to inform civil pro se litigants of the law." *Jones Concrete, Inc. v. Thomas* (Dec. 22, 1999), 9th Dist. No. 2957-M, at *1. "[P]ro se litigants are, 'presumed to have knowledge of the law and of correct legal procedure and [are] held to the same standard as all other litigants." ' Id. at *2, citing *Kilroy v. B.H. Lakeshore Co*. (1996), 111 Ohio App.3d 357, 363, 676 N.E.2d 171. In the case at hand, the trial court held that the Appellant freely and voluntarily entered into the agreement. The trial court found the agreement clearly stated it was not an automatic change of custody.

Furthermore, it found Appellant should have attempted to get counsel if she did not understand the agreement. Appellant acknowledges the trial court advised her that she would only have the "chance" to regain custody. Most importantly, even had she known the change of custody was not automatic, at the time of the final hearing she was not in a position to care for the child. Appellant testified (though later changed this testimony after consulting with her attorney) that at the time of the dissolution she was not stable, did not have a high school diploma or GED and, thus, could not have taken custody.

{¶14} Appellant relies heavily upon *In re Marriage of Watson* (1983), 13 Ohio App.3d 344, 13 O.B.R. 424, 469 N.E.2d 876, for support in her Civ.R. 60(B) motion. The court in *Watson*, which also dealt with child custody and a motion under Rule 60(B), affirmed the trial court's order granting relief from judgment. However, in *Watson*, the facts indicate clear-cut and indefensible fraud. Since the mother in *Watson* knowingly failed to mention that she was pregnant with the couples' second child, she robbed the court of jurisdiction to determine parenthood, visitation, custody and other important matters relative to that second unborn child. There is no such instance of fraud in the facts of the matter below.

{¶15} The trial court below had a full opportunity to hear testimony from all concerned parties and draw conclusions based on that testimony.

Appellant has made no claim that Appellee hid information from, or tried to deceive, the trial court at the time of the dissolution. Here, the trial court simply did not agree with Appellant's argument that her written consent to the agreement was, in effect, not voluntary. Further, it found Appellant was properly advised, at the time of the dissolution hearing, of her right to counsel, custody and all other matters relevant to that final hearing.

{¶16} "The term discretion itself involves the idea of choice, of an exercise of will, of a determination, made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 15 O.B.R. 311, 473 N.E.2d 264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 94 N.W.2d 810. After carefully reviewing the record, we find the trial court's decision to deny Appellant's Civ.R. 60(B) motion was within its sound discretion. None of the court's findings on this issue were unjustified, clearly against reason and plainly an injustice to Appellant. As such, the trial court did not abuse it's discretion and Appellant's first assignment of error is overruled.

IV. Second Assignment of Error

{¶17} In her second assignment of error, Appellant argues the trial court erred in denying its Motion to Modify Parental Rights and Responsibilities and this denial was against the manifest weight of the evidence. "A reviewing court will not reverse an award of custody as being against the manifest weight of the evidence if it supported by some competent and credible evidence." *Carr v. Carr*, 4th Dist. No. 00CA26, 2001-Ohio-2466, at *5. "In allocating the parental rights of the parties, the trial court must take into account the best interests of the children. R.C. 3109.04(B)(1). In determining the best interests of the children, the trial court must consider all relevant factors, including, but not limited to, those listed in R.C. 3109.04(F)(1)." *Purvis v. Purvis*, 4th Dist. No. 00CA703, 2002-Ohio-570, at *11. "R.C. 3109(E)(1)(a) imposes restrictions on the exercise of judicial authority and requires that, before a trial court modifies an existing order of custody, it is not only required to find, based on facts that have arisen since the prior decree or that were unknown to it at that time, that a change has occurred in the circumstances of the child, the child's residential parent, or either parent subject to a shared-parenting decree, but also that the modification is necessary to serve the best interest of the child." *In re Brayden James*, 113 Ohio St.3d 420, 2007-Ohio-2335, at ¶19.

{¶18} In the present case, the trial court did decide that there was a change of circumstances, in that Appellee appeared to be controlling when visitation took place and did not notify the Appellant of an emergency medical issue regarding the child until the mother had called him, but that it was not in the best interest of the child to modify custody. In making this determination, the trial court heard testimony from both parties, from witnesses with relevant knowledge of the situation, and considered all the factors contained in R.C. 3109.04 (F)(1). After considering these factors, it found the harm likely to be caused to the child by a change in environment outweighed the advantages of the change.

{¶19} The record shows the trial court had ample evidence upon which to base its decision in favor of Appellee. In its decision, the trial court listed each important witness and the weight given to the testimony. Appellant argues that certain witnesses lack credibility and gives reasons why their testimony should be afforded little weight. However, determining witness credibility and giving weight to testimony are decisions properly made by the trier of fact. "The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record. * * * Thus, an appellate court must be guided by a presumption that the findings of the trial court are

correct, since the trial court is in the best position to view the witnesses and weigh the credibility of the proffered testimony." *Mays v. Mays*, 4th Dist. No. 01CA2585, 2001-Ohio-2474, at *2. Here, the trial court decided it was in the best interest of the child to remain in the custody of his father. A careful review of the record reveals competent, credible evidence to support the trial court's award of custody to Appellee.

{¶20} While the trial court did determine there was a change of circumstances, that alone is not enough to modify custody. It must also "be necessary to serve the best interest of the child." *James* at ¶19. Here, after weighing all the evidence, the trial court determined the harm likely to be caused by a change in environment outweighed the advantages of the change.

{¶21} After reviewing the entire record, we find a reasonable trier of fact could conclude there was some competent, credible evidence that it was in the best interest of the child not to modify the custody arrangement between the Appellant and Appellee. As such, the decision of the trial court to deny Appellant's Motion to Modify Parental Rights and Responsibilities is supported by the manifest weight of the evidence. Appellant's second assignment of error is, thus, overruled.

V. Conclusion

{¶22} In our opinion, Appellant failed to prove the trial court abused its discretion in denying her motion for relief from judgment under Civil Rule 60(B). None of the findings in the trial court's decision was unreasonable, unconscionable or arbitrary. Appellant has also failed to demonstrate the trial court's decision, denying her motion for change of custody, was against the manifest weight of the evidence. Accordingly, we affirm the trial court's decision and overrule both of Appellant's assignments of error.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court, Domestic Relations, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Abele, J. and Harsha, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.