

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Christopher W.

Court of Appeals No. L-03-1259

Appellee

Trial Court No. 02106325

v.

Roxanne G.

**DECISION AND JUDGMENT ENTRY**

Appellant

Decided: October 15, 2004

\* \* \* \* \*

Samuel Z. Kaplan and Gina M. Lewis, for appellant.

\* \* \* \* \*

PIETRYKOWSKI, J.

{¶ 1} Appellant, Roxanne G., appeals the August 25, 2003 judgment of the Lucas County Court of Common Pleas, Juvenile Division, which granted appellee Christopher W.’s motion for legal custody of their minor child. For the reasons that follow, we reverse the trial court’s decision.

{¶ 2} An overview of the facts is as follows. On July 26, 2002, the Lucas County Child Support Enforcement Agency (“CSEA”) and appellee, Christopher W., filed a parentage complaint. Following court-ordered genetic testing, appellee was found to be the natural father of Krishawnda, born in 1991. Thereafter, on November 26, 2002,

appellee, pro se, filed a motion to modify the allocation of parental rights and responsibilities. In his motion, appellee requested legal custody of Krishawnda.

{¶ 3} On January 17, 2003, the parties unsuccessfully mediated the matter. On February 12, 2003, the parties appeared pro se at the hearing on appellee's motion for legal custody. During the hearing, appellant expressed her desire to have an attorney; the magistrate indicated that it was too late. Appellee testified and had his mother testify on his behalf. Appellant testified on her behalf. No exhibits were proffered or admitted into evidence.

{¶ 4} On February 24, 2003, the magistrate, in a two-paragraph opinion, appointed appellee as Krishawnda's legal guardian, effective April 14, 2003. The court further ordered the standard court visitation schedule. Following the magistrate's decision, appellee retained counsel.

{¶ 5} Timely objections to the magistrate's decision were filed. On April 16, 2003, an objection hearing was held on the issue of appellant's right to counsel. On June 26, 2003, the objection was found not well-taken and denied. Thereafter, on July 31, 2003, an objection hearing was held on the merits of the magistrate's decision. The court, in its August 25, 2003 judgment, denied appellant's objections and affirmed the magistrate's decision. This appeal followed.

{¶ 6} On appeal, appellant raises the following assignment of error:

{¶ 7} “The juvenile court magistrate erred in not ever inquiring as to whether appellant wanted to have counsel appointed or a reasonable continuance to secure private counsel.”

{¶ 8} In her sole assignment of error, appellant argues that the magistrate erred by failing to inquire prior to the hearing on the allocation of parental rights and responsibilities whether appellant wished to have counsel appointed or a continuance to retain counsel. Appellee has not participated in this appeal.

{¶ 9} Juv.R. 4(A) provides:

{¶ 10} “Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.”

{¶ 11} Harmonizing with the above rule, R.C. 2151.352 provides, in part:

{¶ 12} “A child or a child’s parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code and if, as an indigent person, any such person is unable to employ counsel, to have counsel provided for the person pursuant to Chapter 120. of the Revised Code. If a party appears without counsel, the

court shall ascertain whether the party knows of the party's right to counsel and the party's right to be provided with counsel if the party is an indigent person. The court may continue the case to enable a party to obtain counsel or to be represented by the county public defender or the joint county public defender and shall provide counsel upon request pursuant to Chapter 120 of the Revised Code."

{¶ 13} Though not constitutionally mandated, R.C. 2151.352 provides for the right to counsel in all juvenile proceedings. *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44. Further, in *McKinney v. McClure* (1995), 102 Ohio App.3d 165, the Twelfth Appellate District specifically held that a parent involved in a juvenile court custody and visitation proceeding is entitled to counsel.

{¶ 14} In this case, the custody hearing commenced without mention of appellant's right to counsel. The magistrate did not ask whether appellant was aware of her right to counsel or whether appellant wished to waive her right to counsel. The following exchange took place after appellee's examination of his witness:

{¶ 15} "THE COURT: Do you have questions?

{¶ 16} "[APPELLANT]: No, ma'am. I want to wait and get me a lawyer.

{¶ 17} "THE COURT: Pardon me?

{¶ 18} "[APPELLANT]: I want to get me a lawyer.

{¶ 19} "THE COURT: Well you can't get one in the middle of this hearing now.

{¶ 20} "[APPELLANT]: Oh, okay.

{¶ 21} "THE COURT: That's why we're in hearing."

{¶ 22} At the close of appellee’s testimony, the following conversation took place:

{¶ 23} “THE COURT: \* \* \*. Do you have any witnesses?

{¶ 24} “[APPELLANT]: No, ma’am, I don’t have nobody here with me.

{¶ 25} “THE COURT: I asked you when we started if you were ready – if you were prepared and you said yes.

{¶ 26} “[APPELLANT]: I thought we was going to get a date and come back.

{¶ 27} “\* \* \*.

{¶ 28} “[APPELLANT]: I misunderstood the question. Because I don’t have nobody in here. That’s why I was like I wanted to wait until I get a lawyer.”

{¶ 29} Based on the foregoing, we find that pursuant to R.C. 2151.352, appellant had a right to counsel and the record does not demonstrate that appellant was informed of or waived that right. The magistrate further erred by conducting the hearing despite appellant’s obvious unpreparedness and desire for counsel. Appellant’s assignment of error is well-taken.

{¶ 30} On consideration whereof, we find that appellant was prevented from having a fair proceeding. The judgment of the Lucas County Court of Common Pleas, Juvenile

{¶ 31} Division, is reversed and the case is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, court costs are assessed to appellee.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.  
See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J.

\_\_\_\_\_  
JUDGE

Richard W. Knepper, J.

\_\_\_\_\_  
JUDGE

Mark L. Pietrykowski, J.  
CONCUR.

\_\_\_\_\_  
JUDGE