

[Cite as *Ott v. Ott*, 2011-Ohio-356.]

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

Cheryl L. Ott

Court of Appeals No. H-10-007

Appellee

Trial Court No. DR 2008 0881

v.

Thomas L. Ott

DECISION AND JUDGMENT

Appellant

Decided: January 28, 2011

* * * * *

K. Ronald Bailey, for appellee.

Reese M. Wineman, for appellant.

* * * * *

COSME, J.

{¶ 1} This is an appeal from a final divorce decree judgment issued by the Huron County Court of Common Pleas, Domestic Relations Division. Because we conclude that the trial court did not abuse its discretion in designating appellee wife as the residential parent of the parties' minor child or in denying appellant's request to disqualify appellee's counsel, we affirm.

{¶ 2} Appellant, Thomas L. Ott, and appellee, Cheryl L. Ott, were married on April 24, 2002, with one child, R., born in May 2004 as issue of the marriage. Appellee filed for divorce in August 2008. The court granted temporary custody of R. to appellee and visitation to appellant pursuant to the standard court schedule.

{¶ 3} In January 2009, appellee was allegedly assaulted in her apartment, suffering a severe head injury, and was hospitalized. She remained in a coma for three weeks, and continued her treatment in the hospital, including several surgeries. She was released from the hospital at the beginning of April 2009. While appellee was hospitalized, R. lived with and was cared for by appellee's mother and father, Ellen and Michael Drake. The Drakes allowed appellant to continue visitations. At some point after she regained consciousness, appellee claimed that appellant had caused her fall and instructed her parents not to permit any further visitations. Despite this instruction, appellant's father set up a few visitations but eventually stopped.

{¶ 4} Appellant filed a show cause motion in March 2009. After conducting a hearing in June 2009, the court ordered appellee to comply with the original temporary visitation order, since she had never sought a modification of that order. On July 31, 2009, the final divorce hearing was conducted by the magistrate. At that hearing, the parties and various witnesses testified regarding a number of issues, including designation of the residential parent of R., and whether appellee's counsel, K. Ron Bailey ("Bailey"), should be required to withdraw as counsel in the matter. Attorney Bailey had previously represented appellant in a custody action for another child, not issue of this

marriage, and appellant argued that his prior representation effectively created a conflict of interest in the instant action. At the hearing, appellant acknowledged that he had disclosed to appellee anything he had discussed with Bailey during that prior proceeding.

{¶ 5} The magistrate ruled that appellant had not established that the previous custody proceeding and the instant divorce action were substantially related. Therefore, Bailey was not disqualified and was allowed to continue his representation of appellee. After hearing evidence regarding the present custody issues, the magistrate ruled that it was in R.'s best interest to designate appellee as the residential parent. The trial court overruled appellant's objections and adopted the magistrate's findings and conclusions of law. Appellant now appeals from the rulings on those two issues.

I.

{¶ 6} In his first assignment of error, appellant argues:

{¶ 7} "Assignment of Error No. 1

{¶ 8} "The trial court below abused its discretion in its failure to conduct a thorough independent review of the facts and law when it upheld the magistrate's ruling that the prior representation by plaintiff/appellee's counsel, K. Ron Bailey, of the defendant/appellant in a custody action, which took place during the marriage of the parties in this matter, was not substantially related to the issues before the court on the custody of another child."

{¶ 9} Ohio has applied the three-part test for disqualification of counsel due to a conflict of interest set forth in *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*,

(C.A.6, 1990), 900 F.2d 882. See *Morgan v. N. Coast Cable Co.* (1992), 63 Ohio St.3d 156; *Hollis v. Hollis* (1997), 124 Ohio App.3d 481, 485. The test is as follows: (1) a past attorney-client relationship must have existed between the party seeking disqualification and the attorney he or she wishes to disqualify; (2) the subject matter of the past relationship must be substantially related to the present case; and (3) the attorney must have acquired confidential information from the party seeking disqualification. *Dana*, supra, at 889; *Morgan*, supra, at 159, fn. 1. "Disqualification of an attorney is a drastic measure which should not be imposed unless it is absolutely necessary." *Crockett v. Crockett* (Feb. 6, 2003), 10th Dist. No. 02-AP-482, citing *Spivey v. Bender* (1991), 77 Ohio App.3d 17, 22, quoting *Gould, Inc. v. Mitsui Mining & Smelting Co.* (N.D. Ohio 1990), 738 F.Supp. 1121, 1126.

{¶ 10} In this case, evidence was presented that Ron Bailey was appellant's counsel in a previous custody case involving a child from another relationship. Thus, appellant has met the first prong of *Dana*. Appellant acknowledged at the hearing, however, that in preparation for those custody proceedings, appellant and appellee both met with Bailey. Nothing in the first custody action was related to the current divorce action. If anything, the information gathered and presented regarding appellant's general fitness as a father in the first custody proceeding would favor appellant. Thus, the second prong of *Dana* has not been met.

{¶ 11} Finally, contrary to appellant's suggestion, no evidence was presented that Bailey had any confidential or privileged information from anyone, including witnesses.

In addition, since Bailey was not privy to any information from appellant that was not also disclosed to appellee, no breach of confidentiality occurred when he represented appellee during the subsequent divorce action. Consequently, appellant has failed to establish the third *Dana* prong.

{¶ 12} Therefore, we conclude that the trial court properly found that appellant failed to establish that appellee's counsel should have been disqualified. Accordingly, appellant's first assignment of error is without merit.

II.

{¶ 13} In his second assignment of error, appellant contends:

{¶ 14} "Assignment of Error No. 2

{¶ 15} "The trial court abused its discretion in upholding the decision of the magistrate designating the plaintiff/mother residential parent in failing to recognize the magistrate's failure to properly consider the import and legislative intent of sections 3109.04(F)(1)(e), (f), and (i), of the Ohio Revised Code based upon the facts that were developed in the hearings before the magistrate."

{¶ 16} A trial court has broad discretion in its allocation of parental rights and responsibilities. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Appellate courts must afford "the utmost respect" to the trial court's exercise of discretion because "[t]he 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." *Id.* Consequently, a reviewing court may not overturn a trial court's determination regarding

the allocation of parental rights and responsibilities absent an abuse of discretion.

Donovan v. Donovan (1996), 110 Ohio App.3d 615, 618. An abuse of discretion implies that the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 17} R.C. 3109.04(B)(1) requires the court to consider the best interest of the children when making an allocation of parental rights and responsibilities. In making a best interest determination, the trial court considers the factors in R.C. 3109.04(F)(1).

Those factors pertinent to this appeal include:

{¶ 18} "(a) The wishes of the child's parents regarding the child's care;

{¶ 19} " * * *

{¶ 20} "(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;

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

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

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

{¶ 24} " * * *

{¶ 25} "(i) Whether the residential parent * * * has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court; * * *."

{¶ 26} Not one of the factors listed in R.C. 3109.04(F)(1) is to be given more weight than the others. *Graves v. Graves*, 9th Dist. No. 3242-M, 2002-Ohio-3740, ¶ 43.

{¶ 27} In this case, contrary to appellant's contentions, the trial court specifically noted that it considered the transcripts and testimony presented, and found that the magistrate's findings in regard to R.C. 3109.04(F)(1)(e) and (f) weighed in favor of appellant. Notwithstanding those findings, however, the court agreed that other facts in the case mitigated against appellant on those issues. The court found that additional factors weighed more in favor that appellee be designated as the residential parent.

{¶ 28} Our review of the record reveals that appellee had been the primary caregiver for all of R.'s life. R. was integrated into the community, attended school and church functions with appellee, and had been well cared for by the maternal grandparents during his mother's hospitalization and convalescence. Although visitation with appellant was arguably hindered at times by the maternal grandparents at appellant's direction, this action was initiated because of questions and allegations that appellant had assaulted appellee and caused her head injury. As a result, we conclude that the record supports that the trial court conducted an independent review of the magistrate's findings, considered all the relevant statutory factors, and did not abuse its discretion in designating appellant as the residential parent.

{¶ 29} Accordingly, appellant's second assignment of error is not well-taken.

{¶ 30} The judgment of the Huron County Court of Common Pleas, Domestic Relations Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
