[Cite as *In re N.B.*, 2013-Ohio-5470.]

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

In re N.B. Court of Appeals No. L-13-1072

Trial Court No. 10202317

DECISION AND JUDGMENT

Decided: December 13, 2013

* * * * *

John Paul Zima, for appellant.

James S. Adray, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, that granted appellee's motion for relief from judgment pursuant to Civ.R. 60(B)(5) and vacated the court's prior order awarding legal custody of appellee's minor child to the maternal grandparents. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} Grandparents/Appellants set forth the following assignments of error:

First Assignment of Error:

The trial court erred in granting appellee's Civ.R. 60(B) motion because Civ.R. 60(B) is only available to parties and appellee was not a party.

Second Assignment of Error:

The trial court erred in granting appellee's Civ.R. 60(B) motion because he failed to present a meritorious defense.

Third Assignment of Error:

The trial court erred in granting appellee's Civ.R. 60(B) motion because he failed to specify which subsection of the rule applies.

Fourth Assignment of Error:

The trial court erred in granting appellee's Civ.R. 60(B) motion because it was granted under Civ.R. 60(B)(5) when it should have been brought under Civ.R. 60(B) (1) or (3).

Fifth Assignment of Error:

The trial court erred in granting appellee's Civ.R. 60(B) motion because his motion did not address the reason for his delay in filing his motion.

Sixth Assignment of Error:

The trial court erred in granting appellee's Civ.R. 60(B) motion because his motion was not filed within a reasonable time.

Seventh Assignment of Error:

The trial court erred in granting appellee's Civ.R. 60(B) motion because his situation was not an extraordinary circumstance justifying relief under Civ.R. 60(B)(5).

{¶ 3} The undisputed facts relevant to the issues raised on appeal are as follows. When N.B. was born in January 2010, the child's mother named appellee and two other men as possible fathers. Appellee was not named on the birth certificate and did not execute an affidavit of paternity. The record contains no indication that mother and appellee were living together at that time or that they had any contact with one another. At some point shortly after the child's birth, Lucas County Children Services became involved and the agency prepared a case plan naming appellee as the "alleged father." The agency also requested that appellee make arrangements for paternity testing. Within a few days of the child's birth, mother permitted maternal grandparents to have possession of the child and on February 22, 2010, grandparents filed a pro se complaint for custody of N.B. Grandparents listed mother's name and address for service but placed a question mark on the praecipe for service in the area requesting the father's name. The record reflects that mother was properly served.

{¶ 4} On April 14, 2010, grandparents' attorney sent appellee a copy of her entry of appearance. A hearing was held and, based on an agreement reached between mother and grandparents during mediation, the magistrate awarded temporary custody to grandparents effective April 20, 2010. Appellee did not attend the hearing or attempt to visit with N.B. Lucas County Children Services was involved in the mediation, although the background of the agency's involvement in this matter is not clear from the record.

{¶ 5} On July 12, 2010, grandparents filed a pro se "Motion to Modify the Allocation of Parental Rights and Responsibilities," in which they stated that "the case with [CSB] is closed and adoption is the next step." Grandparents again listed mother's name and address for service and placed a question mark, as well as "John Doe," in the space for the father's name. A hearing was held before a magistrate on September 8, 2010, but mother and father failed to appear. The magistrate awarded legal custody to grandparents, effective on that date. The magistrate's decision was adopted by the trial court by judgment entry filed October 14, 2010; it is that judgment entry which was the subject of the trial court's March 25, 2013 judgment that is now being appealed by grandparents.

{¶ 6} In December 2010, appellee sought a paternity test and on August 25, 2011, his paternity was established as to N.B. On February 28, 2012, appellee/father (hereafter, "father") filed a pro se "Motion for Change of Custody/Motion to Modify the Allocation of Parental Rights."

{¶ 7} On September 21, 2012, grandparents filed a "Motion for Joint Custody, or in the Alternative, Motion for Grandparents' Visitation and Companionship * * *." A hearing was held that same day and father appeared with counsel. In a decision filed at the conclusion of the hearing, the magistrate found that it was in the best interest of N.B. that legal custody be awarded to grandparents. The magistrate did not find that N.B. was abused, neglected or dependent, nor did he make any other specific findings as to the child. Father was granted visitation and the matter was set for further hearing in December on the issue of whether this was an original custody action or a motion to modify custody. The matter was continued and then set for hearing on January 30, 2013. Grandparents and father filed briefs on the custody issue. On February 13, 2013, the magistrate filed a decision finding that, unless the prior custody order was vacated, the matter would proceed to trial pursuant to R.C. 3109.04(E)(1)(a) on the issue of whether a change of circumstance had occurred and, if so, whether a change in custody would be in the child's best interest.

{¶ 8} On February 20, 2013, however, before the scheduled March 26, 2013 hearing could be had, father filed a motion for relief from judgment pursuant to Civ.R. 60(B). In his motion, father essentially argued that the trial court should either grant him an original hearing on the issue of suitability or vacate the October 14, 2010 judgment and begin the proceedings anew with proper notice to all parties. In support, father asserted that the magistrate granted legal custody to grandparents without having made any findings as to the suitability of either parent. Father asserted that, in a child custody

proceeding between a parent and a nonparent which does not arise from an abuse, neglect or dependency determination, a court may not award custody to the nonparent without first making a determination that the parent abandoned the child, the parent contractually relinquished custody of the child, the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child.

{¶ 9} Grandparents filed a memorandum in opposition. On March 25, 2013, the trial court found that it was appropriate to grant father's Civ.R. 60(B) motion and vacate the October 14, 2010 judgment adopting the magistrate's decision in light of issues that had arisen since the September 8, 2010 hearing and the resultant magistrate's decision. In its decision, the trial court noted it was unclear why the alleged father(s) were not served with the grandparents' original complaint for custody, or any subsequent filings in this case, when the parties and LCCS either knew or should have known of their existence. Additionally, the court found that the magistrate's September 2010 decision was legally insufficient due to a failure to indicate that the magistrate had considered the suitability of either parent before awarding legal custody to the grandparents. The trial court further found that the magistrate had not made an explicit finding that the minor child was abused, neglected or dependent – and in fact made no specific findings aside from checking a box indicating "Evidentiary hearing held" – before awarding legal custody to a non-parent. The trial court noted that the magistrate's decision simply stated that it was in the child's best interest that legal custody be awarded to the grandparents.

{¶ 10} In support of its decision, the trial court relied on the authority of *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, in which the Supreme Court of Ohio recognized that R.C. 2151.23(A)(2), the statute under which grandparents herein filed their petition for custody, contains no best interest of the child standard. *Hockstok* held that "a juvenile court must make a determination of parental unsuitability before awarding child custody to a nonparent in a legal custody proceeding." *Id.* at ¶ 19, citing *In re Perales*, 52 Ohio St.2d 89, 96, 369 N.E.2d 1047 (1997). Accordingly, the trial court herein reinstated grandparents' status as temporary custodians of N.B. and confirmed the trial date of March 26, 2013, for appellant's pending motion for a change of custody/motion to modify allocation of parental rights as well as grandparents' original complaint for custody. Finally, the trial court vacated the February 13, 2013 decision in which the magistrate concluded that the matter would proceed to trial with the issue of custody to be determined pursuant to a change of circumstances/best interest standard.

{¶ 11} It is well-established that the decision whether or not to grant relief from judgment pursuant to Civ.R. 60(B) lies well within the discretion of the trial court. As such, these decisions will not be disturbed unless it is shown that the trial court abused its discretion. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994). An abuse of discretion connotes more than a mere error in law or judgment; it requires demonstration that the trial court's action was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 12} Grandparents have set forth several arguments on appeal in support of their claim that the trial court erred by granting father's Civ.R. 60(B) motion, asserting that father's motion failed in various respects to comply with the general requirements for motions seeking relief from judgment, and therefore should not have been granted by the trial court. However, the action of the trial court which brings this matter before us is that court's decision to vacate its own judgment of October 14, 2010, adopting the magistrate's decision granting legal custody to appellants. Therefore, for the reasons set forth below, our review focuses on whether the trial court properly vacated its earlier decision.

{¶ 13} Ohio courts have held that a court has inherent power to vacate its own void judgment. In *Oxley v. Zacks*, 10th Dist. Franklin No. 00AP-247, 2000 WL 1455289 (Sept. 29, 2000), wherein the appellant complained of a default judgment that was entered without proper service of process, the appellate court stated that "a default judgment entered without proper service of process is void and the authority to vacate such a judgment is not derived from Civ.R. 60(B) but, rather, constitutes an inherent power of the court." While the case before us arises from a custody determination rather than a default judgment, the rationale in *Oxley* is clearly applicable to this matter. *Oxley* continued: "Thus, a motion to vacate judgment for improper service need not satisfy all the requirements of Civ.R. 60(B). In particular, the movant need not set forth a

meritorious defense, nor is it necessary that the motion be timely filed." *Oxley*, *supra*, citing *Rite Rug Co., Inc. v. Wilson*, 106 Ohio App.3d 59, 62-63, 665 N.E.2d 260 (10th Dist.1995).

{¶ 14} Additionally, this court addressed this issue in *Doolin v. Doolin*, 123 Ohio App.3d 296, 704 N.E.2d 51 (6th Dist.1997), wherein we held that the trial court properly vacated an order modifying the division of the ex-husband's pension benefits because the order was void ab initio. In *Doolin*, we held that two QDROs at issue were void ab initio and could be vacated by the trial court pursuant to its inherent authority. *Doolin* at 300, citing *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988), paragraph four of the syllabus. Therefore, we held that the appellee's motion to vacate the void judgment did not have to comply with the requisites of Civ.R. 60(B). *United Home Fed. v. Rhonehouse* , 76 Ohio App.3d 115, 123, 601 N.E.2d 138 (6th Dist.1991).

{¶ 15} As the court in Hockstok held, "a finding of parental unsuitability * * * [is] a necessary first step in child custody proceedings between a natural parent and nonparent." *Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971 at ¶ 18. The suitability determination "must be made and appear in the record before custody can be awarded to a nonparent." *Id*. at ¶ 36. The Supreme Court emphasized that a parent's suitability determination should come at the time of the legal custody hearing and that, after such a determination has established, or taken away, a parent's fundamental custodial rights, "the focus must shift from the rights of the parents to the rights of the child." *Id*. at ¶ 38. After the suitability issue is addressed and a custody award made,

"that award will not be modified unless necessary to serve the best interest of the child." *Id*. at ¶ 21, citing *In re Perales*, 52 Ohio St.2d at 97, 369 N.E.2d 1047. Accordingly, based on the foregoing, we find that the trial court herein did not abuse its discretion by vacating its October 14, 2010 order and granting father's Civ.R. 60(B) motion. Appellants first, second, third, fourth, fifth, sixth and seventh assignments of error are therefore not well-taken.

{¶ 16} On consideration whereof, the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Costs of this appeal are assessed to appellants 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE