

[Cite as *In re B.R.*, 2010-Ohio-2359.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94099

IN RE: B.R.
A Minor Child

JUDGMENT:
REVERSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. CU 08137274

BEFORE: Boyle, J., Dyke, P.J., and Celebrezze, J.

RELEASED: May 27, 2010

**JOURNALIZED:
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MARY J. BOYLE, J.:

{¶ 1} Appellant D.D. (“mother”) appeals from the trial court’s decision awarding legal custody of her minor daughter to R.R. and P.R. (the paternal “grandparents”) upon their petition for a “power of attorney” (“POA”). The magistrate sua sponte converted the POA into a petition for legal custody and awarded same to the grandparents without providing notice to the parents, without holding a custody hearing, and without stating any reasons for the court’s best interest determination or making any finding that the parents

were unsuitable. Five days later, prior to the expiration of the time period for filing objections, the trial court approved and adopted the decision. We reverse.

Procedural History and Facts

{¶ 2} On August 25, 2008, the grandparents filed a POA with the juvenile division of common pleas court. The court sent notice to the mother, father, and grandparents regarding a “POA/Caregiver hearing” to be heard before a magistrate. At the hearing, the magistrate addressed the parties and the contents of the POA filed. All parties were in agreement as to the court approving the POA, which granted the grandparents inter alia authority to enroll the child in school and seek medical treatment on the child’s behalf. Notably, the record is devoid of any discussion or request that the grandparents be granted legal custody.

{¶ 3} Following the hearing, the magistrate inexplicably treated the grandparents’ motion for POA as a petition for legal custody and awarded same to the grandparents. The magistrate did so despite finding that “notice requirements have not been met” and despite not having held a hearing on custody. Nor did the magistrate make any findings regarding the unsuitability of the parents.

{¶ 4} Five days later, the trial judge approved and adopted the magistrate’s decision, awarding legal custody to the grandparents.

{¶ 5} From this decision, mother appeals, raising the following three assignments of error:

{¶ 6} “I. The lower court committed plain error when it awarded legal custody of the minor child to the grandparents.

{¶ 7} “II. The trial court committed error as a matter of law and deprived appellant of her due process rights when the court converted the caretaker authorization affidavit to a petition for legal custody and granted the same.

{¶ 8} “III. The lower court committed plain error when it granted legal custody of the minor child to the grandparents without making the required findings.”

Due Process and Court’s Jurisdiction

{¶ 9} In her first and second assignments of error, mother contends that the trial court committed plain error and violated her due process rights by sua sponte converting a petition for POA/caretaker authorization into a motion for legal custody and granting same without affording her any notice. We agree.

{¶ 10} This case originated by the grandparents seeking to renew their POA previously filed in the juvenile court. R.C. 3109.52 describes the authority conveyed in a grandparent’s POA as follows:

{¶ 11} “The parent, guardian, or custodian of a child may create a power of attorney that grants to a grandparent of the child with whom the child is residing any of the parent’s, guardian’s, or custodian’s rights and responsibilities regarding the care, physical custody, and control of the child, including the ability to enroll the child in school, to obtain from the school district educational and behavioral information about the child, to consent to all school-related matters regarding the child, and to consent to medical, psychological, or dental treatment for the child. The power of attorney may not grant authority to consent to the marriage or adoption of the child. The power of attorney does not affect the rights of the parent, guardian, or custodian of the child in any future proceeding concerning custody of the child or the allocation of parental rights and responsibilities for the care of the child and ***does not grant legal custody to the attorney in fact.***” (Emphasis added.)

{¶ 12} Throughout the statutory scheme governing a grandparent POA and caretaker authorization affidavits, i.e., R.C. 3109.51 through 3109.80, the General Assembly repeatedly states that the authority vested in grandparents for the care of the child does not grant legal custody to them. See, e.g., R.C. 3109.52, 3109.53, 3109.66, and 3109.69. Given the clear language of the statutory scheme, we are utterly dumbfounded as to why the magistrate believed that a request for a POA would allow it to sua sponte treat the request

as a petition for legal custody. We likewise find that the trial court abused its discretion in adopting the magistrate's decision.

{¶ 13} Suffice it to say, we are also astonished in the trial court's granting of legal custody to the grandparents without there ever being any request for a change of custody, a hearing on custody, and a complaint alleging neglect, accompanied by a summons providing notice to the mother. Notice is the most elementary and fundamental requirement in any custody proceeding. Indeed, cases regarding parental custody involve issues of fundamental rights, and throughout such proceedings, parents are entitled to every procedural and substantive protection the law allows. See *In re Hayes* (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680. It is well settled that such rights "cannot be abrogated, even temporarily, without due process." *In re Surdel* (May 12, 1999), 9th Dist. No. 98CA007172.

{¶ 14} Aside from trampling on mother's due process rights, the trial court utterly ignored the statutory provisions governing an award of legal custody. Indeed, we find that the juvenile court lacked jurisdiction to award legal custody when there was never (1) a summons issued, (2) a complaint filed specifying allegations of neglect and requesting a change of custody, and (3) notice of a hearing and warning that mother's failure to attend may result in the loss of custody of her child. See *In re Surdel*, *supra*, citing R.C. 2151.28(C) and (D); see, also, *In re Corey* (1945), 145 Ohio St. 413, 61 N.E.2d

892 (If juvenile court fails to properly serve a parent, jurisdiction does not attach for a determination of change of custody).

{¶ 15} Mother's first and second assignments of error are sustained.

{¶ 16} Having already found that the trial court lacked jurisdiction, thereby rendering its order void, we need not address mother's remaining assignment of error pertaining to the trial court's failure to make the required "unsuitability determination" of the parents prior to awarding custody to a nonparent. See App.R. 12(A)(1)(c).

Judgment reversed.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

MARY J. BOYLE, JUDGE

ANN DYKE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR