[Cite as *In re B.R.*, 2010-Ohio-3092.]

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: July 1, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Timothy R. Sterkel
1414 South Green Road
Suite 310
Cleveland, Ohio 44121

Dominic R. Leone
26 Market Street
Suite 610
Huntington Building
Youngstown, Ohio 44503

FOR APPELLEES

Richard T. Rubin
3538 Ingleside Road
Shaker Heights, Ohio 44122

MARY J. BOYLE, J.:

{¶ 1} On reconsideration, the original announcement of *In re B.R.*, 8th Dist. No. 94099, 2010-Ohio-2359, released on May 27, 2010, is hereby vacated. We find it necessary to vacate that opinion because of our misstatement regarding the court's jurisdiction and our oversight of R.C. 3109.77, the statutory provision that allows the trial court to treat a renewal for a power of attorney ("POA") as a petition for legal custody. But for the reasons discussed below, we nonetheless reach the same outcome and find that the trial court erred in awarding legal custody of B.R. to her paternal grandparents upon their second petition for a POA. Accordingly, we reverse.

Procedural History and Facts

{¶ 2} On August 17, 2009, the grandparents filed a POA with the juvenile division of common pleas court, seeking to renew their POA previously filed in the juvenile court. The court sent notice to the appellant D.D. ("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. Mother specifically inquired as to the scope of the POA, which the magistrate explained as follows:

{¶ 3} "[Mother]: Now, does the POA affect what the parents — or that just allows them to be able to make health decisions —

{¶ 4} "[The Court]: Health decisions, school decisions.

{¶ 5} "[Mother]: — if the parents are unavailable for that?

{¶ 6} "[The Court]: They don't have to come to the parents to get health decisions or enrolled in school, but there's no termination of parental rights, no. This is — it's kind of legalizing the arrangement, and it gives the grandparents to do whatever's necessary in the interest of the child. Does that answer —

{¶ 7} "[Mother]: Yes, it does. Thank you very much."

{¶ 8} The record further reveals that all parties were in agreement as to the court approving the subsequent POA, which granted the grandparents inter alia authority to enroll the child in school and seek medical treatment on the child's behalf. Based on this agreement, the magistrate stated the following at the hearing:

{¶ 9} "[The Court]: My concern when we bring these cases is, are the parties in agreement? * * * So as long as everybody is in reasonable agreement, I'll approve it.

{¶ 10} "* * *

{¶ 11} "I'll just say the POA is approved. What happens is I have to electronically do a magistrate's decision, in essence, that says that. From

there it goes to Judge Russo, who is the judge assigned to this. He looks at it, and assuming he says okay to it, he'll click it and will sign it and it will be filed with the clerk's office. The entry of approving the power of attorney will be sent out to everybody time wise, two, three weeks, maybe."

{¶ 12} Following the hearing, however, the magistrate 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 heard any evidence regarding a change in custody.

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

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

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

{¶ 16} "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.

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

Court's Jurisdiction and Due Process

{¶ 18} In her first and second assignments of error, mother contends that the trial court committed plain error in sua sponte converting the grandparents' second petition for a POA into a petition for legal custody and granting the grandparents custody without affording her any notice. She contends that the trial court lacked authority to do so and that its order directly contravenes basic due process because she had no notice that a change of custody was even being contemplated. She further argues in her third assignment of error that the trial court failed to make a parental "unsuitability" determination to justify an award of legal custody to the grandparents.

{¶ 19} First, we address the trial court's jurisdiction. Under R.C. 2151.23(B)(7), the juvenile court has original jurisdiction "[t]o receive filings under section 3109.74 of the Revised Code [filing of grandparent power of attorney], and to hear and determine actions arising under sections 3109.51 to 3109.80 of the Revised Code." Contrary to mother's assertion, R.C.

3109.77 expressly authorizes a trial court to treat a subsequent request for a POA as a petition for legal custody. The statute provides in relevant part:

{¶ 20} "(A) On the filing of a power of attorney or caretaker authorization affidavit under section 3109.76 of the Revised Code[1], the court in which the power of attorney or caretaker authorization affidavit was filed shall schedule a hearing to determine whether the power of attorney or affidavit is in the child's best interest. * * *

{¶ 21} " * * *

{¶ 22} "(C) At the conclusion of the hearing, the court may take any of the following actions that the court determines is *in the child's best interest*:

{¶ 23} "(1) Approve the power of attorney or affidavit. If approved, the power of attorney or affidavit shall remain in effect unless otherwise terminated under section 3109.59 of the Revised Code with respect to a power of attorney or section 3109.70 of the Revised Code with respect to an affidavit.

{¶ 24} "(2) Issue an order terminating the power of attorney or affidavit and ordering the child returned to the child's parent, guardian, or custodian. If the parent, guardian, or custodian of the child cannot be located, the court shall treat the filing of the power of attorney or affidavit with the court as a

[1]R.C. 3109.76 governs "second or subsequent power of attorney" created under R.C. 3109.52.

complaint under section 2151.27 of the Revised Code that the child is a dependent child.

{¶ 25} "(3) *Treat the filing of the power of attorney or affidavit as a petition for legal custody and award legal custody of the child to the grandparent designated as the attorney in fact under the power of attorney or to the grandparent who executed the affidavit*." (Emphasis added.)

{¶ 26} The express language of R.C. 3109.77(C)(3) therefore allows the court to treat a second power of attorney as a petition for legal custody. But despite that authority, we nevertheless find that the trial court committed plain error in awarding legal custody to the grandparents based on the record before us.

{¶ 27} Initially, we must emphasize that "the overriding principle in custody cases between a parent and nonparent is that natural parents have a fundamental liberty interest in the care, custody, and management of their children." *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶16, citing *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599; *In re Murray* (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169. Accordingly, "any action by the state that affects this parental right, such as granting custody of a child to a nonparent, must be conducted pursuant to procedures that are fundamentally fair." Id.

{¶ 28} Here, the entire transcript of the proceedings conducted below consists of ten pages. During this obviously short hearing, the parties never once discussed a change of custody. Indeed, the mother specifically inquired as to the scope of the hearing and POA, expressing her concern that it not infringe on her parental rights. At no time during the hearing did the court indicate that it was considering a change in custody. To the contrary, the entire proceeding focused on the parties' mutual agreement that the second grandparent POA should be approved.[2] Notably, the magistrate told the parties that he would prepare an order approving the POA for the judge to sign.

{¶ 29} And while we recognize that R.C. 3109.77 allows a court to treat a subsequent request for POA as a petition for legal custody, we cannot say that the court "treated" the matter below as a petition for legal custody as contemplated under R.C. 2151.23. Applying the plain language of R.C. 3109.77, the only "petition for legal custody" that could apply in this case would be one made under R.C. 2151.23(A)(2). In a custody dispute between a parent and nonparent arising out of R.C. 2151.23(A)(2), it is well established that "a court may not award custody to the nonparent 'without first determining that a preponderance of the evidence shows that the parent

[2]We note that neither the grandparents nor the father have filed an appellee brief in this appeal.

abandoned the child; contractually relinquished custody of the child; that 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.' If a court concludes that any one of these circumstances describes the conduct of a parent, the parent may be adjudged unsuitable, and the state may infringe upon the fundamental parental liberty interest of child custody." (Internal citations omitted.) *In re Hockstok*, ¶17; see, also, *In re Perales* (1977), 52 Ohio St.2d 89, 369 N.E.2d 1047 (requires parental unsuitability determination before custody may be awarded to a nonparent). The record contains no evidence as to any one of these factors, and consequently the trial court made no finding of mother's unsuitability prior to granting the grandparents legal custody. Moreover, to the extent that a POA was previously created and filed, this does not constitute a relinquishment of custodial rights. See R.C. 3109.52.[3]

{¶ 30} Further, R.C. 2151.23(F)(1) states that "[t]he juvenile court shall exercise its jurisdiction in child custody matters in accordance with sections 3109.04 and 3127.01 to 3127.53 of the Revised Code * * *." R.C. 3109.04 (F)

[3]Under this statute, which describes the authority conveyed in a POA, it clearly states that "[t]he 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."

states a non-exhaustive list of factors for a court to consider in determining a child's best interest in a custody dispute. Because the parties agreed that the POA should be approved, the court heard no evidence regarding these factors or any other factors related to the child's best interest. The entire hearing focused solely on the parties' mutual agreement that the POA should be approved.

{¶ 31} We do not believe that the General Assembly, in enacting R.C. 3109.77(C)(3), intended to nullify all procedural and substantive safeguards afforded a parent in a child custody proceeding initiated under R.C. 2151.23(A)(2). Instead, we find that the statutory provision incorporates these procedures and requires a trial court to comply with such safeguards prior to awarding custody to a grandparent.

{¶ 32} Accordingly, although we recognize that the trial court had jurisdiction to award legal custody to the grandparents based on the second POA filed, we find that it was plain error to do so when the court heard no evidence related to the child's best interest for a change of custody, made no finding regarding the suitability of the mother, and expressly represented that the proceedings were limited to the approval of the POA. Under these circumstances, basic notions of due process and fairness require reversal.

{¶ 33} We sustain the first and third assignments of error and overrule the second assignment of error.

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