

[Cite as *In re K.B.*, 2015-Ohio-4088.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102711

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**IN RE: K.B.**  
A Minor Child

[Appeal by T.B., Mother]

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**JUDGMENT:**  
AFFIRMED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case No. CU02102774

**BEFORE:** Blackmon, J., E.T. Gallagher, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** October 1, 2015

**ATTORNEY FOR APPELLANT**

Christina M. Joliat  
P.O. Box 391531  
Solon, Ohio 44139

**Also listed:**

**Father**

T.R.  
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Shaker Heights, Ohio 44120

**Guardian Ad Litem**

Henry Billingsley  
950 Main Avenue, Suite 1100  
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶1} Appellant T.B. (“mother”) appeals the juvenile court’s awarding custody of K.B. (“child”) to T.R. (“father”) and assigns the following five errors for our review:

I. The trial court erred in denying mother’s motion to dismiss motion for change of custody.

II. The trial court erred in proceeding on the motion to show cause.

III. The trial court erred in finding a material breach of the existing visitation order.

IV. The trial court erred in finding a requisite change of circumstances to modify custody.

V. The trial court erred in determining the best interest of the child.

{¶2} Having reviewed the record and pertinent law, we affirm the juvenile court’s decision. The apposite facts follow.

{¶3} K.B. was born out of wedlock on April 13, 2001, and the mother became the custodial parent. Both mother and father have lived in Ohio since the child’s birth, and the mother allowed the father to visit the child even though there was no visitation order in place. However, on June 23, 2003, the parties entered into a visitation agreement that was adopted by the trial court whereby the father was awarded visitation, and the mother was awarded residential custody.

{¶4} Pursuant to this agreement, the father had regular overnight visits with the child from 2003 until 2008. The father testified that there were some troubles with visitation from 2003 until 2009. He stated that there was one incident where he arrived and the mother tried to refuse him visitation. He took the child and left. As a result, the mother called the police and filed a false report that he assaulted her. The charges were

eventually dropped because the mother did not appear. He stated as of December 2009, the mother started denying him visitation. He believes it was because he called the police after videotaping the mother rummaging through his personal property in his truck. He stated after that, it was difficult for him to receive visitation.

{¶5} According to the father, he filed a motion to show cause in 2013, because from 2010 until 2012, he received no overnight visitation. In 2012, he was only permitted to see K.B. twice.

{¶6} As a result of his motion, the court ordered the parties to develop a temporary visitation schedule while the show cause motion was pending. As a result, a temporary visitation agreement was entered on November 29, 2013. Pursuant to the agreement, the father was able to have K.B. for a week during her winter break from school. The mother claimed the father left the child the entire time with his ex-wife. The father admitted the child spent several days at his ex-wife's house but it was because her half-siblings were there too, and he thought they could bond. He also stated that because the temporary visitation order was entered in late November, it did not give his employer sufficient time to schedule him off for a week around the holidays.

{¶7} The father lives in Shaker Heights and has worked for RTA for the past 20 years. He currently lives with his girlfriend of six years, her 15-year-old daughter and three of his children by another woman of which he has legal custody, including two girls and a boy. He stated that there is room for K.B. in the girls' room because they have bunk beds. The children that the father has custody of are active in school activities and

are performing well academically. He and his live-in girlfriend testified that he is very involved with his children.

{¶8} The mother lives in Garfield Heights and is a receptionist for a dental office. She claimed that the father lost interest in seeing K.B. after getting a divorce in 2008. She stated that the father could have the child for visitation whenever he wanted, but that he had to realize that K.B. had her own social activities.

{¶9} The mother acknowledged that K.B. had been suspended for bullying last school year and that K.B., who was once an “A” student was now receiving “D’s.” However, she blamed it on K.B. being stressed about her father wanting custody. She acknowledged that her daughter was tardy almost every day of school last year. She stated that she had no idea what her daughter did after she left the house for school.

{¶10} The guardian ad litem (“GAL”) testified that he was appointed to the case on May 23, 2013. The GAL stated that a temporary visitation order was entered on November 29, 2013, pending resolution of the motion to show cause. According to the GAL, the mother is not complying with the new order. He spoke with K.B.’s teachers who told him that K.B.’s school work and attitude have deteriorated over the last year, and she was frequently tardy. Additionally, she was suspended for bullying.

{¶11} According to the GAL, on November 19, 2013, an anonymous call was made to the Cuyahoga County Children and Family Services Division stating that the father’s house was infested with rats. He found this curious because the mother had made this same allegation at the pretrial hearing that day. He inspected the house and

found a clean and comfortable home with no rats. Based on the mother's repeated attempts to disrupt the visitation order, the GAL recommended that it was in K.B.'s best interest to live with her father. He met with the child on September 2, 2013, and May 19, 2014, and both times, the child stated she had "no problem" with her father. The magistrate recommended that custody be awarded to the father.

{¶12} The mother filed objections to the magistrate's decision. The trial court overruled the objections and adopted the magistrate's recommendation.

### **Motion to Dismiss**

{¶13} In her first assigned error, the mother argues that the trial court erred by denying her motion to dismiss the father's motion for change of custody. Specifically, she argues that the motion failed to demonstrate a change of circumstances and also, the father's motion was procedurally defective because it failed to include a Uniform Child Custody affidavit or supporting documentation of proof of paternity as required by Loc.Juv.R. 28.

{¶14} Loc.Juv.R. 28 provides as follows:

(A) All private actions seeking custody of a child shall be initiated by a sworn application, or in preexisting cases, by motion, accompanied by a child custody affidavit, pursuant to R.C. 3109.27, a copy of the child's birth certificate, if a copy is not in the court file, and proof of paternity.

{¶15} R.C. 3109.27 has been renumbered as R.C. 3127.23. R.C. 3127.23 provides in pertinent part as follows:

(A) Each party in a child custody proceeding, in the party's first pleading or in an affidavit attached to that pleading, shall give information if

reasonably ascertainable under oath as to the child's present address or whereabouts, the places where the child has lived within the last five years, and the name and present address of each person with whom the child has lived during that period \* \* \*.

{¶16} In *Pasqualone v. Pasqualone*, 63 Ohio St.2d 96, 406 N.E.2d 1121 (1980), first paragraph of the syllabus, the Supreme Court of Ohio held:

The requirement in R.C. 3109.27 that a parent bringing an action for custody inform the court at the outset of the proceedings of any knowledge he has of custody proceedings pending in other jurisdictions is a mandatory jurisdictional requirement of such an action.

{¶17} The Ohio Supreme Court, however, in *In re Complaint for Writ of Habeas Corpus for Goeller*, 103 Ohio St.3d 427, 2004-Ohio-5579, 816 N.E.2d 594, subsequently limited the application of *Pasqualone*. In *Goeller*, the court explained that despite *Pasqualone*'s language "it is well settled that '[t]he requirement that an affidavit be filed in a party's first pleading [under R.C. 3127.23] has been relaxed to allow amended pleading or subsequent filings to include the affidavit information.'" *Id.* at ¶ 11, quoting *In re Porter*, 113 Ohio App.3d 580, 584, 681 N.E.2d 954 (3d Dist.1996). The court reiterated its prior holding that a "mechanistic interpretation of R.C. [3127.23] \* \* \* would not only contravene the clear intent of R.C. [3127.23] but could potentially render the custody statutes of this state a nullity.'" *Id.* at ¶ 12, quoting *In re Palmer*, 12 Ohio St.3d 194, 197, 465 N.E.2d 1312 (1984).

{¶18} Here, the father did attach the required custody affidavit to his motion to show cause that was filed prior to the motion for change of custody. Therefore, although he did not attach the affidavit to his motion to modify custody, the court had the affidavit at the time it was filed. Given the Supreme Court’s allowing a “relaxed” interpretation of R.C. 3127.23, the trial court did not err by denying the mother’s motion to dismiss based on this technical argument.

{¶19} Additionally, the parties had been before the court previously to establish visitation. Therefore, the court was well aware of where and with whom the child had been living and aware of the prior proceedings before the court. Thus, even without the affidavit, the trial court was able to ascertain it had jurisdiction over the matter. *See Sumerford v. Sumerford*, 10th Dist. Franklin Nos. 11AP-29 and 11AP-358, 2012-Ohio-1842, ¶ 16.

{¶20} We also find the court did not err by refusing to dismiss the father’s motion based on the father’s failure to file supporting documentation of proof of paternity. In his affidavit attached to the motion, he stated that he was the father, and there was no dispute at the hearing that he was, indeed, the father. Accordingly, the mother’s first assigned error is overruled.

### **Motion to Show Cause**

{¶21} In her second assigned error, the mother argues that the trial court erred by denying her motion to dismiss the father’s motion to show cause based on the father’s



failure to include a notice of rights pursuant to R.C. 2705.031(C) and a copy of the court order on which it was based pursuant to Loc.Juv.R. 47(A).

{¶22} The mother contends the motion to show cause did not include the “notice of rights” mandated by R.C. 2705.031(C). However, the notice of rights that the mother is referring to is required to be placed in the actual summons, not the motion. Our review of the summons shows that it includes all of the required notices contained in R.C. 2705.031. Thus, the court did not err by refusing to dismiss the motion based on this alleged deficiency.

{¶23} The mother also argues that the trial court should have dismissed the motion because the father failed to attach a copy of the court order that he was alleging was being violated. Loc.Juv.R. 47(A) requires that a copy of the court order be attached to the motion to show cause. A review of the motion shows that a copy of the court order is referenced as exhibit A, yet there is no exhibit A attached.

{¶24} However, we conclude no prejudice resulted from the father failing to attach the exhibit. He details in his affidavit that his motion to show cause concerns the violation of the visitation order entered in May 2003. Moreover, the parties were not at odds on what the prior order mandated. Instead, the mother contended they never followed it formally. Additionally, it was clear that the court and the parties were aware of the prior visitation order and what it mandated, and a copy was presented to the court prior to the hearing. Accordingly, because no prejudice resulted from the father’s failure to attach a copy of the court order to his motion to show cause, the trial court did not err

by denying the mother's motion to dismiss. The mother's second assigned error is overruled.

### **Change of Circumstances and Best Interest of Child**

{¶25} We will address the mother's third, fourth, and fifth assigned errors together because they all concern the juvenile court's decision to modify custody by awarding custody of K.B. to her father.

{¶26} It has long been a recognized rule of law that for a reviewing court to overturn a trial court's determination of custody, the appellate court must find that the trial court abused its discretion. *Masters v. Masters*, 69 Ohio St.3d 83, 85, 630 N.E.2d 665 (1994). The abuse of discretion standard has been defined as "more than an error at law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.*, citing *Miller v. Miller*, 37 Ohio St.3d 71, 73-74, 523 N.E.2d 846 (1989). A trial court does not abuse its discretion in parental rights cases when the determination "is supported by a substantial amount of credible and competent evidence." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997), quoting *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 550 N.E.2d 178 (1990), syllabus. This deference to the trial court is crucial in a child custody case, "where there may be much evident in the parties' demeanor and attitude that does not translate to the record well." *Davis* at 419.

{¶27} The father's motion for modification of parental rights and responsibilities is controlled by R.C. 3109.04(E)(1)(a). That section states in pertinent part:

The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that

have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

\* \* \*

(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

{¶28} Thus, before the juvenile court can modify the allocation of parental rights and responsibilities, it must find: 1) that a change in circumstances has occurred since the last decree; 2) that modification is necessary to serve the best interest of the child; and 3) that the advantages of modification outweigh the potential harm.

### **1) Change in Circumstance**

{¶29} “While R.C. 3109.04 does not define what constitutes a change of circumstances, courts have generally held the phrase to mean ‘an event, occurrence, or situation which has a material and adverse effect upon a child.’” *In re M.D.D.*, 12th Dist. Butler No. CA2009-06-170, 2010-Ohio-326, ¶ 22, quoting *Preece v. Stern*, 12th Dist. Madison Nos. CA2008-09-024 and CA2008-12-029, 2009-Ohio-2519, ¶ 12 (other internal quotation omitted). *See also Rohrbaugh v. Rohrbaugh*, 136 Ohio App.3d 599, 604-605, 737 N.E.2d 551 (7th Dist.2000). The change of circumstances “must be a change of substance, not a slight or inconsequential change.” *Davis*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997).

{¶30} The father argued that a change of circumstances existed because of the mother's repeated interference with his visitation rights. It is beyond question that a custodial parent's interference with visitation by a noncustodial parent may be considered a change of circumstances that would allow for a modification of custody. *C.G. v. C.L.*, 8th Dist. Cuyahoga No. 90341, 2008-Ohio-3135, ¶ 13. *See also Sheppard v. Brown*, 2d Dist. Clark No. 2007 CA 43, 2008-Ohio-203; *Scaffidi v. Scaffidi*, 9th Dist. Medina No. 04CA0068-M, 2005-Ohio-4546; *Holm v. Smilowitz*, 83 Ohio App.3d 757, 773, 615 N.E.2d 1047 (4th Dist.1992). This is because the court recognizes the importance of a child having a strong relationship with both parents, so an award of custody in favor of the parent "who is most likely to foster a relationship between the child and the other parent is in the child's best interests." *In re S.M.T.*, 8th Dist. Cuyahoga No. 97181, 2012-Ohio-1745, citing *Borris*, Interference with Parental Rights of Noncustodial Parent as Grounds for Modification of Child Custody, 8 No. 1 DIVLIT 1 (1997). "When a custodial parent so obstructs the visits between the child and the noncustodial parent, then the best interest of the child is no longer being served." *S.M.T.* at ¶ 7.

{¶31} The mother contends that there has been no systematic willful or continuous denial of visitation that would necessitate a change of custody. She contends that although the visitation order had not been strictly followed, the parties had always been flexible regarding visitation and that the father was welcome to exercise his visitation whenever he wanted.

{¶32} According to the father, the mother failed to abide by the original 2003 visitation order, but because the mother was at least allowing him to have visitation with the child, he was willing to allow the flexibility. However, the father testified that from 2009 until recently, the mother has restricted his visitation to the extent he has only seen the child a few times in three years. In 2012, the mother would not allow the child for overnight visits and only permitted the father to have visitation with the child twice. In 2013, the father did not see the child at all until the court entered a temporary visitation order pending the hearing on the motion to show cause. The mother did allow the father to have the child over Christmas break, but failed to abide by the rest of the visitation order.

{¶33} According to the father, when he would come to get the child for his assigned weekend visitation, either the child would not be there, or the mother would relate an excuse why the child could not go with him. Although the father had tried to contact the child on her cell phone, the messages were not returned or the child's cell phone was turned off or taken away as punishment by the mother. The father believed he could not just physically take the child because the mother had accused him of physically assaulting her the last time he took the child forcefully.

{¶34} When there are two versions of events, neither of which is unbelievable, it is not our province to choose which one should be believed. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Rather, we defer to the factfinder who was best able to weigh the evidence and judge the credibility of witnesses by

viewing the demeanor, voice inflections, and gestures of the witnesses testifying. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1994). The trial court obviously found the father to be a more credible witness. The mother's restricting the father's visitation to several times over several years is a change of circumstances that was in breach of the original visitation order.

{¶35} Also, K.B.'s deteriorating school performance and excessive tardiness supports the court's modification of custody. K.B., who used to be an "A" student, is now receiving "D's" in her course work. According to interviews with her teachers, this has occurred over the past year. Her attendance record also shows she was 45 minutes late to school almost every day of the school year. The child has stopped living up to her potential in her mother's custody.

{¶36} Given the mother's resistance to a structured visitation, even when a temporary order of visitation was issued pending the motion to show cause hearing, and the child's deteriorating school performance, we cannot say the trial court abused its discretion in finding a change of circumstances.

## **2) Best Interest**

{¶37} After finding that a change of circumstances exists, the trial court next must consider whether a modification of parental rights and responsibilities is in the child's best interests. In determining the child's best interests, the court is required to consider the following factors listed in R.C. 3109.04(F)(1):

- (a) The wishes of the child's parents regarding the child's care;

(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

(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;

(d) The child's adjustment to the child's home, school, and community;

(e) The mental and physical health of all persons involved in the situation;

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

(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child \* \* \*;

(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶38} The trial court "has discretion in determining which factors are relevant," and "each factor may not necessarily carry the same weight or have the same relevance, depending upon the facts before the trial court." *Brammer v. Brammer*, 3d Dist. Marion No. 9-12-57, 2013-Ohio-2843, ¶ 41, citing *Hammond v. Harm*, 9th Dist. Summit No. 23993, 2008-Ohio-2310, ¶ 51.

{¶39} The juvenile court stated that it had considered the above factors in determining whether to modify custody. The court found the mother's failure to comply with the visitation order and the child's deteriorating school performance and poor school attendance supported its decision that a change of custody was in K.B.'s best interest. The father stated he had no problem with the mother visiting with the child, and thus, would be conducive to facilitating a visitation order. The evidence also showed that the father is very involved with and attentive to his three children of whom he currently has custody. K.B. could benefit from his attention.

{¶40} The mother argues that the juvenile court erred by not asking K.B. with whom she would like to live. However, the juvenile court stated in its entry:

While the court is a very strong advocate of giving children a voice in court, the court notes that R.C. 3109.04(B)(1) gives a jurist discretion in whether to interview the child and whether to determine the child's wishes and concerns with respect to the allocation. The court notes the transcript indicates [that] an in camera hearing was held with the child on May 19, 2014. The court cannot say the magistrate abused its discretion on its handling of this issue. Nor is the court willing to second guess the decision of the child's GAL in not directly asking her where she wants to live given the emotional and academic issues raised in the transcript.

Trial Court Journal Entry, Feb. 12, 2015, at 1.

{¶41} The trial court did not abuse its discretion by not requiring the child to be asked with which parent she would like to live. Even if the child wanted to live with her mother, given the mother's steadfast refusal to follow the court-ordered visitation, this choice would prevent the child from establishing a relationship with her father. As we



stated above, it is in a child's best interest to have an established relationship with both parents.

### **3) Harm**

{¶42} In the final step of the court's analysis, we must determine whether the advantages of modification outweigh the likely harm. The juvenile court explicitly found that the advantages of modification outweighed the harm. We agree. The child will be given the opportunity to establish a relationship with her father who will be compliant in allowing the mother visitation. Moreover, given the child's recent behavioral issues at school and deterioration of academic performance, allowing her father an active role in her life could result in positive change. Accordingly, we conclude the trial court did not abuse its discretion in awarding the father custody of K.B. The mother's third, fourth, and fifth assigned errors are overruled.

{¶43} Judgment affirmed.

It is ordered that appellant pay her own respective 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.

PATRICIA ANN BLACKMON, 

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 JUDGE

EILEEN T. GALLAGHER, P.J., and  
SEAN C. GALLAGHER, J., CONCUR