

[Cite as *In re R.M.R.*, 2016-Ohio-303.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103342

**IN RE: R.M.R.
A Minor Child**

[Appeal By A.O.]

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. CU-14-114075

BEFORE: Jones, A.J., Boyle, J., and Blackmon, J.

RELEASED AND JOURNALIZED: January 28, 2016

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LARRY A. JONES, SR., A.J.:

{¶1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1. The purpose of an accelerated appeal is to allow the court to render a brief and conclusory opinion. *State v. Priest*, 8th Dist. Cuyahoga No. 100614, 2014-Ohio-1735, ¶ 1; App.R. 11.1(E).

{¶2} Plaintiff-appellant A.O. appeals from the trial court's July 6, 2015 judgment adopting the magistrate's decision and thereby granting the motion to dismiss filed by defendant-appellee K.R. We reverse and remand.

I. Facts and Procedural History

{¶3} Appellant and appellee were domestic partners for a number of years. During the course of their relationship, appellee became pregnant through artificial insemination by an unknown donor. She gave birth to the child, R.M.R., in August 2010. According to appellant, she and appellee raised the child together until their relationship deteriorated in August 2014. Appellant alleges that since that time, appellee has not allowed her to have access to the child or be involved in decision-making relative to the child. Appellant, therefore, filed a complaint in juvenile court seeking a visitation schedule with the child. She filed a first-amended complaint, seeking shared custody; and a second-amended complaint, which also sought shared custody and an interim companionship schedule.

{¶4} Appellee filed a motion to dismiss, in which she claimed that the trial court did not have jurisdiction because there were "no writings, contract, agreements, or other

documentation” evidencing that appellee agreed to partially relinquish her custodial rights to the child. The magistrate issued an order setting the matter for a “motion hearing.” The order further stated that the “parties shall file his/her Witness List and Evidence List a minimum of fourteen (14) days prior to the *trial date*. Failure to do so and to properly serve the lists on all necessary parties shall result in the parties’ witnesses and evidence being excluded from trial.” (Emphasis added.) None of the other previous trial court orders set a trial date, however.

{¶5} After the magistrate issued her “motion hearing” order, appellant filed a motion for clarification of the order. In her motion, she stated that it was her belief that the hearing was “regarding jurisdiction[,] not a trial on the facts and other substantive issues in this matter.” She further stated that if it was the magistrate’s intention to hear evidence on the substantive issues (appellant specifically referred to the court’s order regarding evidence and witness lists), she was seeking a continuance so that she could conduct discovery. The magistrate issued an order addressing appellant’s motion for clarification, in which she stated in relevant part that the “hearing * * * will address the Motion to Dismiss for Lack of Jurisdiction. Motion for Continuance of the hearing is denied.”

{¶6} The hearing took place as scheduled. The parties presented arguments, supported by case law, as to whether a nonparent has the right to custody of a child without a written agreement. Appellant argued yes, and appellee argued no. After reviewing the case law, the magistrate told appellant’s counsel that it believed the

“burden shifts to you now * * * to demonstrate to this Court that there is some agreement by the biological mother to permanently relinquish custodial rights to her child, or to share those custodial rights that are conferred upon her by law.” Counsel then attempted to call appellee to the stand, but appellee’s attorney objected, arguing that appellant should not be allowed to call witnesses because she did not file an evidence or witness list. The magistrate ruled that appellant could not call witnesses, stating “[y]ou didn’t file a witness list. You had notice to do so ***. [My magistrate’s order] was very clear that this was a motion hearing, [and you had] 14 days to file a witness and evidence list prior to [this] date, neither of which was filed.” Appellant requested that the magistrate find that the court did have jurisdiction over the matter and set it for further hearing.

{¶7} The magistrate ruled, however, that there was “nothing that has been presented to this Court to indicate that there was any kind of formal or informal contractual agreement by which [appellee] was relinquishing sole custody of this child to [appellant,]” and dismissed the case for lack of jurisdiction. The magistrate issued a decision dismissing the case with prejudice; appellant filed objections. The trial court overruled appellant’s objections and affirmed the magistrate’s decision.

{¶8} Appellant now raises the following two assignments of error for our review:

- I. The trial court improperly dismissed the Complaint for lack of subject matter jurisdiction.
- II. The trial court incorrectly dismissed the Complaint “with prejudice.”

II. Law and Analysis

{¶9} Appellant's two assignments of error are interrelated and will be considered together. Appellee's motion to dismiss was made on the ground of lack of subject matter jurisdiction under Civ.R. 12(B)(1). The standard of review for a motion to dismiss under Civ.R. 12(B)(1) is "whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989). An appellate court's review of a motion to dismiss predicated on Civ.R. 12(B)(1) is de novo and, therefore, it must review the issues independently of the trial court's decision. *Crestmont Cleveland Partnership v. Ohio Dept. of Health*, 139 Ohio App.3d 928, 936, 746 N.E.2d 222 (10th Dist.2000).

{¶10} Appellee's motion to dismiss was based on the lack of a written agreement evidencing her intent to relinquish custody of the child to appellant. Appellee cited three cases in support of her position that this failure required dismissal of appellant's complaint: (1) *In re L.B.*, 11th Dist. Lake No. 2011-L-117, 2012-Ohio-2356; (2) *In re Mullen*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302; and (3) *In re LaPiana*, 8th Dist. Cuyahoga Nos. 93691 and 93692, 2010-Ohio-3606. Appellee also argued that the case cited by appellant in her request for companionship, *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241, had no application to this case.

{¶11} Upon review of *In re L.B.*, *In re Mullen*, and *In re LaPiana*, we do not find them helpful to appellee's contention. Our review of Ohio law is that a parent can relinquish parental rights to a nonparent, either through a formal written contract, or informally by his or her conduct.

{¶12} In *In re L.B.*, the Eleventh Appellate District considered whether the trial court properly granted summary judgment in favor of the mother and against the mother's former domestic partner on the domestic partner's custody complaint. In support of her motion for summary judgment, the mother had attached her own affidavit, averring that, despite her former partner's request, she had specifically declined to sign any agreement relinquishing part of her custody of the child. The domestic partner was ordered by the trial court to file a response to the mother's pleading, but failed to do so.

{¶13} Analyzing the motion under Civ.R. 56 governing summary judgment, the Eleventh District found that because the domestic partner had failed to file a response to the mother's motion, there was "no evidence illustrating a genuine issue of material fact pursuant to Civ.R. 56(E)." *Id.* at ¶ 28. Thus, *In re L.B.* was analyzed under review for summary judgment, not under a motion to dismiss standard. In conducting that review, there was no evidence, as required under Civ.R. 56, to demonstrate that there was a genuine issue of material fact as to the mother's intent to relinquish custody of her child. In reviewing for such evidence, however, the court never stated that the evidence could only be contained in a written contract.

{¶14} In *In re Mullen*, the Ohio Supreme Court considered "whether a parent, by her conduct with a nonparent, entered into an agreement through which the parent permanently relinquished sole custody of the parent's child in favor of shared custody with the nonparent." *Id.* at 418. Although the court did not find that the parent had relinquished her rights, it made clear that a parent's conduct, in the absence of a written

agreement, can be the basis for finding relinquishment of parental and custodial rights: “the best way to safeguard both a parent’s and nonparent’s rights with respect to children is to agree in writing * * * [but] our prior decisions have not required a parent to create a written contract to relinquish custody rights, although in some cases, writings may have been involved.” *Id.* at 423, citing *Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241, ¶ 9; *Masitto v. Masitto*, 22 Ohio St.3d 63, 64, 488 N.E.2d 857 (1986); *In re Perales*, 52 Ohio St.2d 89, 90, 369 N.E.2d 1047 (1977).

{¶15} In *In re LaPiana*, this court considered the jurisdiction of the juvenile court to consider a petition for custody of a nonparent, and whether the parties’ agreement about custody had to be in writing. This court held the following: “under *Perales*, *Masitto*, and *Bonfield*, the juvenile court had jurisdiction * * * to determine” relinquishment of sole custody of the children, whether it would be in the best interest of the children to have companionship with the nonparent, and what that companionship should entail. *LaPiana* at ¶ 27. This court further held that “a written agreement, while instructive, is not necessary; a parent may relinquish custody by conduct, and a court must look at the evidence as a whole.” *Id.* at ¶ 33.

{¶16} In light of the above, it is clear that a juvenile court has jurisdiction over custody cases between a parent and nonparent, and that relinquishment of custody need not be in writing. The reason given by the trial court for the dismissal of appellant’s action was because appellant “failed to produce any evidence to establish that the child’s

mother had ever agreed to relinquish sole custody of her child and to share custodial rights with [appellant].” We find the trial court’s finding premature on this record.

{¶17} In essence, the trial court treated the hearing on the motion to dismiss as a trial on the merits. That was unfair, in so much as no trial date had been set, and after the trial court set the motion hearing, appellant sought clarification of what the motion hearing would entail. Specifically, appellant stated that it was her belief that the hearing was “regarding jurisdiction[,] not a trial on the facts and other substantive issues in this matter.” Appellant further requested a continuance so that she could conduct discovery if it was the magistrate’s intention to hear evidence on the substantive issues. The magistrate issued an order addressing appellant’s motion for clarification, in which she stated the “hearing * * * will address the Motion to Dismiss for Lack of Jurisdiction. Motion for Continuance of the hearing is denied.” Thus, the implication of the magistrate’s order was that the court would only be entertaining the issue of whether it had jurisdiction to issue a custody order in a case between a parent and nonparent. Further, there was no other court order setting a trial date.

{¶18} Despite what K.R. contends — that custody between a parent and nonparent can only be determined through a written agreement, and appellant failed to present one at the hearing — the law clearly states otherwise. “[A] written agreement, while instructive, is not necessary; a parent may relinquish custody by conduct, and a court must look at the evidence as a whole.” *Masitto*, 22 Ohio St.3d 63, at 66, 488 N.E.2d 857.

{¶19} Thus, once the trial court determined that it did have jurisdiction over a custody case involving a parent and nonparent, it should have set the matter for a trial to determine, whether based on appellee’s conduct, she relinquished part of her custody over the child to appellant. That is the crux of this case, and what should be tried: it was improper to dispose of that issue at the “motion hearing for jurisdiction,” in light of the court’s order implying that it was not a trial on the merits and denying appellant a continuance for the purpose of conducting discovery.

{¶20} In light of the above, both assignments of error are sustained. The trial court’s judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

{¶21} Reversed and remanded.

It is ordered that appellant recover from appellee her 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.

LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
PATRICIA ANN BLACKMON, J., CONCUR