

[Cite as *In re N.M.*, 2017-Ohio-1288.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104971

**IN RE: N.M.
A MINOR CHILD**

[Appeal by: J.H.M., Grandfather]

**JUDGMENT:
REVERSED; REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. CU 16109553

BEFORE: E.A. Gallagher, P.J., Stewart, J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 6, 2017

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EILEEN A. GALLAGHER, P.J.:

{¶1} Appellant J.H.M., the paternal grandfather of N.M. (the “grandfather”), appeals from the decision of the Cuyahoga County Court of Common Pleas, Juvenile Division (the “juvenile court”), dismissing his complaint for visitation with prejudice on the ground that N.M. was “under the jurisdiction of another court” due to a pending dependency action. For the reasons that follow, we reverse the decision of the juvenile court and remand the matter for further proceedings.

Factual and Procedural Background

{¶2} N.M. was born in 2010. Her mother, S.M., who is now deceased, was not married at the time of her birth. Her father, J.A.M., acknowledged paternity of N.M. and that acknowledgment became final. On June 17, 2016, the grandfather filed a complaint for reasonable companionship or visitation rights with N.M. pursuant to R.C. 3109.12 (“complaint for visitation” or “visitation action”). At the time the grandfather filed his complaint, N.M. was the subject of a dependency action pending with the juvenile court.

The Dependency Action

{¶3} In December 2014, the Cuyahoga County Division of Children and Family Services (“CCDCFS”) filed a complaint for dependency and emergency temporary custody relating to N.M. with the juvenile court (Case No. AD 14915620-21) (the “dependency action”). On January 25, 2015, N.M. was committed to the emergency custody of CCDCFS. In March 2015, after N.M.’s parents stipulated to an adjudication

of dependency, CCDCFS was awarded temporary custody of N.M. In November 2015, CCDCFS filed a motion to modify temporary custody to permanent custody.

{¶4} Throughout the course of the dependency action, the grandfather filed various motions to intervene in the dependency action and for custody of N.M.¹ These motions were either denied or not ruled upon by the juvenile court. After the juvenile court summarily denied his third motion to intervene on April 22, 2016, the grandfather appealed the ruling to this court. In December 2016, this court reversed the juvenile court's decision, concluding that the trial court abused its discretion in denying the grandfather's motion to intervene without a hearing, and remanded the case for further proceedings. *In re N.M.*, 8th Dist. Cuyahoga No. 104498, 2016-Ohio-7967, ¶ 21-22.

Motion to Dismiss the Grandfather's Complaint for Visitation

{¶5} On July 27, 2016, CCDCFS filed a motion to dismiss the grandfather's complaint for visitation on jurisdictional grounds, arguing (1) that "the juvenile court, pursuant to [the dependency action], has exclusive jurisdiction of the child" and (2) given that the grandfather had appealed the denial of his third motion to intervene in the dependency action, the juvenile court was without jurisdiction to issue any orders relating to N.M. until the appeal was resolved.² CCDCFS also contended that the grandfather's

¹ A full discussion of the dependency action and the grandfather's filings in that case can be found in *In re N.M.*, 8th Dist. Cuyahoga No. 104498, 2016-Ohio-7967. Those filings are not part of the record in this case.

² CCDCFS attached three orders from the dependency action to its motion to dismiss denying the grandfather's motions to intervene in that case.

complaint for visitation should be dismissed on res judicata grounds. CCDCFS argued that if the grandfather had wanted visitation with N.M., he should have raised the issue when he first moved to intervene in, and sought legal custody of N.M. in, the dependency action. It maintained that based on the juvenile court's denials of his motions to intervene in the dependency action, he was barred by res judicata from asserting a claim for visitation.

{¶6} Eight days later, the magistrate issued a decision granting CCDCFS's motion and dismissing the complaint with prejudice. The magistrate stated that "for good cause shown, said Motion is granted" and that "[the parties may refer to case number AD14915620 for further proceedings."

{¶7} On August 10, 2016 — after the magistrate issued her decision granting the motion — the grandfather filed his opposition to the motion to dismiss, arguing that custody and visitation are distinct legal concepts and that the pendency of the dependency action did not foreclose the juvenile court from exercising jurisdiction over his complaint for visitation under R.C. 3109.12. The grandfather further argued that res judicata did not preclude his visitation action because he had not filed a prior visitation action and could not have petitioned for visitation in the dependency action because he was not a party to that case.

{¶8} On August 16, 2016, the grandfather filed objections to the magistrate's decision, incorporating his August 10, 2016 opposition to the motion to dismiss. The grandfather objected to the magistrate ruling on the motion before the time had run —

based on his interpretation of the rules — for him to file a response. The grandfather also addressed CCDCFS’s jurisdictional and res judicata arguments. The grandfather argued that he was properly exercising his statutory right to seek visitation under R.C. 3109.12, that the juvenile court had both subject matter jurisdiction and personal jurisdiction in the case and that the complaint should not be dismissed on res judicata grounds because his right to visitation had not been previously adjudicated and res judicata is an affirmative defense that cannot be decided on a motion to dismiss.

{¶9} The juvenile court overruled the grandfather’s objections and affirmed, approved and adopted the magistrate’s decision “as amended by [the juvenile] court.” In its judgment entry adopting the magistrate’s decision, the trial court indicated that “the motion is well taken as the child is under the jurisdiction of another court. See case number AD14915620.”³ The juvenile court dismissed the grandfather’s complaint with prejudice and granted him “[leave * * * to file a motion to intervene and for companionship/visitation * * * in case number AD14915620.”

{¶10} The grandfather appealed the juvenile court’s ruling, raising the following two assignments of error for review:

FIRST ASSIGNMENT OF ERROR: The trial court erred in dismissing appellant’s complaint for companionship or visitation.

SECOND ASSIGNMENT OF ERROR: The trial court erred in dismissing appellant’s complaint for companionship or visitation with prejudice.

³The trial court also found that N.M.’s father had not been properly served with the complaint for visitation.

Law and Analysis

{¶11} In his first assignment of error, the grandfather argues that the juvenile court erred in dismissing his complaint for visitation. We agree.

{¶12} The grandfather filed his complaint for visitation pursuant to R.C. 3109.12. That provision provides, in relevant part:

(A) If a child is born to an unmarried woman, the parents of the woman and any relative of the woman may file a complaint requesting the court of common pleas of the county in which the child resides to grant them reasonable companionship or visitation rights with the child. *If a child is born to an unmarried woman and if the father of the child has acknowledged the child and that acknowledgment has become final pursuant to section 2151.232, 3111.25, or 3111.821 of the Revised Code or has been determined in an action under Chapter 3111. of the Revised Code to be the father of the child, the father may file a complaint requesting that the court of appropriate jurisdiction of the county in which the child resides grant him reasonable parenting time rights with the child and the parents of the father and any relative of the father may file a complaint requesting that the court grant them reasonable companionship or visitation rights with the child.*

(B) The court may grant the parenting time rights or companionship or visitation rights requested under division (A) of this section, if it determines that the granting of the parenting time rights or companionship or visitation rights is in the best interest of the child. * * *

Except as provided in division (E)(6) of section 3113.31 of the Revised Code, if the court, pursuant to this section, grants parenting time rights or companionship or visitation rights with respect to any child, it shall not require the public children services agency to provide supervision of or other services related to that parent's exercise of parenting time rights with the child or that person's exercise of companionship or visitation rights with the child. *This section does not limit the power of a juvenile court pursuant to Chapter 2151. of the Revised Code to issue orders with respect to children who are alleged to be abused, neglected, or dependent children or to make dispositions of children who are adjudicated abused, neglected, or dependent children or of a common pleas court to issue orders pursuant to section 3113.31 of the Revised Code.*

(Emphasis added.)

{¶13} There appears to be no dispute that the grandfather satisfies the requirements for seeking visitation under R.C. 3109.12. N.M. was born to an unmarried woman, her father (J.H.M.’s son) acknowledged N.M., the acknowledgment has become final and the grandfather has filed a complaint requesting that “the court of appropriate jurisdiction of the county in which the child resides” grant him reasonable visitation with the child. Nevertheless, CCDCFS asserts that because the juvenile court adjudicated N.M. to be dependent and committed her to the temporary custody of CCDCFS in accordance with R.C. 2151.353(A)(2), it has “exclusive jurisdiction” pursuant to R.C. 2151.23 and 2151.353(F)(1) “to render custody decisions, including decisions concerning visitation, regarding N.M.” in the dependency action and that the juvenile court, therefore, properly dismissed the grandfather’s visitation action.

{¶14} R.C. 2151.23 provides, in relevant part:

(A) *The juvenile court has exclusive original jurisdiction* under the Revised Code as follows:

(1) *Concerning any child who* on or about the date specified in the complaint, indictment, or information *is alleged* to have violated section 2151.87 of the Revised Code or an order issued under that section or *to be* a juvenile traffic offender or *a* delinquent, unruly, *abused, neglected, or dependent child* and, based on and in relation to the allegation pertaining to the child, concerning the parent, guardian, or other person having care of a child who is alleged to be an unruly or delinquent child for being an habitual or chronic truant;

(2) Subject to divisions (G), (K), and (V) of section 2301.03 of the Revised Code, to determine the custody of any child not a ward of another court of this state * * *

(Emphasis added.) Pursuant to R.C. 2151.353(F)(1), the juvenile court “shall *retain jurisdiction*” over any child for whom the court issues an order of disposition” pursuant to R.C. 2151.353(A) until the child reaches the age of 18 (or 21 if the child has a mental or developmental disability or physical impairment) or until the child is adopted and a final decree of adoption is issued. (Emphasis added.) In addition, R.C. 2151.417(A)(1) provides, in relevant part:

*Any court that issues a dispositional order pursuant to section 2151.353 * *
* of the Revised Code may review at any time the child’s placement or
custody arrangement, the case plan prepared for the child pursuant to
section 2151.412 of the Revised Code, the actions of the public children
services agency or private child placing agency in implementing that case
plan, the child’s permanency plan if the child’s permanency plan has been
approved, and any other aspects of the child’s placement or custody
arrangement. * * * Based upon the evidence presented at a hearing held
after notice to all parties and the guardian ad litem of the child, the court
may require the agency, the parents, guardian, or custodian of the child,
and the physical custodians of the child to take any reasonable action that
the court determines is necessary and in the best interest of the child or to
discontinue any action that it determines is not in the best interest of the
child.*

(Emphasis added.)

{¶15} *In State ex rel. Allen Cty. Children Servs. Bd. v. Mercer Cty. Common Pleas Court*, Slip Opinion No. 2016-Ohio-7382, the Ohio Supreme Court held that the juvenile court’s exclusive jurisdiction over a child under R.C. 2151.23(A)(1) terminates after the court adjudicates the child to be an abused, neglected or dependent child and issues a dispositional order, including an order of temporary custody, pursuant to R.C. 2151.353(A). *Id.* at ¶ 21-23. The court held that the jurisdiction retained by the juvenile court following the issuance of a dispositional order is “continuing jurisdiction” pursuant to R.C. 2151.353(F)(1) and 2151.417(B). *Id.* at ¶ 22-23.

{¶16} In this case, the juvenile court granted CCDCFS’s motion to dismiss on the

ground that “the child is under the jurisdiction of another court,” referencing the dependency action. This case, however, is not a case in which a party seeks to have “another court” exercise jurisdiction over a child. The grandfather filed his complaint for visitation in the same court in which the dependency action is pending — i.e., the juvenile court for Cuyahoga County. Although there was *another case* pending in that court — i.e., the dependency action — the grandfather was not a party to that case and had been denied an opportunity to intervene in and assert his rights in that case.

{¶17} CCDCFS likens the juvenile court’s decision to an application of the jurisdictional priority rule. Under the jurisdictional priority rule, “[as between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.]” *In re SCALE*, 8th Dist. Cuyahoga No. 102136, 2016-Ohio-2826, ¶ 21, quoting *State ex rel. Racing Guild of Ohio v. Morgan*, 17 Ohio St.3d 54, 56, 476 N.E.2d 1060 (1985), quoting *State ex rel. Phillips v. Polar*, 50 Ohio St.2d 279, 364 N.E.2d 33 (1977), syllabus. However, “it is a condition of the jurisdictional-priority rule that the claims and parties be the same in both cases, so ‘[if the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter.]’” *State ex rel. Dunlop v. Sark*, 135 Ohio St.3d 171, 2013-Ohio-67, 985 N.E.2d 450, ¶ 10, quoting *State ex rel. Judson v. Spahn*, 33 Ohio St.3d 111, 113, 515 N.E.2d 911 (1987). Likewise, the jurisdictional priority rule does not apply to cases filed in the same division of the same court. *State ex*

rel. Consortium for Economic & Community Dev. for Hough Ward 7 v. McMonagle, 8th Dist. Cuyahoga No. 103657, 2016-Ohio-4704, ¶ 18.

{¶18} The grandfather argues that this is an issue of jurisdiction over the particular case, i.e., “the trial court’s authority to determine a specific case within that class of cases that is within its subject matter jurisdiction,” quoting *In re J.J.*, 111 Ohio St.3d 201, 2006-Ohio-5484, 855 N.E.2d 851, ¶ 12, and that an action for visitation is not “within that class of cases that is within” the “exclusive, original subject matter jurisdiction” of an abuse, neglect or dependency action under R.C. 2151.23(A)(1). The grandfather further argues, based on the Ohio Supreme Court’s decision in *In re Gibson*, 61 Ohio St.3d 168, 573 N.E.2d 1074 (1999), that because “a visitation action pursuant to R.C. 3109.12 is not barred by the [juvenile] court’s jurisdiction over a particular custody case under [R.C.] 2151.23(A)(2),” “neither can it be barred by the juvenile court’s jurisdiction over an abuse, neglect and dependency action under [R.C. 2151.23(A)(1)].” He contends that the jurisdiction the juvenile court obtains under R.C. 2151.23(A)(1) (and retains under R.C. 2151.353(F)(1)) is to determine abuse, neglect and dependency and the custody of the subject child, not visitation.

{¶19} In *Gibson*, a grandfather filed a complaint seeking visitation with his grandchild, arguing that the juvenile court had the power to award him visitation based on its authority to determine custody under R.C. 2151.23(A)(2). *Gibson* at 169-170. The child was not an abused, neglected or dependent child. In rejecting the grandfather’s argument, the court noted that visitation and custody are “distinct legal concepts” and

held that a grandparent’s complaint seeking only visitation could not be determined by the juvenile court pursuant to its authority to determine the “custody” of children under R.C. 2151.23(A)(2). *Id.* at syllabus and 171-172. The court, therefore, held that the juvenile court lacked jurisdiction to consider his request for visitation. *Id.*

{¶20} *Gibson*, however, involved an interpretation of the juvenile court’s jurisdiction under R.C. 2151.23(A)(2) “to determine the custody of any child not a ward of another court of this state.” (Emphasis added.) It did not involve the jurisdiction of the juvenile court under R.C. 2151.23(A)(1) “[c]oncerning any child who * * * is alleged * * * to be [an] abused, neglected, or dependent child,” which is much broader in scope than the juvenile court’s jurisdiction “to determine * * * custody” under R.C. 2151.23(A)(2). (Emphasis added.) Furthermore, pursuant to R.C. 2151.417(A)(1), “[a]ny court that issues a dispositional order pursuant to section 2151.353” “may review at any time the child’s placement or custody arrangement” and has the authority to order, “[b]ased upon the evidence presented at a hearing,” “the agency, the parents, guardian, or custodian of the child, and the physical custodians of the child to take any reasonable action that the court determines is necessary and in the best interest of the child,” which would include nonparent visitation if appropriate. *See, e.g., In re C.C.*, 2d Dist. Montgomery No. 21707, 2007-Ohio-3696, ¶ 6-8 (pursuant to R.C. 2151.417(A)(1), juvenile court had authority to order nonparent visitation with a child as part of its continuing jurisdiction based on its adjudication of the child as dependent); *In re Haywood*, 2d Dist. Montgomery No. 21276, 2006-Ohio-576, ¶ 10 (juvenile court had

jurisdiction over issue of nonparent visitation because child had been previously adjudicated in that court and, in accordance with R.C. 2151.417(A), could grant nonparent visitation where it was in child's best interest); *see also* R.C. 3109.12(B) ("This section does not limit the power of a juvenile court pursuant to Chapter 2151. of the Revised Code to issue orders with respect to children who are alleged to be abused, neglected, or dependent children or to make dispositions of children who are adjudicated abused, neglected, or dependent children * * * ."). Accordingly, unlike the juvenile court in *Gibson*, the juvenile court in this case had the authority to order grandparent visitation with N.M. as part of the dependency action if certain requirements were met.

{¶21} Thus, the issue in this case is not whether the juvenile court had jurisdiction to grant visitation with N.M. as a dependent child, the issue is how a person seeking visitation with such a child, who meets the statutory requirements for requesting visitation with that child, properly gets his or her request for visitation heard by the court when a dependency action is pending. In other words, was intervention in the dependency action the exclusive means by which the grandfather could seek visitation with N.M. or could he, as he did in this case, file a complaint, thereby initiating a separate action in the juvenile court, seeking visitation with N.M.?

{¶22} As noted above, CCDCFS does not dispute that the grandfather had a right to seek visitation with N.M. under R.C. 3109.12(A). Under its view, however, the grandfather had no means of exercising that right once the dependency action was filed

and the juvenile court denied him leave — without a hearing⁴ — to intervene in the dependency action.

{¶23} The Fifth District considered a similar issue in *Brunner v. Stark Cty. Dept. of Job & Family Servs.*, 5th Dist. Stark No. 2010CA00047, 2011-Ohio-271. In that case, the Stark County Department of Job and Family Services (“SCDJFS”) filed a complaint in the Stark County Court of Common Pleas, Juvenile Division (“Stark County juvenile court”) for the temporary custody of two minor children alleging abuse, neglect and/or dependency. *Id.* at ¶ 1. The children were placed in the temporary custody of SCDJFS and their maternal great-aunt (the “great aunt”) filed a motion for joinder and legal custody. *Id.* After her motion for joinder was denied, the great-aunt filed a complaint for companionship of the children under R.C. 3109.12 in the Stark County juvenile court. *Id.* at ¶ 2. SCDJFS filed a motion to dismiss the complaint, arguing that the great-aunt was precluded from pursuing the companionship complaint because she had been denied joinder in SCDJFS’s abuse, neglect and/or dependency case. *Id.* The trial court granted the motion and dismissed the complaint. *Id.* The great-aunt appealed. On appeal, the Fifth District held that, although the initial complaint filed by SCDJFS “established exclusive jurisdiction to that complaint,” there was no prohibition against the great-aunt’s filing of a complaint for companionship pursuant to R.C. 3109.12 in the same court. *Id.*

⁴ As noted above, this court has since held that the juvenile court’s denial, without a hearing, of the grandfather’s motion to intervene in the dependency action was an abuse of discretion and remanded the matter for a hearing on the issue. *See In re N.M.*, 8th Dist. Cuyahoga No. 104498, 2016-Ohio-7967.

at ¶ 17. As the court explained:

[T]here is no prohibition in filing a complaint pursuant to R.C. 3109.12 in the same court, despite the fact that said statute is in the “Domestic Relations” chapter and the jurisdiction over the children is in the Juvenile Division with the filing of the R.C. 2151.353 complaint.

We find no bar to the filing of an R.C. 3109.12 action when an R.C. 2151.353 action is pending. * * * Given that access to the courts is permitted via two statutory sections, appellant can legally use a “back door” that is statutorily granted without fear of dismissal.

Id. at ¶ 17-19.

{¶24} CCDCFS argues that “private visitation filings” should be prohibited to avoid the possibility of “jurist shopping” and “contradictory decisions on visitation issued by two different jurists for the same child.” This case, however, prevents no such risks. Because the dependency action and visitation action were filed in the same court — the Cuyahoga County juvenile court — rather than two different courts, the juvenile court could consolidate the visitation action with the dependency action so that conflicts do not arise. *See Brunner* at ¶ 18. Indeed, when filing his complaint for visitation, the grandfather submitted a “parenting proceeding affidavit” in which he specifically identified the dependency action as a “proceeding[] that could affect the current proceeding,” ensuring that the court would be aware of the relationship between the two matters.

{¶25} CCDCFS also argues that the juvenile court properly dismissed the grandfather’s complaint based on the doctrine of res judicata. CCDCFS contends that the “final judgments” denying the paternal grandfather’s three motions to intervene in the

dependency action bar him from now seeking visitation with N.M. under R.C. 3109.12 based on res judicata. We disagree. Res judicata is an affirmative defense. Even if res judicata applied, application of that doctrine would not be a proper basis upon which to grant CCDCFS's motion to dismiss. *See, e.g., State ex rel. West v. McDonnell*, 139 Ohio St.3d 115, 2014-Ohio-1562, 9 N.E.3d 1025, ¶ 16 ("It is not proper for a court to grant a motion to dismiss based on res judicata, because res judicata is an affirmative defense * * * and because resolution of a res judicata defense typically requires resort to materials outside the pleadings[.]"); *State ex rel. Freeman v. Morris*, 62 Ohio St.3d 107, 109, 579 N.E.2d 702 (1991) ("the defense of res judicata may not be raised by motion to dismiss under Civ.R. 12(B)").

{¶26} We agree with the reasoning of the Fifth District in *Brunner*. The juvenile court erred in dismissing the grandfather's complaint for visitation based on the pendency of the dependency action. The grandfather's first assignment of error is sustained. The trial court's judgment is reversed and the case remanded for a hearing on the grandfather's request for visitation under R.C. 3109.12(A).

Dismissal of Complaint with Prejudice

{¶27} In his second assignment of error, the grandfather argues that even if a dismissal was warranted, the trial court erred in dismissing the grandfather's complaint with prejudice. Based on our resolution of the grandfather's first assignment of error, his second assignment of error is moot.

{¶28} Judgment reversed; remanded and we encourage the Juvenile Court of

Cuyahoga County to consolidate this matter with the dependency case that remains pending.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas, Juvenile Division, 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.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MELODY J. STEWART, J., and
PATRICIA A. BLACKMON, J., CONCUR