

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CHAD EASTWOOD

Appellee

v.

RACHEL EASTWOOD

Appellant

C. A. No. 25310

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DR 2006 05 1661

DECISION AND JOURNAL ENTRY

Dated: December 30, 2010

MOORE, Judge.

{¶1} Appellant, Rachel Eastwood, appeals from a judgment of the Summit County Court of Common Pleas, Domestic Relations Division, that ordered her to pay attorney fees and litigation costs pursuant to R.C. 2323.51 for filing a frivolous motion to modify parental rights and responsibilities. This Court reverses and remands.

I.

{¶2} Rachel Eastwood (“Mother”) and Chad Eastwood (“Father”) were married on November 4, 2000. They had one child together prior to the marriage and one child during the marriage. On June 12, 2008, the parties were granted a divorce. Father was designated the residential parent and legal custodian and Mother was allocated parenting time with the children.

Paragraph three of the divorce decree further provided:

“[Notwithstanding] O.R.C. 3109.04(E)(1)(a), if either party requests a modification of * * * the allocation of parental rights and responsibilities, * * * neither party shall be required to demonstrate a change of circumstances as it relates to the residential parent. The only requirement for modification of the

orders regarding companionship or any allocation of parental rights shall be in the best interest of the children.”

The divorce decree was signed by the parties, their attorneys, and the trial judge.

{¶3} On October 29, 2009, Mother moved the trial court to modify parental rights and responsibilities. She did not allege that there had been a change of circumstances, but instead quoted paragraph three of the divorce decree, in which the parties had agreed that no change would be necessary to modify parental rights and responsibilities. She further asserted that the modification would be in the best interests of the children because Father was not communicating effectively or respectfully with her about the children; Father belittled her in front of the children and interfered with her relationship with them; and that, in an apparent attempt to confuse the children and/or add further strain to his relationship with Mother, Father performed a mock marriage proposal to his girlfriend in the presence of the children.

{¶4} The matter was set for a hearing before a magistrate. In response to Mother’s motion, Father recognized that a hearing had been set and apparently conceded that a modification of parental rights and responsibilities would be warranted if the trial court determined that it would be in the best interests of the children. Father requested that the trial court order Mother to undergo a psychological examination prior to the hearing. Father’s counsel proceeded to depose Mother and spent several hours preparing for and litigating at the hearing on the motion for modification.

{¶5} The matter was set for a hearing before a magistrate, at which the parties contested only whether a modification of parental rights and responsibilities would be in the best interests of the children. Mother testified at the hearing about Father’s lack of communication with her about the children, such as making several decisions about the children’s schooling, medical providers, and medical insurance without informing her or allowing her to have any

input in the decisions. She also testified about times that Father had called her derogatory names and otherwise belittled her, sometimes in the presence of the children. Another witness testified about Father pretending to propose marriage to his current girlfriend in the presence of the children and that he had heard Father suggest beforehand that he was doing it as a joke.

{¶6} On the first day of the hearing, Father moved the trial court to award him attorney fees pursuant to R.C. 2323.51 and Civ.R. 11. He maintained that Mother's motion to modify was frivolous because it was not supported by evidence that modification was in the children's best interests and that defending against the motion had caused him to incur significant attorney fees and litigation expenses.

{¶7} Following the hearing on the motion to modify, the magistrate made lengthy factual findings that included the observation that Mother had failed to present "one scrap of credible evidence" to demonstrate that a modification would be in the children's best interest. The magistrate faulted Mother for filing the motion when "the ink was barely dry on the divorce decree" and for pointing to incidents that had occurred before the divorce. The magistrate granted Father's motion for attorney fees and costs.

{¶8} The magistrate's decision further provided:

"The divorce decree shall be henceforth modified to delete paragraph 3 waiving the requirement that a moving party prove a change of circumstances. The full text of O.R.C. 3109.04 shall apply to these parties, just as it does to all other parties who have cases before this court."

{¶9} Mother filed objections to the magistrate's decision, which the trial court sustained insofar as she challenged the magistrate's failure to hold a hearing on the issue of attorney fees. The trial court otherwise overruled her objections and adopted the decision of the magistrate, including the amendment of the divorce decree to remove paragraph 3, again

emphasizing that these parties would be bound by R.C. 3109.04 with respect to modifying parental rights and responsibilities.

{¶10} Following a hearing on attorney fees, the magistrate recommended that Father be awarded \$9,423.33 in attorney fees and costs and the trial court adopted that recommendation. Mother again filed objections to the magistrate's decision, asserting that the magistrate erroneously found that her motion was frivolous because it lacked any evidentiary support, but the trial court overruled her objections. The trial court later issued a nunc pro tunc order, which indicated that the attorney fee award was not dischargeable in bankruptcy. Mother appeals and raises two assignments of error.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING [MOTHER] ENGAGED IN FRIVOLOUS CONDUCT AND BY GRANTING [FATHER’S] MOTION FOR ATTORNEY FEES, PURSUANT TO O.R.C. 2323.51, AS [MOTHER] SET FORTH EVIDENCE IN SUPPORT OF HER MOTION TO MODIFY PARENTAL RIGHTS AND RESPONSIBILITIES.”

{¶11} Mother argues that the trial court abused its discretion by finding that she engaged in frivolous conduct, and in consequently awarding Father attorney fees under R.C. 2323.51. R.C. 2323.51 provides for an award of attorney fees and other litigation expenses to any party to a civil action “who was adversely affected by frivolous conduct[.]” It was enacted as “a mechanism for the court to place blame directly where fault lies[.]” on the party or attorney responsible for advancing the frivolous conduct. *Rindfleisch v. Aft, Inc.*, 8th Dist. Nos. 84551, 84897, and 84717, 2005-Ohio-191, at ¶19, quoting *Estep v. Global Holdings, Inc.* (1992), 79 Ohio App.3d 313, 317 and citing *Cseplo v. Steinfels* (1996), 116 Ohio App.3d 384, 388.

{¶12} This Court has applied a two-step analysis to claims made pursuant to R.C. 2323.51: “(1) whether an action taken by the party to be sanctioned constitutes ‘frivolous

conduct,’ and (2) what amount, if any, of reasonable attorney fees necessitated by the frivolous conduct is to be awarded to the aggrieved party.” *Ceol v. Zion Indus., Inc.* (1992), 81 Ohio App.3d 286, 291. A trial court’s award of attorney fees under R.C. 2323.51 is generally reviewed under an abuse of discretion standard, but the trial court’s factual finding that frivolous conduct occurred will be affirmed if supported by competent, credible evidence in the record. *S & S Computer Systems, Inc. v. Peng*, 9th Dist. No. 20889, 2002-Ohio-2905, at ¶9.

{¶13} Father maintained, and the trial court found, that the filing of Mother’s motion should be sanctioned as frivolous conduct under R.C. 2323.51(A)(2)(a)(iii), which defines “frivolous conduct” as “[c]onduct of an * * * other party to a civil action * * * or other party’s counsel of record that *** consists of allegations or other factual contentions that have no evidentiary support [.]”

{¶14} Mother maintained through her objections to the magistrate’s decision and on appeal that the trial court erred in concluding that her motion was groundless because it lacked any evidentiary support. She provided a transcript of the hearing. The transcript supports her argument that she did present evidence at the hearing to support the factual allegations in her motion that Father was not communicating with her about several important aspects of the children’s lives and that he was belittling her in the presence of the children. Mother gave several examples of situations in which Father had not communicated with her about changing the children’s physician, eye doctor, counselor, medical insurance provider, and schools without informing Mother or seeking her input. She also presented the testimony of another witness to support her allegation that Father had pretended to propose to his girlfriend in front of the children, apparently as a joke of some sort.

{¶15} The trial court’s conclusion that Mother did not present any evidence to support her motion is not supported by the record. R.C. 2323.51(A)(2)(a)(iii) authorizes the trial court to sanction the filing of a motion only if it has “no evidentiary support,” which was not the case here. Sanctions are not warranted under R.C. 2323.51 merely because Mother was unable to persuade the trial court to grant her motion after it weighed the evidence. See, e.g. *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. Nos. 24434 & 24436, 2009-Ohio-5148, at ¶45.

{¶16} Moreover, the trial court seemed to fault Mother for filing her motion too soon after the divorce and for raising issues that predated the divorce, even though the parties’ prior agreement allowed her to do so. With the advice of counsel and approval of the trial court, both parties had agreed that either one of them could seek modification of their parental rights and responsibilities without the requirement that they demonstrate a change of circumstances. Although the trial court ultimately struck that part of the prior decree, it was not until after conducting a full hearing to litigate whether modification would be in the best interests of the children. At that point, after making its findings on the best interest issue, the trial court implicitly found that the parties’ agreement to waive the necessity of proving a change of circumstances was not enforceable under Ohio law, as it struck paragraph three of the parties’ divorce decree. It emphasized that these parties, as any other parties seeking to modify a prior allocation of parental rights and responsibilities, would be bound by the terms of R.C. 3109.04 and could not bypass the threshold requirement of demonstrating a change of circumstances. In other words, had Mother been able to prove that modification of the residential parent was in the best interests of the children in this case, the trial court would have concluded that her motion to modify had no merit based upon the absence of a change of circumstances.

{¶17} Nonetheless, given that both parties and the trial court had approved the prior decree that purported to allow either party to seek modification without a threshold showing of a change of circumstances, it would be unreasonable to sanction Mother for coming back to the trial court so soon. Moreover, it would also be unreasonable to sanction Mother for raising issues that predated the divorce, given that these issues were never previously brought before the trial court and the parties understood that it was unnecessary to demonstrate a change in circumstances when seeking a modification of the allocation of parental rights and responsibilities. In other words, the parties' agreement opened the door to litigating matters that predated the entry of the divorce decree.

{¶18} In light of the parties' agreement, there is nothing in the record to suggest that Mother was more at fault than Father, or the parties' counsel, for pursuing her motion or for failing to recognize that the trial court would refuse to enforce the parties' agreement and that ultimately Mother would be required to show a change of circumstances before it would modify her parental rights and responsibilities. Throughout the proceedings on the motion to modify, including the litigation of whether Mother had filed a frivolous motion, neither the trial court nor the parties focused on the trial court's ultimate requirement here: that a change of circumstances be demonstrated before it would consider modifying its prior allocation of parental rights and responsibilities. Instead, both parties and their counsel devoted hours of time to litigating whether Mother could establish that modification would be in the children's best interests.

{¶19} That Mother did not allege a change of circumstance was apparent from the face of her motion, yet neither Father nor the trial court raised that issue until after the hearing. Father could have resolved this matter much more quickly by raising the dispositive issue here: Mother failed to allege a change of circumstances and the parties lacked the authority to waive

the requirements of R.C. 3109.04. The trial court's decision to sanction Mother for incurring over \$9,000 in attorney fees and costs was not reasonable. Mother's assignment of error is sustained.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT LACKED JURISDICTION TO DETERMINE THAT THE AWARD OF ATTORNEY FEES SHALL BE NON-DISCHARGEABLE IN BANKRUPTCY."

{¶20} This assignment of error has been rendered moot by this Court's disposition of Mother's first assignment of error and will not be addressed. See App.R. 12(A)(1)(c).

Judgment reversed,
and the cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

TIMOTHY D. MCKINZIE, and KERRY G. FULTON, Attorneys at Law, for Appellant.

LESLIE S. GRASKE, Attorney at Law, for Appellee.