

[Cite as *In re E.S.K.*, 2011-Ohio-3926.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of: : No. 10AP-832
E.S.K. : (C.P.C. No. 08JU03-4042)
: (REGULAR CALENDAR)
:

D E C I S I O N

Rendered on August 9, 2011

*Law Offices of Eugene F. Battisti, Jr., Eugene F. Battisti, Jr.,
and Kristine M. McDonnell, for appellant.*

Robert C. Hetterscheidt, for appellee.

Blythe Bethel, Guardian ad Litem.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

KLATT, J.

{¶1} Plaintiff-appellant, Edward S. Kindler, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, that: (1) granted defendant-appellee, Nichole C. Sweitzer, legal custody of the minor child, E.S.K., and made Sweitzer the residential parent; (2) allocated other parental rights and responsibilities and; (3) ordered Kindler to pay child support. Because Kindler has not shown that the trial court abused its discretion, we affirm.

Facts and Procedural History

{¶2} Although they were never married, Kindler is the biological father and Sweitzer is the biological mother of a minor child, E.S.K., born July 10, 2007. On March 24, 2008, Kindler filed a complaint for custody of the minor child and for allocation of parental rights and responsibilities. Kindler alleged that it was in the best interest of the minor child that he be designated the residential parent and legal custodian. Thereafter, Sweitzer filed a motion seeking temporary child support from Kindler. The matter was referred to a magistrate who held a hearing on January 12, 2009, at which the parties entered into an agreed interim order that addressed parenting time and the conduct of the parties when exchanging the child. The interim order also imposed on the parties certain other requirements and restrictions regarding their contact with one another.

{¶3} On March 10, 2009, the magistrate issued a decision awarding temporary legal custody to Sweitzer and ordering Kindler to pay temporary child support. The magistrate also allocated between the parties other financial and insurance obligations for the minor child. Kindler filed an objection to the amount of child support ordered by the magistrate.

{¶4} The magistrate held a second hearing on October 13, 2009 at which the parties entered into another agreed interim order addressing questions of drug use by the parties. However, the prior orders also remained in effect.

{¶5} The magistrate held a third hearing on March 5, 2010 on the merits of Kindler's complaint and on his objection to the temporary child support order. Kindler appeared pro se. Sweitzer appeared with counsel. A guardian ad litem ("GAL") appeared on behalf of the minor child. Kindler's only witness was the GAL. The GAL

testified that Sweitzer should continue as the residential parent and legal custodian of the minor child.

{¶6} The magistrate issued a decision on March 15, 2010 dismissing both Kindler's complaint and his objection to the temporary child support order. The magistrate's decision also terminated all temporary orders including child support. Kindler timely filed an objection to the magistrate's decision.

{¶7} On June 28, 2010, the trial court held a hearing on Kindler's objection. Thereafter, the trial court entered a final judgment that: (1) designated Sweitzer as the residential parent and legal custodian of the minor child; (2) awarded parenting time between the parties; (3) ordered Kindler to pay child support of \$421.95 per month plus two percent processing charge and denied Kindler a deviation from the guideline amount; (4) ordered Kindler to maintain all current levels of medical and hospitalization insurance for the benefit of the minor child; and (5) allocated between the parties the cost of any extraordinary uncovered medical, dental, and other healthcare expenses of the minor child.

{¶8} Kindler now appeals assigning the following error:

THE TRIAL COURT ERRED AS MATTER OF LAW AND ABUSED ITS DISCRETION BY REINSTATING THE DISMISSED TEMPORARY ORDERS AS A FINAL ORDER WITHOUT A FULL HEARING AND TESTIMONY FROM THE PARTIES.

Applicable Legal Framework and Standard of Review

{¶9} Pursuant to R.C. 3109.042, as an unmarried female who gave birth to a child, Sweitzer was the sole residential parent and legal custodian of the minor child until a court of competent jurisdiction issues an order designating another person the

residential parent and legal custodian. Kindler's complaint seeks an order designating him the residential parent and legal custodian. Because there was no prior judicial determination, Kindler's action constitutes an initial custody determination. *Clark v. Malicote*, 12th Dist. No. CA2010-07-049, 2011-Ohio-1874, ¶16; *Flax v. Wise*, 12th Dist. No. CA2007-05-017, 2008-Ohio-3076, ¶10, fn. 1.

{¶10} The trial court had jurisdiction to determine the residential parent and legal custodian under R.C. 2151.23(F)(1) and 3109.04. *In re L.G.*, 12th Dist. No. CA2006-05-116, 2007-Ohio-591, ¶5. That determination is guided by what is in the best interest of the minor child. R.C. 3909.04(B)(1) and 3109.04(F)(1). We review an initial custody determination under an abuse of discretion standard of review. *Davis v. Flickinger*, 77 Ohio St.3d 415, 416-17, 1997-Ohio-260; *In re Stose*, 5th Dist. No. 2008CA00049, 2008-Ohio-5457, ¶9. A trial court abuses its discretion if its determination is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

Appellant's Assignment of Error

{¶11} By his only assignment of error, Kindler argues that the trial court abused its discretion because the trial court failed to conduct a second evidentiary hearing in addressing Kindler's objections to the magistrate's decision. Kindler also argues that the trial court improperly reinstated the dismissed temporary orders. We disagree with both arguments.

{¶12} As previously noted, this matter was initially referred to a magistrate pursuant to Civ.R. 53. The magistrate held an evidentiary hearing on the merits of Kindler's complaint. Kindler had the opportunity to present any evidence supporting his claim that he should be designated the residential parent and legal custodian of the minor

child. Kindler called only one witness at this hearing—the GAL. The GAL's testimony did not support his claim. In fact, the GAL testified that Sweitzer should continue to be the residential parent and legal custodian of the minor child. Kindler presented no other evidence. Based upon Kindler's failure to support his claim, the magistrate issued a decision dismissing Kindler's complaint and terminating all temporary orders, including child support. Kindler timely filed objections to the magistrate's decision.

{¶13} In ruling on objections to a magistrate's decision, a trial court must conduct an independent review of any issue of fact or law that the magistrate has determined. Civ.R. 53(D)(4)(d); *Knauer v. Keener* (2001), 143 Ohio App.3d 789, 793 (interpreting former Civ.R. 53(E)(3)(b)). A trial court may hear additional evidence "but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate." Civ.R. 53(D)(4)(d). Here, Kindler has not advanced any legitimate reason why he should have been granted a second opportunity to present evidence supporting his claim.

{¶14} Kindler had the opportunity to present any evidence supporting his claim at the evidentiary hearing before the magistrate. Neither the record nor Kindler's appellate brief indicate what specific additional evidence Kindler might have presented at a second evidentiary hearing or why, with reasonable diligence, he could not have presented that evidence for consideration by the magistrate. See Civ.R. 53(D)(4)(d). Under these circumstances, we fail to discern how the trial court abused its discretion.

{¶15} Moreover, contrary to Kindler's assertion, the trial court held a hearing on Kindler's objection. Each party was represented by counsel. There is no transcript of that hearing in the record. Therefore, there is no indication in the record that Kindler or his

counsel requested the opportunity to present additional evidence or that the trial court denied him that opportunity. In addition, the trial court's judgment entry indicates that the parties addressed the trial court directly at the June 28, 2010 hearing. Again, nothing in the record supports Kindler's assertion that the trial court abused its discretion.

{¶16} Kindler is also mistaken in arguing that the trial court improperly reinstated the temporary orders. The trial court did not reinstate the temporary orders. Rather, the trial court exercised its de novo review of the magistrate's decision under Civ.R. 53(D)(4)(b) and modified the magistrate's decision to reflect its custody, child support, and parental rights and responsibility determinations based upon its review of the pleadings, the transcript of the evidence before the magistrate, and arguments advanced during the June 28, 2010 hearing. Given the absence of any evidence supporting Kindler's claim, he has not shown that the trial court abused its discretion.

{¶17} For the foregoing reasons, we overrule Kindler's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

BROWN and FRENCH, JJ., concur.
