STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
January 20, 2011

In the Matter of B J, Minor.

No. 296273
Wayne Circuit Court
Family Division
LC No. 06-461948

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

This case is before this Court for the second time. In a prior appeal, this Court vacated Wayne Circuit Court Judge Jerome C. Cavanagh's May 2008 order entered in a child protective proceeding, pursuant to which the court terminated its jurisdiction over the minor child and awarded physical custody of the child to his father, respondent Reid. *In re AP*, 283 Mich App 574; 770 NW2d 403 (2009). This Court held that the juvenile court erred because it failed to ensure that its order was entered in a related paternity action between respondents Johnson and Reid, pursuant to which Johnson had been awarded physical custody of the child, and because the juvenile court also effectively decided the issue of custody without considering the statutory best interest factors in the Child Custody Act (CCA), MCL 722.23. Accordingly, this Court vacated the juvenile court's "custody" order and remanded the case for further proceedings. *Id.* at 599-600, 607-608. On remand, the juvenile court entered a dispositional order in December 2009 providing (1) that the child's "primary residence" would be with Reid, subject to parenting time with Johnson in accordance with a mediation agreement, (2) that any future issues of custody or parenting time would be decided by the domestic section of the family court, and (3) terminating its jurisdiction over the child in the child protective proceeding. Respondent Johnson again appeals as of right. We again vacate the juvenile court's order and remand for further proceedings.

Initially, we agree with respondent Johnson that the juvenile court again erred by failing to enter its order in the related paternity action in addition to the child protective proceeding. In the prior appeal in *In re AP*, 283 Mich App at 599, this Court stated:

> We stress, however, that when a family division court deems it appropriate to consolidate numerous matters concerning the same family that fall within the jurisdiction of the family division under MCL 600.1021 but may have originally been assigned to different judges, it is necessary that family division courts follow the procedural requirements incumbent upon them. Here the trial court failed to

> require that the motion be captioned with the appropriate paternity case name and number and, instead, proceeded to decide the motion for custody under the juvenile case number. And the resultant custody order that the court entered was entered in the same supplemental juvenile order rather than in the paternity action. This was error.

The juvenile court repeated this error on remand when it entered its December 2009 order affecting issues of custody and parenting time only in the juvenile child protective proceeding rather than in the paternity action. Although the court stated that future issues relating to custody and parenting time were to be submitted to the domestic section court that decided the paternity action, because the court's December 2009 order effectively decided issues of custody and parenting time, it was necessary that its order also be captioned with the appropriate paternity case name and number.

Furthermore, the December 2009 order was not entered in accordance with this Court's decision in the prior appeal because the juvenile court again effectively decided issues of custody without complying with the requirements of the CCA, and further, entry of the order resulted in a conflict with the original custody order entered in the paternity action, which without being properly modified, became effective once the juvenile court terminated its jurisdiction in the child protective proceeding.

In the prior appeal, this Court recognized that respondent Johnson had previously been awarded custody of the minor child by the domestic court in the related paternity action, but explained that once the juvenile court assumed jurisdiction over the child, its orders superseded the previous custody order. *In re AP*, 283 Mich App at 593. Once the juvenile court dismissed its jurisdiction, any previous custody order would continue to remain in full force and effect, unless properly modified. *Id.* at 594. This Court explained that a circuit court with jurisdiction over a child has the authority to decide issues of custody pursuant to the CCA ancillary to making determinations under the juvenile code, but it must do so in accordance with the CCA, which requires a determination of the applicable burden of persuasion and an analysis of the child's best interests based on the best interest factors set forth in MCL 722.23. *Id.* at 598-602. This Court held that the juvenile court erred when it effectively changed custody by awarding Reid sole legal and physical custody of the child, but failed to consider the best interest factors of MCL 722.23 before doing so. *Id.* at 600.

Thus, in accordance with this Court's prior decision, the juvenile court could not properly enter an award of custody of the child to Reid which would survive the termination of its jurisdiction unless its decision was made in compliance with the CCA. On remand, the trial court's December 2009 order did not purport to award "custody" of the child to Reid, but it established Reid's home as the child's "primary residence," subject to a parenting time schedule for Johnson. Despite the different nomenclature, the order effectively awarded Reid custody of the child, but as before, the juvenile court never considered the statutory best interest factors before changing custody.

Although the December 2009 order purportedly was based on a mediation agreement, that agreement did not address the issue of physical custody, only parenting time. Mediation in

domestic relations actions is governed by MCR 3.216. MCR 3.216(H) provides, in pertinent part:

> (5) The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. The mediation will continue until a settlement is reached, the mediator determines that a settlement is not likely to be reached, the end of the first mediation session, or until a time agreed to by the parties.
>
> (6) Within 7 days of the completion of mediation, the mediator shall so advise the court, stating only the date of completion of the process, who participated in the mediation, whether settlement was reached, and whether further ADR proceedings are contemplated. If an evaluation will be made under subrule (I), the mediator may delay reporting to the court until completion of the evaluation process.
>
> (7) If a settlement is reached as a result of the mediation, to be binding, the terms of that settlement must be reduced to a signed writing by the parties or acknowledged by the parties on an audio or video recording. After a settlement has been reached, the parties shall take steps necessary to enter judgment as in the case of other settlements.

Domestic relations mediation under MCR 3.216 differs from binding mediation in other civil actions because mediation under MCR 3.216 is not binding, but is subject to acceptance or rejection by the parties. *Frain v Frain*, 213 Mich App 509, 511; 540 NW2d 741 (1995).

It is well established that parents' utilization of alternative dispute resolution does not deprive the court of its authority and obligations under the Child Custody Act. In *Harvey v Harvey*, 470 Mich 186; 680 NW2d 835 (2004), our Supreme Court held that parties cannot stipulate to restrict a trial court's authority to decide a custody issue. The Court stated:

> The Child Custody Act is a comprehensive statutory scheme for resolving custody disputes. *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999). With it, the Legislature sought to "promote the best interests and welfare of children." *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994). The act applies to all custody disputes and vests the circuit court with continuing jurisdiction. MCL 722.26.
>
> The act makes clear that the best interests of the child control the resolution of a custody dispute between parents, as gauged by the factors set forth at MCL 722.23. MCL 722.25(1). It places an affirmative obligation on the circuit court to "declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act" whenever the court is required to adjudicate an action "involving dispute of a minor child's custody." MCL 722.24(1); *Van*, *supra* at 328. Taken together, these statutory provisions impose on the trial court the duty to ensure that the resolution of any custody dispute is in the best interests of the child. [*Harvey*, 470 Mich at 191-192.]

The Court stated in a footnote:

> We recognize that parents sometimes reach agreements regarding custody and visitation matters either informally through direct negotiations or through mediation procedures made available by dispute resolution organizations. Our decision does not restrict the ability of parties to address disputes through alternative dispute resolution processes. We hold only that the statutory "best interests" factors control whenever a court enters an order affecting child custody. An initial agreement between the parties cannot relieve the court of its statutory responsibility to ensure that its adjudication of custody disputes is in a child's best interests.
>
> Likewise, parties must understand that a child custody determination resulting from alternative dispute resolution processes is not enforceable absent a court order. [*Id.* at 187-188 n 2.]

See also *Rivette v Rose-Molina*, 278 Mich App 327, 330-333; 750 NW2d 603 (2008) (holding that a Friend of the Court referee must consider the best interest factors in making a custody recommendation, and the trial court must satisfy itself that the best interest factors were considered or make its own findings regarding the factors).

Here, the parties did not settle the issue of physical custody in mediation. The parties' agreement states that the parties will "share joint legal custody," but it does not indicate which parent will have physical custody. The agreement sets forth a "parenting time" schedule, but Johnson signed the agreement subject to the condition that "I only agree to this being a temp arrangement," thereby further dispelling any suggestion that the agreement purported to settle the issue of physical custody. Indeed, the juvenile court commented that "[t]his agreement pretty much deals only with visitation." Nevertheless, as previously explained, the order that was entered established Reid's home as the child's "primary residence," subject to a parenting time schedule for Johnson. This led to a custody arrangement whereby Reid was effectively awarded physical custody of the child, contrary to the custody order in the original paternity action, but without the prior custody order ever having been modified and without an order formally awarding custody to Reid ever having been entered. As before, because the trial court effectively decided the child's custody without complying with the CCA, remand is again required.

Accordingly, we vacate the juvenile court's December 2009 order and remand this case to the juvenile court to resolve the issue of custody in accordance with the CCA, consistent with this Court's prior decision in *In re AP*. Also, the custody order must be entered in the related

paternity action in addition to the juvenile case. Further, in accordance with MCL 722.26a(1), the court must consider an award of joint custody if requested by either parent.[1]

We disagree with the minor child's argument that this case should be remanded to a different judge because of "the trial court's repeated failure to follow the law and the directions of this court." While we are deeply troubled by Judge Cavanagh's failure to follow this court's published decision, the record does not suggest that his failure was the result of bias against a party, an immutable preexisting opinion, or a willful disagreement with this Court's prior decision. The errors are procedural in nature and do not reflect the judge's opinion of the facts, the parties, or the applicable law. Moreover, we are not persuaded that he would have difficulty putting aside previously expressed views or findings, or that reassignment is advisable to preserve the appearance of justice. Further, given his familiarity with the case and the parties, reassignment would likely entail excessive waste or duplication. *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004). Accordingly, we decline the minor child's request to reassign this case to another judge.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro

[1] In light of our decision, it is unnecessary to address respondent Johnson's argument challenging the Wayne Circuit Court's plan of separating the domestic relations and juvenile sections of the family court.