

[Cite as *Burton v. Caudill*, 2010-Ohio-4946.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

BRIAN O. BURTON,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-12-047
- vs -	:	<u>OPINION</u>
	:	10/12/2010
ELAYNA K. CAUDILL,	:	
Defendant-Appellant.	:	

APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 20084462

C. Nicholas Ring, 735 East State Street, Georgetown, Ohio 45121, for plaintiff-appellee

Michael P. Kelly, 108 South High Street, P.O. Box 3740, Mt. Orab, Ohio 45154-9464, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Elayna K. Caudill, appeals the judgment of the Brown County Common Pleas Court, Juvenile Division, granting custody of her son to plaintiff-appellee, Brian O. Burton.

{¶2} The child, who is the subject of this appeal, was born in November

2007. Caudill was unmarried at the time. Genetic testing later determined that Burton was the child's natural father. Burton filed a complaint to establish visitation with his son. After a hearing, the juvenile court ordered visitation between Burton and his son.

{¶13} On August 21, 2009, Burton filed a "multi-branch" motion to reallocate parental rights and responsibilities and change the minor child's surname. The juvenile court ordered an investigation and set an October 8, 2009 hearing date. It appears that Caudill was served with notice of the custody hearing, on September 19, 2009.

{¶14} At the October 8, 2009 hearing, Caudill was unrepresented by counsel, however the juvenile court proceeded with the hearing. On November 24, 2009, the juvenile court found it was in the best interest of the child to grant custody to his father. The juvenile court also ordered the child's last name changed. Caudill filed an appeal raising two assignments of error.¹

{¶15} Based on our disposition of this case, we have elected to address Caudill's assignments of error out of order.

{¶16} Assignment of Error No. 2:

{¶17} "THE TRIAL COURT ERRED WHEN IT DID NOT OFFER APPELLANT AN OPPORTUNITY FOR A CONTINUANCE TO OBTAIN COUNSEL AND DID NOT ALLOW APPELLANT SUFFICIENT OPPORTUNITY TO PRESENT HER CASE."

{¶18} Although Caudill's second assignment of error states the juvenile court

1. Burton failed to file an appellate brief in this case. Pursuant to App.R. 18(C), if an appellee fails to file a brief in response to appellant's brief, this court "may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action."

erred in not offering her a continuance to obtain counsel and allow her to present her case; Caudill's actual argument focuses on the juvenile court's failure to inform her of the right to counsel and the right for indigent parties to have counsel appointed. As a result of these failures, Caudill maintains she was prejudiced by the absence of an attorney at the custody hearing.

{¶19} At the beginning of the October 8, 2009 hearing, the following exchange took place:

{¶10} "THE COURT: All right. Ms. Caudill we're here this morning – this afternoon for a hearing on the motion filed by Mr. Burton in which he is seeking a change of custody of the child, and for the child's name to be changed to presumably Burton. That wasn't ever done, eh?

{¶11} "MR. RING [Burton's counsel]: No, it was not, Your Honor.

{¶12} "THE COURT: Okay. Very good. So let me ask Ms. Caudill, do you agree that Mr. Burton should have custody?

{¶13} "MS. CAUDILL: No, ma'am.

{¶14} "THE COURT: Okay. So you are contesting this matter?

{¶15} "MS. CAUDILL: Yes.

{¶16} "THE COURT: Okay. Were you expecting a lawyer this afternoon?

{¶17} "MS. CAUDILL: No, Ma'am. I can't afford one.

{¶18} "THE COURT: Okay. Well, I mean, have you attempted to get an attorney?

{¶19} "MS. CAUDILL: I tried legal aid –

{¶20} "THE COURT: Uh-huh.

{¶21} "MS. CAUDILL: – but my court date when I called them wasn't 30 days

so I couldn't get anybody.

{¶22} "THE COURT: Well, the last time you were here was the 29th of July.

{¶23} "MS. CAUDILL: Well, I'm talking about whenever I had – when I received the papers in the mail?

{¶24} "THE COURT: By the more recent papers?

{¶25} "MS. CAUDILL: Yes.

{¶26} "THE COURT: Okay. Okay. Well, so are you representing yourself?

{¶27} "MS. CAUDILL: Yes, Ma'am.

{¶28} "THE COURT: Is that correct? All right."

{¶29} The court then proceeded to swear both Burton and Caudill in as witnesses, and continued with the hearing.

{¶30} Pursuant to R.C. 2151.352: "A * * * child's parents * * * [are] entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152 of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120 of the Revised Code except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2), (3), (9), (10), (11), (12), or (13); (B)(2), (3), (4), (5), or (6); (C); (D); or (F)(1) or (2) of section 2151.23 of the Revised Code. If a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person. The court may continue the case to enable a party to obtain counsel, to be represented by the county public defender or the joint county public defender, or to be appointed counsel upon request pursuant to Chapter 120 of the Revised Code."

{¶31} Similarly, Juv.R. 4(A) provides that: "Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute."

{¶32} "Juv.R. 4 and R.C. 2151.352 clearly provide parents who are parties to juvenile proceedings with the right to be represented by counsel at all stages of juvenile proceedings." *In re Lander* (June 26, 2000), Butler App. No. CA99-05-096, at 5. See, also, *Christopher W. v. Roxanne G.*, Lucas App. No. L-03-1259, 2004-Ohio-5510, ¶13. "Juv.R. 4(A) and R.C. 2151.352 'go beyond federal and state constitutional requirements to afford parties the right to counsel at all juvenile proceedings, unless such right is intentionally waived.'" *Lander* at ¶5, quoting *In re Richardson* (Aug. 19, 1987), Scioto App. No. CA 1674, unreported, 1987 WL 15980, at *9. In order to comply with statutory requirements, the juvenile court "must fully and clearly explain the right to counsel * * *." *Lander* at 6. The failure to explain and/or inform a party of their right to counsel in juvenile proceedings constitutes reversible error. See *Lander* at 6,11; *In re Prunty* (Mar. 1, 1995), Summit App. No. 16952, 1995 WL 89473, at *1; *Christopher W.* at ¶29-31.

{¶33} In this case, there is no evidence that the juvenile court ever explained to Caudill that she had a right to counsel. Instead, the court merely inquired whether Caudill had counsel. After learning Caudill was unable to obtain counsel, the juvenile

court chose to proceed with the hearing rather than determine whether Caudill knew of her right to counsel. We also find that Caudill's affirmative response to the juvenile court's question about self-representation does not qualify as a valid waiver of her right to counsel. Accord *Lander* at ¶6; *Christopher W.* at ¶29. As such, the juvenile court erred in holding the hearing without informing Caudill of her right to counsel for the proceedings.

{¶34} Caudill also contends that the juvenile court should have inquired whether she was indigent in order to ascertain whether she qualified for appointed counsel. This argument is meritless as a party is not entitled to have counsel appointed in civil custody matters brought pursuant to R.C. 2151.23(A)(2). *In re M.E.H.*, Washington App. No. 08CA4, 2008-Ohio-3563, ¶12; R.C. 2151.352.²

{¶35} Nevertheless, because we have found the trial court erred in failing to inform Caudill of her right to counsel during juvenile proceedings, Caudill's second assignment of error is sustained.

{¶36} Assignment of Error No. 1:

{¶37} "THE COURT ERRED IN DETERMINING THERE HAD BEEN A CHANGE OF CIRCUMSTANCES AND THAT A CHANGE OF CUSTODY WAS IN THE BEST INTEREST OF THE MINOR CHILD."

{¶38} In her first assignment of error, Caudill maintains that the juvenile court failed to consider all of the factors in determining the best interest of the child. In addition, Caudill argues that the evidence presented was neither competent nor credible, and as such, was insufficient to support the juvenile court's decision. Based

2. Although the previous version of R.C. 2151.352 allowed for such an appointment, the current version of the statute "now limits the right to counsel at government expense." *M.E.H.* at fn. 1. See, also, Am.Sub.H.B. No. 66.

upon our resolution of Caudill's second assignment of error, her first assignment of error is rendered moot. See App.R. 12(A)(1)(c).

{¶39} Judgment reversed and remanded.

YOUNG, P.J., and BRESSLER, J., concur.