

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

N.V.

Court of Appeals No. S-08-032

Appellant

Trial Court No. 63545

v.

W.S., et al.

DECISION AND JUDGMENT

Appellees

Decided: July 31, 2009

* * * * *

George R. Royer, for appellant.

* * * * *

HANDWORK, P.J.

{¶ 1} This is an appeal from a decision of the Sandusky County Court of Common Pleas, Juvenile Division, which dismissed appellant's complaint requesting custody of her then minor sister. Because we conclude that the trial court did not err in dismissing the complaint, we affirm.

{¶ 2} On August 28, 2006, appellant, N.V., filed an action seeking permanent custody of her then minor sister, C., born in June 1990, against appellees, C.'s alleged adoptive parents ("adoptive parents"). The court appointed an attorney to act as guardian ad litem ("GAL") for the minor child, and ordered the parties to pay GAL fees. On November 14, 2006, appellees filed a motion to dismiss, stating that the trial court had no jurisdiction over the requested relief because appellant's complaint failed to include a required "parentage affidavit," or any allegations of neglect, abuse, and dependency and was also based on an alleged challenge to prior completed adoption proceedings.

{¶ 3} In December 2006, appellant filed the required parentage affidavit, and requested an extension of time to respond to appellees' motion to dismiss. In January 2007, appellant filed a response and an amended response in opposition to the motion to dismiss, arguing that the court did have jurisdiction over the minor child, and that the action should go forward. Over the next two years, appellant also filed various other motions requesting the court to order and facilitate visitation between appellant and her sister and to require the GAL to take a more active role in the case. On June 17, 2008, appellant filed a motion seeking reimbursement for her filing fees and the \$400 paid to the GAL for fees. Appellant requested the fees, stating that, despite her counsel's numerous calls to the court about the status of the proceedings, the case had languished for so long that C. had now reached the age of majority.

{¶ 4} On August 29, 2008, the trial court granted appellees' motion to dismiss, finding that the "complaint fails to state a claim upon which this Court can exercise

jurisdiction and otherwise grant relief and that no amended complaint was filed." The court also "dismissed" appellant's pending motions, but ordered that "all unexpended costs advanced shall be refunded through plaintiff's counsel."

{¶ 5} Appellant now appeals from that judgment, arguing the following three assignments of error:

{¶ 6} "Assignment of Error Number One

{¶ 7} "It is not proper in a motion to dismiss pleadings under Rule 12(B)(6) to adduce a [sic] present evidence that is outside or beyond the scope of the pleadings.

{¶ 8} "Assignment of Error Number Second [sic]

{¶ 9} "The court error [sic] by refusing to grant appellant's motion to recover the guardian fee paid by appellant.

{¶ 10} "Assignment of Error Number Third [sic]

{¶ 11} "It was a denial of appellant's due process rights (speedy trial rights) to delay decision the case [sic] for a period of two years of the minority of the minor child was (that custody was filed for by appellant) and not accord appellant a due process hearing."

I.

{¶ 12} In her first assignment of error, appellant contends that the trial court erred in dismissing her complaint by considering evidence beyond the pleadings.

{¶ 13} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel.*

Hanson v. Guernsey Cty. Bd. of Commrs. (1992), 65 Ohio St.3d 545, 548. When considering a motion to dismiss, a trial court is required to assume that all the facts alleged in a complaint are true, and it must make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. In addition, a trial court may not consider or rely on evidence outside the complaint. Civ.R. 12(B); *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.* (1990), 55 Ohio St.3d 98, 99. For a trial court to properly "dismiss a complaint for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts" in support of his claim which would entitle him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus.

{¶ 14} Because all facts alleged in the complaint are presumed true under a Civ.R. 12(B)(6) analysis, only questions of law are presented. *Hunt v. Marksman Prods.* (1995), 101 Ohio App.3d 760, 762. Thus, an appellate court review of a trial court's disposition of a motion to dismiss for failure to state a claim is de novo. *Doty v. Fellhauer Elec., Inc.*, 175 Ohio App.3d 681, 684, 2008-Ohio-1294, ¶ 17.

{¶ 15} We initially note that appellant sought custody against her sister's purported adoptive parents. R.C. 3107.15(A) provides that, under Ohio law, a final decree of adoption issued by an Ohio court terminates all parental rights of the biological parents and creates those parental rights in the adoptive parents. *State ex rel. Kaylor v. Bruening* (1997), 80 Ohio St.3d 142, 145. Therefore, in subsequent custody proceedings, adoptive parents stand in the same position as if they had been the biological parents.

{¶ 16} R.C. 2151.23 gives juvenile courts exclusive jurisdiction to "determine the custody of any child not a ward of another court of this state." A non-parent has the right to seek temporary and legal custody of a minor child from a parent under R.C. 2151.27(A), 2151.27(C), and 2151.353(A)(3). *In re Brown*, 2d Dist. No. 1676, 2006-Ohio-3189, ¶ 6-7. In a custody proceeding between a parent and a nonparent, the court may not award custody to the nonparent without first determining that the parent is unsuitable to raise the child. *In re Perales* (1977), 52 Ohio St.2d 89, syllabus. The court must determine, by a preponderance of the evidence, that the parent abandoned the child, contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child. *Id.*

{¶ 17} In this case, despite being C.'s biological sister, appellant is a nonparent who sought custody from the purported adoptive parents. Therefore, appellant had to allege some facts or claim that the adoptive parents were unsuitable to raise C. The complaint, however, merely alleged that the adoptive parents had prevented contact between the minor child and appellant and other relatives. No specific or general allegations of parental unsuitability were pled. The sole reason indicated for the "change" in custody was that the minor child "expressed a desire and need to live with" appellant. These allegations, however, are not enough to indicate a claim of unsuitability of the adoptive parents.

{¶ 18} We further note that, after appellees' response and motion to dismiss was filed, appellant had ample time and opportunity to amend her complaint to include allegations which would establish a claim that the adoptive parents were unsuitable, but did not do so. In fact, appellant initially requested to file an amended complaint, but then indicated her "intent" not to file an amended complaint. In addition, contrary to appellant's contention, we cannot say that the trial court considered or needed to consider any evidence beyond the complaint. Even presuming all the facts in the complaint to be true, appellant failed to plead anything that would indicate that appellant's sister was dependent, neglected, or abused, i.e., parental unsuitability. More importantly, since C. attained the age of majority during the pendency of the trial court proceedings, the question as to her custody actually became moot. Therefore, we cannot say that the trial court erred in granting appellees' Civ.R. 12(B)(6) motion to dismiss.

{¶ 19} Accordingly, appellant's first assignment of error is not well-taken.

II.

{¶ 20} We will address appellant's last two assignments of error together. Appellant argues that the trial court denied her due process by delaying its decision on appellees' motion to dismiss for nearly two years, until the minor child had reached the age of majority. Appellant also claims that the trial court erred in denying her request for the return of fees paid to file suit and to compensate the GAL.

{¶ 21} "Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law

specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01.

Procedendo is an order from a superior court to a lower court directing the lower court to proceed to judgment. *State ex rel. Ratliff v. Marshall* (1972), 30 Ohio St.2d 101, 102. A "writ of mandamus or procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment." *State ex rel. Dehler v. Sutula* (1995), 74 Ohio St.3d 33, 35, citing *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas* (1995), 72 Ohio St.3d 461, 462.

{¶ 22} In this case, the trial court's delay in deciding appellees' Civ.R. 12(B)(6) motion to dismiss was caused in part by pleadings and extensions of time requested by appellant. We agree, however, that the length of the delay from October 2007 to August 2008 was somewhat excessive, considering the simplicity of the issue that needed to be decided. We do not condone such delays and admonish the court to act expeditiously when dealing with the time sensitive matters involved in child custody proceedings.

{¶ 23} In addition, since custody proceedings are civil in nature, appellant's claim of a violation of "speedy trial" rights has no merit. Nevertheless, appellant could have sought to compel the trial court's ruling by filing actions in mandamus or procedendo. Appellant did not, however, avail herself of these remedies to obtain "due process" and a more timely ruling.

{¶ 24} Although we agree that the proceedings were unnecessarily prolonged, the filing fee and GAL fees¹ are not refundable. A party who files suit expends such costs without expectation of reimbursement or guarantees that the end results will necessarily be favorable or without delays. Moreover, as we previously noted, by the time the court ruled on the Civ.R. 12(B)(6) motion, C. had turned 18 and, presumably, exercised her own right to choose her place of residence. Therefore, we conclude that appellant's due process claim became moot and her claim for reimbursement of fees was without merit.

{¶ 25} Accordingly, appellant's second and third assignments of error are not well-taken.

{¶ 26} The judgment of the Sandusky County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

¹We agree that a GAL should perform certain duties and a trial court should enforce that performance. Although appellant claims she should get her money back because the GAL failed to interview her or perform other duties, the record in this case does not provide enough evidence to make such a determination. If deficient, the GAL may be removed by the court with an order to return funds to be paid to his or her successor. We encourage the trial court, however, to take an active role in oversight of a GAL's function, so that all parties who contribute to his or her fees will be satisfied with the GAL's performance.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.