

[Cite as *Comrie v. Comrie*, 2010-Ohio-3319.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94018

BRENDA J. COMRIE

PLAINTIFF-APPELLANT

vs.

RONALD E. COMRIE

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-306395

BEFORE: Gallagher, A.J., Boyle, J., and Jones, J.

RELEASED: July 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Brenda Comrie (hereinafter “Brenda”), appeals the decision of the Cuyahoga County Court of Common Pleas, Domestic Relations Division. For the reasons stated herein, we affirm.

{¶ 2} On June 13, 2007, Brenda and appellee, Ronald Comrie (hereinafter “Ronald”), were divorced. The couple has two children, one of whom, Kyle, was still a minor when the underlying action was heard. This appeal concerns the disposition of several post-decree motions, including Ronald’s motions for spousal support, child support, and attorney’s fees, and motion to show cause, as well as Brenda’s motion for reallocation of mortgage.

{¶ 3} Four pretrials were held between January and May 2008; the magistrate set the matter for hearing on July 24-25, 2008. Brenda moved for a continuance of the July hearing because weather conditions in Boston, where she was living at the time, prevented her from flying to Cleveland. The magistrate granted her a continuance and rescheduled the hearing for September 18-19, 2008.

{¶ 4} On September 18, the parties met and spent the morning exchanging requested documents. They reached a shared parenting agreement prior to the start of the hearing. The hearing began in the afternoon of September 18, and Brenda was called as if on cross-examination.

Ronald testified, and his testimony continued on September 19. That

afternoon, Brenda notified the court that she needed to leave in order to check out of her hotel room and catch a flight to Boston. The magistrate adjourned the hearing and scheduled its completion on November 6-7, 2008.

{¶ 5} The day before the November hearing, Brenda notified the court Kyle was hospitalized, and she was unable to come to Cleveland for the hearing. Further, Brenda's counsel notified the court that he had a scheduling conflict that day. Ronald had already traveled to Cleveland from his home in Florida. The court continued the hearing until January 8-9, 2009. The November 7, 2008 order, which was *drafted in its entirety by Brenda's counsel* and adopted by the court as written, stated, "It is further ordered that no further continuances will be granted and this matter will proceed to conclusion in the absence of any necessary parties."

{¶ 6} On January 7, 2009, Brenda notified her attorney that due to inclement weather in Boston, she was unable to come to Cleveland for the hearing scheduled the next day. This information was communicated to Ronald's attorney, and Ronald did not come to Cleveland. Only counsel for the parties appeared in court on January 8. Ronald's attorney brought with him a written motion for continuance, stating as the basis for Ronald's failure to appear that his 91-year-old mother was ill, and he was attending to her needs. Brenda's attorney made an oral motion for a continuance. The magistrate denied both motions based on its November 7 order that no

further continuances would be granted. Counsel was informed that the court would admit their exhibits into evidence, and that the parties had 30 days to submit written closing arguments.

{¶ 7} On April 28, 2009, the magistrate filed her decision. The magistrate granted Ronald's motions for spousal support and child support. She granted his motion to show cause in part, and denied both of his motions for attorney's fees. The magistrate also denied Brenda's motion for reallocation of mortgage. Brenda filed objections to the magistrate's decision, arguing solely that the magistrate erred by failing to grant a continuance of the January hearing and not permitting the parties to complete their testimony. Ronald filed his response to Brenda's objections. On September 21, 2009, the trial court denied Brenda's objections and adopted the magistrate's decision in its entirety.

{¶ 8} On appeal, Brenda raises four assignments of error for our review.

{¶ 9} "I. The trial court committed plain error prejudicial to appellant by denying appellant's motion for continuance."

{¶ 10} Brenda argues that her due process rights were violated by the court's failure to grant her a continuance in order to allow her and Ronald to complete their testimony.

{¶ 11} The decision to grant or deny a motion for a continuance lies within the sound discretion of the court and will not be reversed absent an abuse of discretion. *Harmon v. Baldwin*, 107 Ohio St.3d 232, 2005-Ohio-6264, 837 N.E.2d 1196; *Sayre v. Hoelzle-Sayre* (1994), 100 Ohio App.3d 203, 208, 653 N.E.2d 712. An “abuse of discretion” implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. “[A]n abuse of discretion most commonly arises from a decision that was unreasonable.” *Wilson v. Lee*, 172 Ohio App.3d 791, 2007-Ohio-4542, 876 N.E.2d 1312, at ¶ 11. “Decisions are unreasonable if they are not supported by a sound reasoning process.” *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

{¶ 12} Although Brenda argues that this court should review the magistrate’s decision for plain error, we decline to do so. “In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, at syllabus.

We do not find that exceptional circumstances exist here to warrant application of the plain error doctrine.

{¶ 13} In determining whether the court erred in denying a continuance, we weigh the trial court's interest in controlling its own docket and the public's interest in the prompt and efficient dispatch of justice against any potential prejudice to the moving party. *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078; *Seget v. Seget*, Cuyahoga App. No. 83905, 2004-Ohio-6289. The trial court should consider the following factors when deciding whether to grant or deny a continuance: "the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstances which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of the each case." *Unger*, supra, at 67-68.

{¶ 14} These factors should be considered in light of the actual circumstances surrounding this case. The January hearing marked the fourth time this case had been scheduled. By adopting Brenda's proposed order, the court made it clear that no further continuances would be granted and that the matter would be concluded with or without the necessary parties

being present. The evidence and testimony that would enable the court to make its decision were based on financial documents admitted into evidence. Neither party's attorney objected to going forward on written closing arguments and exhibits, all of which were accepted by the court.

{¶ 15} There is nothing in the record to indicate how long a continuance the parties wanted. The prior two continuances were granted because of Brenda's unavailability; she was also responsible in part for the termination of the September hearing by her need to leave prior to the completion of testimony. Furthermore, it was Brenda who drafted the November 7 order, which she now objects to.

{¶ 16} A party to civil litigation has no statutory right to be present at a hearing. *Rielinger v. Rielinger*, Cuyahoga App. No. 90614, 2009-Ohio-1236. The court did not deny Brenda an opportunity to be present at the hearings, and in fact, the court warned her it would proceed in January in her absence.

Brenda was not denied her right to be present; instead, she chose not to travel to Cleveland in advance of January 8 to ensure her presence at the hearing. See *In re Kutcher*, Belmont App. No. 02 BE 58, 2003-Ohio-1235 ("failure to assert a right is not the same as being prevented from asserting a right"). We find this was a voluntary decision on Brenda's part.

{¶ 17} The record demonstrates that the magistrate had all the necessary documentation and testimony she needed to reach a decision

regarding the modification of spousal support under R.C. 3105.18, modification of child support with attached computation worksheet, and reallocation of the mortgage. The parties' exhibits included the requisite income documentation, tax returns, bank statements, and expenses that formed the basis of the court's decision.

{¶ 18} We are troubled by the apparent practice in domestic relations of granting seemingly unlimited continuances. The pending post-decree motions in this case lingered on the court's docket through four pretrials and four hearing dates, over a span of 12 months. It is no surprise that the parties, and Brenda in particular, came to expect that any request for a continuance would be granted. Therefore, we understand the court's frustration by Brenda's third no-show at a scheduled hearing, as well as its decision to deny any further continuances of the matter, especially since all the necessary documents had been admitted into evidence.

{¶ 19} We find the magistrate did not abuse her discretion by denying Brenda's motion for continuance and proceeding to a decision on the parties' motions. Brenda's first assignment of error is overruled.

{¶ 20} "II. The trial court committed error prejudicial to appellant and denied appellant due process by failing to strike appellee's testimony."

{¶ 21} “III. The trial court committed plain error prejudicial to appellant in entering judgment when neither party completed testifying or completed his or her case.”

{¶ 22} “IV. The trial court committed error prejudicial to appellant in granting appellee’s motions.”

{¶ 23} Brenda argues her remaining three assigned errors are related; therefore, we discuss them together. The crux of Brenda’s appeal is that the court erred by failing to allow both parties the opportunity to complete their testimony and, therefore, rendered its judgment prematurely. She argues the court should have continued the matter or dismissed the motions for failure to prosecute. We are not persuaded.

{¶ 24} “If a party has knowledge of an error with sufficient time to object before the judge takes any action, that party waives any objection to the claimed error by failing to raise that issue on the record before the action is taken.” *Tissue v. Tissue*, Cuyahoga App. No. 83708, 2004-Ohio-5968. Brenda did not object to the magistrate’s decision to conclude the proceedings without taking further testimony before issuing her report.¹ She did not move to strike Ronald’s testimony. She did not move to dismiss the action

¹This is a separate issue from whether Brenda filed objections to the magistrate’s report, which we acknowledge she did.

for failure to prosecute. In essence, Brenda acquiesced to the proceedings until she learned that the magistrate ruled in Ronald's favor and against her.

{¶ 25} The basis of Brenda's objections to the magistrate's report was that the magistrate failed to grant her a continuance, or in the alternative, did not dismiss the motions for failure to prosecute under Civ.R. 41(B)(1). Yet, she argues in her reply brief that Civ.R. 41(B)(1) does not apply, but instead that the Ohio Rules of Evidence control.

{¶ 26} Despite Brenda's assertion that this case was decided on a technicality rather than on the merits, she fails to identify any erroneous finding of fact or conclusion of law in the magistrate's report. She does not identify in what way the outcome would have been different if she or Ronald had the opportunity to testify further. In short, she fails to demonstrate what prejudice she suffered by having the magistrate reach her decision based on the testimony already given and the admitted exhibits.

{¶ 27} A review of the hearing transcript and exhibits demonstrates that the magistrate's decision was supported by law and facts. There was testimony regarding the parties' income; their personal expenses, as well as those for Kyle and the marital home; and the amount of time Kyle spent with each of his parents. There was documentation to support the parties' testimony. Nothing in Brenda's argument suggests otherwise.

{¶ 28} Brenda cites no authority to support her argument that Ronald's testimony should be stricken. On the issue of whether the magistrate unfairly limited Ronald's testimony, her citation to *Vance v. Vance*, 151 Ohio App.3d 391, 2003-Ohio-310, 784 N.E.2d 172, is not instructive. The *Vance* court affirmed the trial court's decision to limit cross-examination to avoid "harassment, prejudice, confusion of the issues, or interrogation that is repetitive or only marginally relevant," which was not at issue here. Finally, given that Brenda did not move to dismiss Ronald's motions, Brenda fails to offer any evidence that the magistrate's decision would have been different had there been additional testimony. Mere supposition that there could have been or would have been testimony that would have altered the outcome is not enough to reverse the magistrate's decision.

{¶ 29} Brenda's second, third, and fourth assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

**MARY J. BOYLE, J., and
LARRY A. JONES, J., CONCUR**