

[Cite as *Nyamusevya v. Nkurunziza*, 2011-Ohio-5287.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Leonard Nyamusevya, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 11AP-137
 : (C.P.C. No. 09DR-05-1832)
 Consolata Nkurunziza, : (REGULAR CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on October 13, 2011

Anelli Holford, Ltd., and Dianna M. Anelli, for appellant.

Solove & McCormick, and Kerry L. McCormick, for Guardian
ad Litem.

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

FRENCH, J.

{¶1} Plaintiff-appellant, Leonard Nyamusevya ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, which issued a decision ordering appellant to pay a portion of the fees of attorney Kerry L. McCormick. McCormick was appointed as a guardian ad litem ("GAL") for appellant's children in the contested divorce action between appellant and

his ex-wife, defendant-appellee, Consolata Nkurunziza ("appellee"). For the following reasons, we affirm.

{¶2} On October 15, 2009, appellee filed a motion for the court to appoint a GAL to represent the interests of the parties' three children. The matter was set for hearing on November 17, 2009. On that date, the court prepared, and counsel for each party signed, a form entry appointing McCormick as the GAL for the children. The form entry indicates that, pursuant to Rule 15 of the local rules of the Franklin County Court of Common Pleas, Division of Domestic Relations ("Loc.R. 15") and it appearing to the court that the best interest of minors would be served and protected by making them parties to the action and appointing a GAL, the court appointed McCormick. The court identified the children by name, but did not check the boxes on the entry that would have designated them as parties. The entry ordered each party to deposit \$500 into a trust account for purposes of paying McCormick. Although the specific box was not checked, the entry states that the court could order additional sums, upon motion by the GAL.

{¶3} On March 24, 2010, McCormick filed a motion requesting an order of interim fees. Neither party filed an objection to McCormick's motion. On April 15, 2010, the court filed an order granting the fees and ordering an additional deposit by the parties.

{¶4} On April 20, 2010, appellant moved to set aside the April 15 order. Although appellant's motion was untimely, in an order dated August 12, 2010, the court remanded the matter to the magistrate for reconsideration and gave the parties an

opportunity to file objections to McCormick's motion for fees. Appellant filed objections on August 23.

{¶5} On September 1, 2010, the magistrate issued an order setting a hearing for October 21, 2010, and outlining the requirements for submitting "an affidavit in support of his and her position" on the motion filed by McCormick, who by this time had withdrawn as GAL. The magistrate ordered the affidavits to be filed by October 14, 2010, and stated that anyone who failed to meet that deadline would be deemed to have waived the opportunity to submit evidence. Appellant and McCormick each filed affidavits on October 14, 2010. Appellant filed a supplemental affidavit on October 21, 2010, just before the parties appeared before the magistrate for a hearing.

{¶6} On October 26, 2010, the magistrate issued a decision that addressed and rejected appellant's arguments. The magistrate refused to consider appellant's supplemental affidavit, but, in effect, considered the substance of all of appellant's objections to McCormick's motion. The magistrate granted McCormick's motion for fees and ordered appellant to pay \$540.97 as his contribution to those fees.

{¶7} Appellant objected to the magistrate's order. In a decision filed on January 13, 2011, the trial court denied appellant's objections, which the court interpreted as a motion to set aside the magistrate's order. The court affirmed and adopted the magistrate's order for appellant to pay \$540.97.

{¶8} Appellant filed a timely appeal, and he raises the following assignments of error:

[I.] The trial court abused its discretion in granting the GAL's motion for interim fees as the children were never made parties to the action divesting the court of jurisdiction over them, prohibiting the appointment of a GAL and further prohibiting the assessment of GAL fees as costs.

[II.] The trial court abused its discretion [in] granting the GAL's motion for interim fees prior to holding a hearing and making a determination as to whether the GAL's fees were reasonable and necessary.

[III.] The trial court abused its discretion [in] granting the GAL's motion for interim fees when the GAL did not perform the duties required under Civ.R. 74(B)(2) [sic], [Loc.R.] 15 and the Order appointing her as GAL.

{¶9} In his first assignment of error, appellant contends that the trial court erred by granting McCormick's motion for fees without first making the children parties to the case. Appellant did not raise this issue in his objections to the magistrate's decisions, nor at any other time before the trial court. Therefore, pursuant to Civ.R. 53(D)(3)(b)(iv), we will consider only whether the trial court committed plain error. *In re: J.M.B.*, 10th Dist. No. 06AP-1138, 2007-Ohio-3876, ¶13. In doing so, we recognize that we may apply plain error "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, syllabus. We discern no plain error here.

{¶10} Appellee moved for appointment of a GAL for the children, but she did not ask in that motion that they be made parties to the action. Although it is unclear from the November 17, 2009 entry whether the court intended to add the children as parties,

the entry did not do so, and we have found no indication that the children were ever served or otherwise made parties.

{¶11} In its entry, the trial court purported to act pursuant to Loc.R. 15(E), which authorizes the court to appoint a GAL upon motion of any party or upon its own motion, "[i]n order to superintend the best interest of minor children/incompetents in any action over which this court has jurisdiction." R.C. 3109.04(B)(2)(a) similarly allows the domestic court to appoint a GAL when allocating parental rights and responsibilities in a divorce proceeding. Neither Loc.R. 15(E) nor R.C. 3109.04(B) requires the court to join a child as a party prior to appointing a GAL to protect that child's interests.

{¶12} Nevertheless, appellant contends that Civ.R. 75(B) required the court to join the children as parties here in order to appoint a GAL and assess fees. Civ.R. 75(B)(2) provides that, "[w]hen it is essential to protect the interests of a child, the court may join the child of the parties as a party defendant and appoint a guardian ad litem and legal counsel, if necessary, for the child and tax the costs." The rule does not require the court to join a child as a party in order to appoint a GAL. *Wilburn v. Wilburn*, 169 Ohio App.3d 415, 2006-Ohio-5820, ¶15. Nor does appointment of a GAL for a child make that child a party. *Id.*; *Posey v. Posey*, 4th Dist. No. 07CA2968, 2008-Ohio-536, ¶22-23.

{¶13} The trial court had discretion to appoint a GAL and assess fees. By doing so, the court was not exercising jurisdiction over the children as parties, as appellant suggests. Rather, the court was protecting their interests, as Loc.R. 15(E) (in any

domestic proceeding) and R.C. 3109.04(B)(2)(a) (when allocating parental rights) allow. We overrule appellant's first assignment of error.

{¶14} In his second assignment of error, appellant contends that the trial court erred by granting McCormick's motion for fees without holding a hearing and making a determination that the requested fees were reasonable and necessary. We disagree.

{¶15} As an initial matter, we disagree with appellant's characterization of the trial court proceedings relating to McCormick's motion for fees. As noted, although appellant submitted an untimely objection to the magistrate's order granting fees, the trial court remanded the matter to the magistrate for reconsideration and gave each party the opportunity to file objections. In his objections, appellant stated that McCormick had withdrawn from the case, and he did not owe her anything. He also made the following specific complaints: (1) McCormick should not have appeared at the hearing regarding appellee's request for a civil protection order ("CPO") against him; (2) she should not have charged for time spent reviewing the appeal concerning the CPO issued against him; and (3) she should have requested additional records. McCormick addressed these issues in her memorandum contra, specifically stating her disagreement with appellant's contention that her presence at the CPO hearing was unnecessary.

{¶16} The magistrate heard arguments on October 21, 2010. In the decision filed October 26, the magistrate gave detailed responses to the substance of appellant's arguments.

{¶17} After filing objections to the magistrate's order, appellant appeared before the trial judge and submitted evidence. Following "a thorough review of the evidence presented to the Magistrate and the arguments of the parties," the trial court agreed with the magistrate's order. In particular, the court expressed its disagreement with appellant's contention that McCormick's attendance at certain hearings was improper.

{¶18} Although appellant assigns as error the court's failure to hold a hearing, the record clearly indicates that the trial court did hold a hearing, at which the court took evidence and heard arguments. Appellant submitted numerous objections, all of which were considered by the magistrate and trial judge, even when they were untimely. While the trial court's decision did not state explicitly that McCormick's fees were reasonable and necessary, the trial court obviously held so when it rejected appellant's contentions that the fees were unreasonable and unnecessary and then approved them. Accordingly, we overrule appellant's second assignment of error.

{¶19} In his third assignment of error, appellant contends that the trial court erred by granting McCormick's fees because she did not fulfill her responsibilities as a GAL. A trial court has broad discretion to assess and allocate GAL fees. *Padgett v. Padgett*, 10th Dist. No. 08AP-269, 2008-Ohio-6815, ¶36. We will not reverse a trial court's decision as to GAL fees unless the trial court has abused that discretion. *Id.*

{¶20} Before addressing each of appellant's arguments regarding the GAL's performance, we note the absence of a transcript of the hearing before the trial court on appellant's objections to the magistrate's order. In its decision, the court stated that neither party requested that a record be made of the proceeding, and our record

contains no transcript. The court attached to its decision the exhibits offered by appellant and McCormick.

{¶21} On appeal, appellant contends, first, that McCormick failed to comply with Loc.R. 15(G)(2), which requires a GAL to "maintain independence, objectivity and fairness as well as the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom." Appellant appears to suggest that McCormick demonstrated her bias, in part, by appearing at the proceedings relating to appellee's request for a CPO against appellant. At the October 21, 2010 hearing before the magistrate, McCormick defended her presence at those proceedings. Specifically, she noted that R.C. 3109.04 requires the court, in determining the best interest of a child subject to a parenting order, to determine whether either parent has committed domestic violence. We agree with the trial court that McCormick's presence at proceedings, as well as her awareness of any issues on appeal, relating to a CPO against appellant was proper.

{¶22} Appellant also contends that McCormick's billing for attendance and participation in a February 25, 2010 hearing was biased and improper. That hearing concerned appellee's motion for an order finding appellant in contempt for non-payment of household expenses, including the mortgage. McCormick appeared at the hearing. She stated that, although she does not normally participate in the parties' financial activities, she believed it was in the children's best interest that they remain in appellee's home. To that end, she asked appellant questions to determine if he had paid the mortgage or utility bills for that home. Before the hearing concluded, the

parties reached a settlement, which McCormick signed, and the contempt motion was dismissed. We conclude that McCormick's participation in the February 2010 contempt hearing was proper.

{¶23} Second, appellant contends that McCormick failed to comply with Loc.R. 15(G)(12)(g), which requires a GAL to "[i]nterview school personnel, medical and mental health providers, child protective services workers and relevant court personnel and obtain copies of relevant records." Specifically, appellant argues that McCormick improperly refused to interview the children's physicians and school officials and failed to obtain and review hospital records concerning an investigation into claims that appellant abused or neglected the children. Appellant acknowledges, however, that McCormick appeared and produced records regarding the investigation and a subsequent hearing. Appellant appears to suggest that McCormick should have attended and participated in the proceedings regarding the abuse investigation, rather than attending and participating in other proceedings. We have already determined that McCormick's presence at the other proceedings was proper, and we discern no prejudice to appellant from McCormick's decision not to personally attend the proceedings relating to the investigation of abuse. As appellant notes, following review of the records and interviews with the children, the trial court concluded that the allegations of abuse were not substantiated and implemented a shared parenting plan.

{¶24} Finally, appellant contends that McCormick failed to comply with Loc.R. 15(I)(1), which requires a GAL to submit a final report no less than seven days before the final hearing. McCormick withdrew as GAL on May 20, 2010, several months before

the final hearing, which occurred on September 28, 2010. The trial court did not abuse its discretion in granting fees under these circumstances.

{¶25} For all these reasons, we conclude that the trial court did not abuse its discretion by ordering appellant to pay half of the GAL's fees. We overrule appellant's third assignment of error.

{¶26} In summary, we overrule appellant's first, second, and third assignments of error. Accordingly, we affirm the decision of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
