[Cite as *Halliday v. Halliday*, 2009-Ohio-5380.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92748

NATALIE PRODAN HALLIDAY

PLAINTIFF-APPELLEE

vs.

BRIAN HALLIDAY

DEFENDANT-APPELLEE

CHERYL A. LUKACS, ESQ.

APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-291466

BEFORE: Gallagher, P.J., Rocco, J., and Jones, J.

RELEASED: October 8, 2009

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), is filed within ten (10) 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. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant, Cheryl A. Lukacs, Esq., appeals the judgment entry regarding guardian ad litem fees issued on January 5, 2009, by the Cuyahoga County Court of Common Pleas, Division of Domestic Relations. For the reasons stated herein, we reverse the decision of the trial court and remand the matter for further proceedings.

{¶ 2} This matter arises from a divorce action between Natalie Prodan Halliday and Brian Halliday. Appellant was appointed guardian ad litem ("GAL") and counsel for the parties' minor child.

{¶ 3} During the course of the divorce proceedings, appellant filed a motion for guardian ad litem fees, as well as supplemental motions. On or about August 6, 2008, the trial court issued a decision on divorce and pending motions in which the court addressed the guardian ad litem's motions. The trial court recognized that certain bonds had been posted and that the court had ordered funds released to the guardian ad litem upon the filed motions. The court indicated that it was continuing the second supplemental motion for guardian ad litem fees "as hereinafter set forth."

{¶ 4} The trial court found that the total guardian ad litem fees were $57,897, that $12,300 had been paid, and that there was a balance of $45,597. The court determined that, although the fee was extraordinary, it was reasonable and necessary to protect the child's best interest. The court discussed methods and considerations for allocating the guardian ad litem fees between the parties. The court concluded as follows: "the court will

reserve jurisdiction to award guardian ad litem fees based on all of the above, and including the parties' incomes for establishment of child support, at a subsequent hearing. However, until the matter is finalized, the court orders Brian Halliday to pay the guardian ad litem $20,000.00 as partial payment of guardian ad litem fees no later October 1, 2008." The court then dismissed Cheryl Lukacs as a party to the proceeding. The court later appointed a successor guardian ad litem.

{¶ 5} On September 12, 2008, the trial court issued a final judgment of divorce that incorporated the above order.[1] The trial court issued a nunc pro tunc order that indicated the incorporated orders were final orders of the court and that included "no just reason for delay" language.

{¶ 6} On September 23, 2008, Natalie Prodan Halliday appealed the final judgment of divorce. On November 12, 2008, the trial court issued a child support order.

{¶ 7} The trial court scheduled a hearing for December 5, 2008, on several pending motions, but the docket entry did not reference any motion pertaining to guardian ad litem fees. Appellant, who had been dismissed from the action, states she did not receive notice of the hearing.

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[1] The final judgment of divorce incorporates various exhibits, including "Exhibit E," which is the decision signed by the court on August 1, 2008. Because the order was filed on August 6, 2008, we refer to the order as the court's August 6, 2008 order.

{¶ 8} The trial court proceeded with the hearing on December 5, 2008. At the hearing, the trial court considered whether to allocate the guardian ad litem fees. On January 5, 2009, the trial court issued a "judgment entry regarding guardian ad litem fees." The trial court found that neither party would be required to pay any further guardian ad litem fees to appellant. The court determined as follows: "The court finds it would be unfair and unjust to impose additional guardian ad litem fees upon the parties. As of the present time, the former guardian ad litem, Cheryl Lukacs, has received $32,300.00 in such fees. While this amount is not the full amount of her billings, it represents a fair and just award considering all factors in this case, including the fact that the parties are unable to pay any additional fees, that the Court found it necessary to terminate her services and appoint a successor guardian ad litem, and the fact that she did not appear for the hearing on December 5, 2008, although given notice thereof."

{¶ 9} Appellant filed this appeal from the above ruling. She raises four assignments of error for our review. Her first assignment of error provides as follows: "1. The trial court abused its discretion when it held a hearing on a matter previously fully litigated and decided and as such res judicata."

{¶ 10} Appellant argues that she was successful in her prosecution of her motion for guardian ad litem fees, that her claims were actually and necessarily litigated and determined and merged into the final judgment of

divorce, and that the award of fees is res judicata. She states that only the issue of apportionment of the fees, which was a monetary issue related to child support, was reserved by the trial court and that the trial court abused its discretion when it allowed relitigation of the award.

{¶ 11} Brian Halliday argues that the court's August 6, 2008 order did not resolve the issue of the amount and the allocation of the guardian ad litem fees. Therefore, he claims the fact that the decision was incorporated into the September 12, 2008 final judgment of divorce does not create any basis for the application of the principles of res judicata.

{¶ 12} Loc.R. 35(E) of the Cuyahoga County Court of Common Pleas, Domestic Relations Division, provides for the payment of guardian ad litem fees. The rule mandates as follows: "Guardians ad litem shall be compensated at the rate of $125.00 per hour for all reasonable and necessary time expended. * * * Upon motion for guardian ad litem fees, the court shall conduct a hearing to determine if the fee sought by the guardian ad litem is reasonable and necessary and to determine the amount each party shall contribute toward the fee." Dom.Rel.Loc.R. 35(E).

{¶ 13} In this case, the trial court conducted a hearing and determined that the guardian ad litem fees, totaling $57,897, were reasonable and necessary. After discussing methods for allocating fees, the trial court indicated that it was reserving jurisdiction to award guardian ad litem fees.

The trial court's August 6, 2008 order was incorporated into the final entry of divorce.

{¶ 14} We recognize that the trial court purported to make the final judgment of divorce, and the orders incorporated therein, a final appealable order and included "no just reason for delay" language. However, the trial court erred in its application of law.

{¶ 15} Because issues regarding child support and the allocation of the guardian ad litem fees remained undecided, the trial court's September 12, 2008 final entry of divorce and the orders incorporated therein were not final and appealable.

{¶ 16} When an action includes multiple claims, Civ.R. 54(B) permits a trial court to enter final judgment as to fewer than all the claims. However, a divorce action entails a single claim, and a divorce decree that fails to resolve all issues ancillary to the divorce is not a final appealable order. *Jordan v. Jordan* (Nov. 15, 1990), Athens App. No. CA 1427; see, also, *In re Marriage of Leopondo* (Ill.1983), 449 N.E.2d 137; *Gould v. Rafaeli* (Mo.App.E.D.1990), 804 S.W.2d 758, 759. Even an express determination by the trial court of no just reason for delay pursuant to Civ.R. 54(B) does not render the entry final and appealable. *Jordan*, supra.

{¶ 17} With regard to judgments in cases of divorce, dissolution, annulment, and legal separation, Civ.R. 75(F) states as follows:

“For purposes of Civ.R. 54(B), the court shall not enter final judgment as to a claim for divorce, dissolution of marriage, annulment, or legal separation unless one of the following applies:

“(1) The judgment also divides the property of the parties, determines the appropriateness of an order of spousal support, and, where applicable, either allocates parental rights and responsibilities, including payment of child support, between the parties or orders shared parenting of minor children;

“(2) Issues of property division, spousal support, and allocation of parental rights and responsibilities or shared parenting have been finally determined in orders, previously entered by the court, that are incorporated into the judgment;

“(3) The court includes in the judgment the express determination required by Civ.R. 54(B) and a final determination that either of the following applies:

“(a) The court lacks jurisdiction to determine such issues;

“(b) In a legal separation action, the division of the property of the parties would be inappropriate at that time.”

{¶ 18} The Ohio Supreme Court has recognized that “in the context of a divorce proceeding, Civ.R. 75(F) prohibits a trial court from entering a final judgment unless (1) the judgment divides the parties’ property, determines the appropriateness of an order of spousal support, and allocates parental rights and responsibilities, including the payment of child support, or (2) the judgment states that there is no just reason for delay and that the court lacks jurisdiction to determine any issues that remain.” *Wilson v. Wilson,* 116

Ohio St.3d 268, 271, 2007-Ohio-6056, 878 N.E.2d 16. A motion for guardian ad litem fees is ancillary to ongoing proceedings regarding custody, support, and contempt. *Jackson v. Herron*, Lake App. No. 2004-L-045, 2005-Ohio-4039.

{¶ 19} In this case, because the trial court reserved ancillary issues for determination, including the issue of child support as well as the allocation of guardian ad litem fees, the September 12, 2008 decision was not a final judgment. Therefore, we conclude that the trial court's judgment entry of divorce did not fully determine the divorce proceeding and is not a final order to which principles of res judicata may be applied herein. Appellant's first assignment of error is overruled.

{¶ 20} Appellant's second assignment of error provides as follows:

{¶ 21} "2. The trial court abused its discretion when it failed to provide notice of hearing."

{¶ 22} Appellant argues that she was dismissed from the matter on August 6, 2008, and as a result, she was not sent notice of the December 5, 2008 hearing at which the trial court considered her award of guardian ad litem fees. Additionally, the docket reflects that several motions filed by Brian Halliday were scheduled to be heard at this hearing; however, no reference is made to the guardian ad litem's motion for fees.

{¶ 23} "In evaluating an order for compensation to a guardian ad litem, a reviewing court shall consider whether the trial court abused its discretion."

Davis v. Davis (1988), 55 Ohio App.3d 196, 200, 563 N.E.2d 320. Dom.Rel.Loc. R. 35(E) requires the court to conduct a hearing upon motion for guardian ad litem fees. The trial court is required to provide an opportunity for parties to be heard on motions pending before the court, including motions relating to the payment of fees. *Rendina v. Rendina* (Feb. 28, 1992), Lake App. No. 91-L-019. "Due process mandates that a party shall have adequate notice of a proposed action as well as an opportunity to be heard. The within judgment was rendered without an opportunity to be heard and essentially without notice." Id.

{¶ 24} In this matter, it appears that appellant was aware of the December 5, 2008 hearing and that the apportionment of the guardian ad litem fees might be considered. However, there is nothing in the record to demonstrate that appellant was provided adequate notice of the full nature of the hearing, at which the trial court determined neither party would be required to pay any further guardian ad litem fees to her. Further, as reaffirmed by the trial court on September 29, 2008, appellant was discharged as a party to the proceeding for all purposes. Under these circumstances, we find appellant was denied due process.

{¶ 25} We find the court abused its discretion when it considered the award of guardian ad litem fees without providing notice and an opportunity to be heard to appellant. We reiterate that Dom.Rel.Loc.R. 35(E) mandates

that the guardian ad litem be compensated "for all reasonable and necessary time expended" and that the court must determine "the amount each party shall contribute toward the fee."

{¶ 26} We sustain appellant's second assignment of error, reverse the judgment entry regarding guardian ad litem fees, and remand the case to the domestic relations court for the purpose of holding a hearing that affords appellant proper due process.

{¶ 27} Appellant's third assignment of error provides as follows:

{¶ 28} "3. The trial court abused its discretion when it failed to provide notice of Civil Rule 41 dismissal."

{¶ 29} The transcript of the December 5, 2008 hearing reflects that Natalie Prodan Halliday made an oral motion to dismiss for want of prosecution appellant's motion for guardian ad litem fees. The trial court granted the motion and directed counsel for Brian Halliday to prepare a judgment entry that cited Civil Rule 41. The judgment entry issued by the trial court does not reflect a dismissal of the motion for failure to prosecute. It is well established that "a court speaks exclusively through its journal entries." *In re Guardianship of Hollins*, 114 Ohio St.3d 434, 439, 2007-Ohio-4555, 872 N.E.2d 1214.

{¶ 30} Regardless, having already determined that appellant was not afforded proper due process and that the judgment entry regarding guardian ad litem fees must be reversed, this assignment of error is moot.

{¶ 31} Appellant's fourth assignment of error provides as follows:

{¶ 32} "4. The trial court erred as a matter of law when it conducted a hearing on a matter fully litigated currently the subject of appeal."

{¶ 33} Appellant argues that Natalie Prodan Halliday filed an appeal from the final judgment of divorce and that the December 5, 2008 hearing was held while the appeal was pending. Appellant claims the trial court abused its discretion when it held a hearing on a matter within the jurisdiction of the appellate court.

{¶ 34} Because we have found that the judgment entry of divorce was not a final appealable order, we find no merit to this assignment of error.

Judgment reversed, case remanded.

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

{¶ 35} 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, PRESIDING JUDGE

KENNETH A. ROCCO, J., CONCURS;
LARRY A. JONES, J., DISSENTS (WITH SEPARATE OPINION)

LARRY A. JONES, J., DISSENTING:

{¶ 36} I respectfully dissent from my learned colleagues in the majority. I believe there is substantial evidence in the record to support the trial court's decision. I believe the trial court's actions were proper and should be affirmed.

{¶ 37} In reviewing the trial court's decision under the abuse of discretion standard, "a presumption of validity attends the trial court's action." *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313, at the syllabus. "Abuse of discretion" connotes more than mere error; it implies that the court's action was unreasonable, arbitrary, or unconscionable. E.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Thus, it is the burden of the appellant to demonstrate that the trial court's decision was unreasonable, arbitrary, or unconscionable. I believe the evidence demonstrates that appellant did not meet that burden.

{¶ 38} The G.A.L. claims that she did not receive notice of the December 5, 2008 hearing. However, the transcript of the hearing reveals otherwise.[2] Moreover, any alleged lack of notice is irrelevant because the court had no obligation to conduct a hearing to determine if the G.A.L. was going to be awarded any more fees. As the G.A.L. herself said in her brief, having "prosecuted" her motion for fees, "nothing further from her was needed or allowable."[3] Therefore, there was no need for her to be present at that hearing.

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[2]Tr. 4-5.

[3]See appellant's brief at p. 9.

{¶ 39} Furthermore, there is *no indication* that if the G.A.L. had received notice of the December 5, 2008 hearing and argued in favor of more fees, the court would have awarded her any more money. As the court said in its entry, "[w]hile [$32,000.00] is not the full amount of billings, it represents a fair and just award considering all factors in this case, including the fact that the parties are unable to pay any additional fees, that the court found it necessary to terminate her services and appoint a successor guardian ad litem."

{¶ 40} In addition, the trial court indicated that a further consideration was the Hallidays' financial ability to afford extensive litigation. Also, the trial court indicated that while it considered the foregoing factors "fair consideration in allocating the [G.A.L.] fees between the parties," it decided to:

> **"reserve jurisdiction to award [G.A.L.] fees based on all of the above, and including the parties' incomes for establishment of child support at a subsequent hearing."**[4]

{¶ 41} Notably, in the same decision, the court discharged appellant as both G.A.L. and as counsel for the child.

{¶ 42} The trial court had no obligation to conduct a hearing to determine if the original G.A.L. was going to be awarded any more fees. Therefore, there was no abuse of discretion on the part of the lower court regarding any alleged failure to provide notice of hearing. Furthermore, any alleged error on the part of lower court regarding a lack of notice to the first G.A.L. would have only been harmless error. The trial court already indicated that it believed the amount of

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[4]See September 12, 2008 Judgment Entry at p. 16.

fees awarded to be a fair and just award. The lower court's actions were not unreasonable, arbitrary, or unconscionable.

{¶ 43} Accordingly, I would affirm the lower court.