[Cite as *In re Adoption of C.L.W.*, 2007-Ohio-3971.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN THE MATTER OF THE ADOPTION OF C.L.W.	:	**O P I N I O N**
	:	**CASE NO. 2007-T-0046**
	:	
	:	
	:	

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 2006 ADP 0090.

Judgment: Reversed and remanded.

Michael A. Scala, 244 Seneca Avenue, N.E., P.O. Box 4306, Warren, OH 44482 (For Adoptive Father, John Waggoner and Mildred Waggoner, Adoptive Mother, Appellants).

Craig H. Neuman, Trumbull County Children Services Board, 2282 Reeves Road, N.E., Warren, OH 44483 (For Trumbull County Children Services Board, Appellee).

A. Joseph Fritz, 135 Pine Avenue, S.E., #212, Warren, OH 44481 (Guardian ad litem).

MARY JANE TRAPP, J.

{¶1} Appellants, John and Mildred Waggoner ("Mr. and Mrs. Waggoner"), appeal the Trumbull County Probate Court's March 7, 2007 dismissal of their adoption petition. For the reasons that follow, we reverse and remand.

{¶2} **Procedural History**

{¶3} On December 20, 2006, Mr. and Mrs. Waggoner filed a petition for adoption of a minor, "C.L.W.", who was born on September 25, 1992. C.L.W. had been living with Mr. and Mrs. Waggoner in a foster care placement. C.L.W.'s birth parents had consented to the permanent surrender of C.L.W. and her five siblings. In July 2005, the court terminated their parental rights with respect to C.L.W. and four of her siblings. Then, in September 2006, the court terminated their parental rights with respect to the youngest child. Appellee, the Trumbull County Children Services Board ("TCCSB"), was awarded permanent custody of the children, including C.L.W.

{¶4} TCCSB filed a motion to intervene in the present action. In its answer, TCCSB alleged that it had made a plan for adoption for the children with another family who was willing to adopt all of the children and that it was in their best interests that they all be adopted by one family. TCCSB further alleged that C.L.W.'s siblings had been living with the new family for more than six months and that C.L.W. was unduly persuaded by Mr. and Mrs. Waggoner to continue to reside with them rather than the new family. TCCSB stated that it would not consent to the adoption of C.L.W. by Mr. and Mrs. Waggoner.

{¶5} Mr. and Mrs. Waggoner filed motions for the court to appoint a guardian ad litem ("GAL") and an independent assessor and asked the court to proceed without the consent of TCCSB because it had acted unreasonably, arbitrarily, and capriciously in opposing their petition for adoption. The court granted the request for a GAL but denied the request for an independent assessor.

{¶6} On February 12, 2007, a "hearing" was held on the motion to intervene, but the record was not transcribed and this is not a part of the record on appeal. In an order dated February 15, 2007, the court granted TCCSB's motion to intervene and noted in its order that the TCCSB is an essential party since it is the legal custodian of C.L.W. and is "mandated by law to seek a permanent planned living arrangement for the child which would include adoption." On the same date, in a separate order, the court ordered, inter alia, counsel to submit briefs on the issue of the need for an adoptive placement and its impact on standing as a party. Attorney Steven A. Turner, counsel for Mr. and Mrs. Waggoner, was to file their brief by February 26, 2007, and counsel for TCCSB was to file its brief by March 5, 2007. A hearing on the legal issue was set for March 14, 2007.

{¶7} On February 26, 2007, the date Mr. and Mrs. Waggoner's brief was due, their counsel filed a motion to withdraw. In the motion, counsel asked the court for an extension of thirty days for Mr. and Mrs. Waggoner to secure new counsel and to file their brief. In a judgment entry dated March 7, 2007, the court denied the request for additional time to secure counsel and to file the brief and dismissed Mr. and Mrs. Waggoner's petition for adoption.

{¶8} Mr. and Mrs. Waggoner filed the instant expedited appeal pursuant to App.R. 11.2, raising one assignment of error:

{¶9} "The Trial Court erred, to the detriment of Appellants by dismissing their Petition for Adoption without a hearing and on the pleadings only."

{¶10} **Standard of Review**

{¶11} In this case, the probate court denied counsel's request for a continuance and dismissed the case. A trial court's decision of whether to grant or deny a continuance is reviewed under an abuse of discretion standard. *DePizzo v. Stabile*, 11th Dist. No. 2006-T-0027, 2006-Ohio-6102, ¶7; *Planin v. Planin,* 11th Dist. No. 2005-G-2644, 2006-Ohio-2933, at ¶13, citing *State v. Unger* (1981), 67 Ohio St. 2d 65, paragraph one of the syllabus and *State ex rel. Buck v. McCabe* (1942), 140 Ohio St. 535, paragraph one of the syllabus. Abuse of discretion "'connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court.'" *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 47, citing *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 91.

{¶12} "[A]n appellate court will not interfere with the exercise of this discretion unless the action of the court is plainly erroneous and constitutes a clear abuse of discretion." *Dipizzo,* at ¶7, citing *Buck* at 538. (Citation omitted.) "In many situations, a court will have acted within its discretion whether it granted or denied the continuance. 'When applying the abuse of discretion standard [in these situations], a reviewing court is *not* free to merely substitute its judgment for that of the trial court.'" Id. citing *Fontanella v. Ambrosio*, 11th Dist. No. 2001-T-0033, 2002-Ohio-3144, at ¶17. (Emphasis sic.) (Citation omitted.) Rather, the court must look at the underlying circumstances present in the particular case and in the reasons presented to the trial court when deciding whether to grant or deny a continuance since "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." *Dipizzo* at ¶8.

{¶13} With respect to the trial court's decision to sua sponte dismiss the case for failure to comply with a court order, we also apply an abuse of discretion standard of review. *Quonset Hut* at 47. With these principles in mind, we turn to the arguments presented and the circumstances underlying the dismissal.

{¶14} **Notice of Involuntary Dismissal**

{¶15} The facts in this matter are not in dispute. Specifically, the trial court ordered each side to file a brief upon the issue of "the need for an adoptive placement and its impact on standing as a party ***." The court gave Mr. and Mrs. Waggoner approximately two weeks to file their brief and opposing counsel one week after that to respond. On the date the brief was due, the Waggoners' counsel filed a motion requesting for leave to withdraw and asked for an additional thirty days to allow successor counsel to file the brief. There had been no other request for extensions. The trial court had before it only a complaint or petition for adoption, a request for waiver of consent both filed by Mr. and Mrs. Waggoner, and an answer and request to intervene on behalf of appellee. From the record before us, while there was no evidence presented by either party, no motion for judgment on the pleadings or request for summary judgment pending, it appears that the trial court sua sponte made factual and legal findings in its order which essentially dismissed the complaint with prejudice, apparently under Civ.R. 41(B)(1).

{¶16} Civ.R. 41(B)(1) provides that "[w]here the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim."

{¶17} Inherent within a Civ.R. 41(B)(1) dismissal is the necessity that plaintiff's counsel receive notice of the impending dismissal. "By its own terms, Civ.R. 41(B)(1) provides that the dismissal may take place only after notice to plaintiff's counsel. *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, wherein the court held that '*** the purpose of this notice requirement is to give a party an opportunity to obey the order *** [n]ot only does this holding embrace the spirit of Civ.R. 41(B)(1), but it also reflects a basic tenet of Ohio jurisprudence that cases should be decided on their merits." *Santill v. General Electric Co.* (Feb. 23, 1990), 11th Dist. Nos. 88-A-1388, 89-A-1432, at 5-6. (Citations omitted.) Thus, the purpose of requiring prior notice is to "'provide the party in default an opportunity to explain the default or to correct it, or to explain why the case should not be dismissed with prejudice.'" *Logsdon v. Nichols* (1995), 72 Ohio St.3d 124, 128, quoting McCormack, Ohio Civil Rules Practice (2 Ed. 1992), 357. In order to satisfy due process and be deemed sufficient, the notice must afford "the party who is in jeopardy of having his or her action or claim dismissed one last chance to comply with the order or to explain the default." *Sazima v. Chalko* (1999), 86 Ohio St.3d 151, 155. As this court has stated previously, the "notice requirement is absolute and is intended to allow the party a reasonable opportunity to defend against the dismissal." *Gordon Food Service, Inc. v. Bystry,* 11th Dist. No. 2002-L-018, 2002-Ohio-4957, at ¶12.

{¶18} In *Quonset Hut,* at the syllabus, the court held that the notice requirement of Civ.R. 41(B)(1) is satisfied "when counsel has been informed that dismissal is a possibility and has had a reasonable opportunity to defend against dismissal." Therefore, "the notice required by Civ.R. 41(B)(1) need not be actual but may be implied

when reasonable under the circumstances." Id. (Citation omitted.) "As long as the party has been informed that dismissal of the action or claim is a possibility and has a reasonable opportunity to defend against the dismissal, then a court does not abuse its discretion. *** An opposing party's motion to dismiss is sufficient to constitute implied notice." *Coleman v. Cleve. School Dist. Bd. of Edn.,* 8th Dist. Nos. 81674, 81811, 2003-Ohio-880, at ¶10. (Citations omitted.) As is relevant to this matter, the *Quonset Hut* court found that the fact that the defendant had filed a motion requesting the court to dismiss plaintiff's claim with prejudice constituted sufficient implied notice for purposes of Civ.R. 41(B)(1).

{¶19} In this case TCCSB never moved the court to dismiss the case for failure to prosecute. The only "request" for dismissal was made in its prayer for relief in its answer, which is found in virtually all pleadings. In this respect, the instant case is factually distinguishable from *Quonset Hut,* where defense counsel filed a separate motion seeking an order of contempt along with sanctions, including the sanction of dismissal with prejudice under Civ.R. 37.

{¶20} Because Mr. and Mrs. Waggoner were never notified, either expressly or impliedly, of the possibility that their case would be dismissed with prejudice. Rather, the trial court sua sponte dismissed the case without providing Mr. and Mrs. Waggoner the opportunity to have additional time to secure new counsel in order to present their position as to why they believed they had standing in the matter or to explain to the court why dismissal was improper. Here, a routine notice to withdraw was filed by the

Waggoners' counsel. The court, in this instance, employed a draconian remedy not authorized under any applicable rule.

{¶21} Although the decision to dismiss a case pursuant to Civ.R. 41(B)(1) is within the sound discretion of the trial court (*Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 371; *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 91) in deciding whether a sua sponte dismissal is appropriate, a trial court must be mindful of the fact that "[d]ismissal of a plaintiff's complaint is a harsh sanction and should not be done casually." *Boccia v. Boccia,* 11th Dist. No. 2005-T-0025, 2006-Ohio-2384, at ¶22. A sua sponte dismissal has been upheld when "'the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order.'" *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 632, quoting *Schreiner v. Karson* (1977), 52 Ohio App.2d 219, 223. However, there is no evidence in this case showing that Mr. and Mrs. Waggoner's counsel displayed such egregious conduct warranting a sua sponte dismissal.

{¶22} While we appreciate the importance, as well as the pressure, placed upon the trial bench in the need to expedite cases dealing with the adoption of children, we are unwilling to justify a trial court's decision to circumvent basic procedural rules at the expense of depriving a party of his or her right to due process. Had the trial court followed the tenets of the applicable rules, this matter would most likely have been completed by this juncture. However, the trial court has inadvertently elongated and delayed this child's inevitable adoption due to this appeal. Based on the record, and

given the fact that the hearing was not transcribed, there is no indication of contempt or willful disregard for the court's order to file the briefs. In conclusion, we find that by dismissing the case sua sponte without providing notice to counsel, the trial court disregarded the rules and abused its discretion, and, in so doing, may have caused the very result it sought to avoid.

{¶23} Appellant's assignment of error has merit.

{¶24} The judgment of the Trumbull County Court of Common Pleas, Probate Division, is reversed and this case is remanded for further proceedings.

COLLEEN M. O'TOOLE, J., concurs.

DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

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{¶25} The majority reverses the probate court's decision, dismissing the Waggoners' petition to adopt C.L.W, on the grounds that the probate court "disregarded the rules and abused its discretion" by failing to provide notice to counsel. Since the record does not support this position, I respectfully dissent.

{¶26} The majority properly notes the dismissal requirement of Civ.R. 41(B)(1) is satisfied "when counsel has been informed that dismissal is a possibility and has had a

reasonable opportunity to defend against dismissal." *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, at syllabus. For example, in *Gordon Food Serv., Inc. v. Bystry*, 11th Dist. 2002-L-018, 2002-Ohio-4957, this court reversed a dismissal of a claim for attorney fees, despite the fact that the party seeking attorney fees did not attend a hearing on the issue. We found the sanction "too harsh" because there had been ***no prior notice*** of possible dismissal and because the party seeking attorney fees "had submitted evidence on the issue prior to the hearing." Id. at ¶13.

{¶27} In *Quonset Hut*, in contrast, the Supreme Court found such notice existed where opposing counsel had requested the trial court to dismiss the claim with prejudice. 80 Ohio St.3d at 48.

{¶28} In the present case, Trumbull County Children Services Board requested the dismissal of the Waggoners' adoption petition as part of its Answer to the petition and concurrently with its Motion to Intervene. Accordingly, the Waggoners were on notice their petition was subject to dismissal.

{¶29} On February 12, 2007, a hearing was held before the probate court on "various motions." The court ordered the Waggoners' counsel to "prepare and submit briefs on the issue of the need for adoptive placement and its impact on standing as a party" by February 26, 2007, a period of about two weeks. At this point, the Waggoners are on notice that their petition is subject to dismissal and the reasons therefore.

{¶30} On February 26, 2007, the date the brief is due, counsel for the Waggoners filed a Motion for Leave to Withdraw as Counsel and sought an additional

thirty days for the Waggoners to obtain new counsel and file their brief. Counsel also noted the present motion was filed at the request of the Waggoners.

{¶31} In these circumstances, there is no abuse of discretion in denying the Waggoners' request and dismissing the petition. As noted above, the Waggoners were on notice that their petition was subject to dismissal. Unlike the appellants in *Bystry*, the Waggoners failed to submit any argument or evidence on the issue of their standing to adopt.

{¶32} Other considerations also support the decision to dismiss. The majority notes the paucity of the record before us and observes that "it appears that the trial court sua sponte made factual and legal findings in its order." However, the Waggoners failed to provide a transcript of the February 12 hearing for this court to consider.

{¶33} "[I]t is the duty of the appellant to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review." *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19. In the absence of such a record, "[a]n appellate court reviewing a lower court's judgment indulges in a presumption of regularity of the proceedings below." *Hartt v. Munobe*, 67 Ohio St.3d 3, 7, 1993-Ohio-177 (party may not claim that it never consented to having a referee preside at trial without filing a transcript of the proceedings in which such consent may have been given); *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶34} In the absence of a complete record before us, it is improper to speculate as to what transpired at the hearing and what evidence may or may not have been

presented. It is obvious that the grounds for dismissing the Waggoners' petition were discussed at this hearing, given the fact the probate court established a briefing schedule on the Waggoners' standing to petition for adoption. Without knowing what was argued or established at the February 12 hearing, it is improper to reverse the probate court's decision as arbitrary.

{¶35} Finally, in its decision dismissing the petition, the probate court properly emphasized the need to expedite resolution of adoption/custody cases as "[d]elays only hurt the child *** in that she is left in a 'state of limbo' as to having a true family."[1] The Waggoners waited until the last day for filing their brief before having counsel seek leave to withdraw and thirty additional days to file their brief, a period of time twice as long as that originally allowed by the probate court.

{¶36} These proceedings have been further delayed by the Waggoners' actions. The Waggoners filed their petition for adoption without notifying Trumbull Children Services and with knowledge that Trumbull Children Services is both C.L.W.'s legal custodian and had found an adoptive home for C.L.W. and her five siblings. Thus, there was an initial delay until Trumbull Children Services learned of this proceeding and could seek leave to intervene.

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1. Ohio's adoption laws and the expedited appeal process were designed to promote permanency and to alleviate the pervasive problem of children languishing in the foster care system. See *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, at ¶18 ("Allowing children to languish in foster care rather than establishing permanent homes for them has become so pervasive that a term has been coined to describe it: 'foster care drift.' 'Drift occurs when children in placement lose contact with their natural parents and fail to form any significant relationship with a parental substitute. *** In response to foster care drift, legislatures at both the national and state levels enacted new laws designed to shorten the length of time children spend in foster care and find permanent homes for foster children more quickly."

{¶37} The probate court is entitled to consider the reasonableness of a party's conduct before it when exercising its discretion to deny a continuance and dismiss an action.

{¶38} For the foregoing reasons, the probate court acted within the limits of the law and its discretion by dismissing the Waggoners' petition. That decision should be affirmed.