[Cite as *Wright v. Wright*, 2003-Ohio-7319.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

RACHEL D. WRIGHT,	:	
Plaintiff-Appellee,	:	Case No. 03CA12
vs.	:	
JOHN F. WRIGHT,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Patricia S. Sanders, Lambert, McWhorter & Bowling, P.O. Box 725, Ironton, Ohio 45638

COUNSEL FOR APPELLEE: Brenda K. Neville, 220 Fourth Street, Chesapeake, Ohio 45619

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-22-03

ABELE, J.

{¶1} This is an appeal from a Lawrence County Common Pleas Court judgment that granted a divorce to Rachel D. Wright, plaintiff below and appellee herein, and to John F. Wright, defendant below and appellant herein. The following errors are assigned for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY ADOPTING THE MAGISTRATE'S DEICISIONS [sic] GIVEN THAT THE APPELLANT-DEFENDANT HAD REQUESTED A CONTINUANCE IN ORDER TO OBTAIN REPRESENTATION."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO ADOPT THE PARTIES' IN COURT AGREEMENT AND BY FAILING TO ESTABLISH AN EQUITABLE DIVISION OF THE PARTIES' ASSETS."

{¶2} The parties married on September 6, 1992, and two children were born as issue of that marriage, Alexis N. Wright (d/o/b/ 3-31-94) and Jonathan S. Wright (d/o/b 3-20-98). On October 10, 2001, appellee commenced the instant action and asked for a divorce on the grounds of incompatibility, gross neglect of duty and extreme cruelty. She also sought custody of the minor children, child support and settlement of property rights.

{¶3} Appellant admitted that the parties were incompatible, but denied the other assertions. Appellant also counterclaimed for divorce on grounds of incompatibility, and asked for custody of their children as well as an equitable division of marital assets.

{¶4} The various issues in this proceeding were bifurcated and, on August 21, 2002, the court granted appellee a divorce on grounds of gross neglect of duty. The trial court scheduled a hearing on September 19, 2002 to determine the remaining issues. Two weeks before that, however, the court granted appellant's counsel's request to withdraw.[1] Appellant did not retain new counsel before the hearing. On September 19, 2002, appellant appeared pro se at the hearing and asked for a continuance in order to secure new representation. The court denied the request and the

[1] Counsel asked to withdraw on grounds that his client failed to pay attorney fees.

matter proceeded to hearing on issues of custody and division of property.

{¶5} The magistrate rendered a decision on October 9, 2002 and recommended, inter alia: (1) that appellee be awarded sole custody of the minor children; and (2) that the marital home be awarded to appellant, but that fifty percent (50%) of any equity recovered in a sale of that residence be paid to appellee.[2]

{¶6} Appellant filed a generalized objection to "all" decisions of the magistrate on October 25, 2002, but did not specify any particular error to which he objected. The trial court overruled appellant's objection and entered judgment on April 30, 2003. The court adopted the magistrate's decision and implemented the magistrate's proposed distribution of property. This appeal followed.

I

{¶7} Appellant argues in his first assignment of error that the magistrate should have granted his request for a continuance in order to obtain new counsel and that, in light of his failure to do so, the trial court erred in adopting his report and recommendations. We disagree.

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[2] The evidence concerning the status of the real estate was, to say the least, very sketchy. The value of the property was pegged at somewhere between $125,000 to $130,000. A mortgage on the property was thought to be somewhere in the neighborhood of $92,000 or $93,000. To make matters worse, the parties testified that the mortgage was in foreclosure, but they were unsure what was happening with it because they were also in bankruptcy. We note that precise information on property valuations, outstanding loan balances and status of legal actions regarding property is necessary if trial courts are to fully comply with the mandates of R.C. 3105.171.

{¶8} Our analysis begins from the premise that the decision to grant or deny a continuance rests with the sound discretion of the trial court. See State v. Mason (1998), 82 Ohio St.3d 144, 155, 694 N.E.2d 932; State v. Claytor (1991), 61 Ohio St.3d 234, 241, 574 N.E.2d 472; State v. Unger (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078, at the syllabus. That decision will not be reversed on appeal absent a showing of an abuse of discretion. Carver v. Map Corp. (Sep. 18, 2001), Scioto App. No. 01CA2757; State v. Meredith (Jun. 22, 2000), Lawrence App. No. 99CA2. We note that an abuse of discretion is more than an error of law or judgment; it implies that the lower court's attitude is unreasonable, arbitrary or unconscionable. State v. Clark (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331; State v. Adams (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. In applying the abuse of discretion standard, appellate courts should not substitute their judgment for that of the trial court. See State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 732, 654 N.E.2d 1254; In re Jane Doe 1 (1991). 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181. Indeed, to establish an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias. Nakoff v. Fairview Gen. Hosp. (1996), 75 Ohio St.3d 254, 256, 662 N.E.2d 1; also see Bragg v. Hatfield, Vinton App. No. 02CA567, 2003-Ohio-1441, ¶ 22.

{¶9} In the case sub judice, appellant's counsel withdrew more than two weeks before the scheduled hearing. This provided appellant sufficient time to either locate another attorney or give the trial court notice that he was unable to do so. Instead, appellant waited until the hearing to request additional time. By this point, both appellee and her counsel had already cleared their respective schedules in order to attend the hearing. We also note that by the time of the hearing, this case had been pending for eleven months. Further, a prior continuance appears to have been granted appellant[3] and that the sole reason he was without counsel was that he failed to pay his attorney fees - a situation that was, at least arguably, under his control.

{¶10} Ohio courts consider several factors to determine if a continuance should be granted, including: (1) the length of the delay requested; (2) whether other continuances have been requested and received; (3) the inconvenience to the litigants, witnesses, opposing counsel, and the trial court; (4) whether the request is legitimate; (5) whether the defendant contributed to the need for the continuance; and (6) any other relevant, or unique facts to the case. See Unger, supra at 67-68; also see McDermott v. Tweel, 151 Ohio App.3d 763, 786 N.E.2d 67, 2003-Ohio-885, at ¶ 31; Bland v. Graves (1994), 99 Ohio App.3d 123, 129, 650 N.E.2d 117.

[3] The record contains an April 23, 2002 motion wherein appellant requested a continuance of a hearing because he was incarcerated. The next filing is a notice of a new hearing date which we presume was issued in response to his motion.

{¶11} Three of these factors clearly weighed against appellant below (i.e. a previous continuance, a continuance would have been inconvenient to the parties who had appeared at the hearing, and appellant contributed to the need for a continuance by failing to pay his attorney or timely securing substitute counsel). In addition, we note that appellant could have requested the continuance at any time during the two week interval between withdraw of counsel and commencement of the hearing, but he failed to do so. This no doubt also played a role in the magistrate's decision. While we do not question the legitimacy of his request, this is the only factor weighing in his favor. On balance, we cannot find that the trial court's decision to deny appellant a continuance was arbitrary, unreasonable or unconscionable.

{¶12} Our conclusion is buttressed by decisions from other appellate districts that uphold the denial of requests for continuances under analogous circumstances. See e.g. Fegen v. Devet, Huron App. No. H-02-012, 2002-Ohio-4473 (counsel withdrew three days before scheduled trial); State v. McDay (Sep. 20, 2000), Summit App. No. 19610 (even though no earlier continuances had been granted, request did not specify amount of time needed and new counsel could have acted in a more timely fashion to enter an appearance and conduct discovery); State v. Petty (Sep. 6, 2000), Summit App. No. 19611 (request for continuance did not specify amount of time needed and continuance would have been inconvenient for the State and its witnesses who showed up at trial).

{¶13} For these reasons, we find no merit in appellant's first assignment of error and it is hereby overruled.

II

{¶14} Appellant offers various arguments in his second assignment of error to the effect that the trial court erred in adopting the magistrate's decision on the distribution of property. We need not address these arguments, however, because appellant has not complied with proper procedural rules to preserve them for our review.

{¶15} Civ.R. 53(E)(3)(a) provides that within fourteen days of the filing of a magistrate's decision, a party may file written objections to the decision. Those objections shall be specific and state with particularity the grounds of the objection. Id. at (E)(3)(b). A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule. Id.

{¶16} We believe that appellant failed to comply with this rule in two aspects. First, we note that the magistrate's decision was filed October 9, 2002. Appellant filed his objections on October 25, 2002. This was two days out of rule. When objections are filed out of rule, an appellant cannot assign as error the trial court's adoption of the magistrate's decision. Willman v. Cole, Adams App. No. 01CA725, 2002-Ohio-3596, at ¶ 19; Ironton Edn. Assn.

OEA/NEA v. Ironton City School Dist. Bd. of Edn. (May 12, 1997), Lawrence App. No. 96CA23.[4]

{¶17} The second compliance problem is that appellant did not make "specific" objections which "state with particularity the grounds of the objection." See Civ.R. 53(E)(3)(b). Rather, the objections filed by appellant in the instant case state that he was "objecting to all Decisions made as a result of the hearing. . ." This generalized objection does not preserve any alleged errors for appeal. See Stewart v. Taylor, Wayne App. No. 02CA26, 2002-Ohio-6121, ¶ 10; Youngstown Metropolitan Housing Authority v. Scott (Jun. 26, 2001), Mahoning 99CA238; Michaels v. Michaels (Mar. 25, 1998), Lorain App. No. 97CA6720. For these reasons, the second assignment of error is overruled.

{¶18} Having considered the two errors assigned and argued in the briefs, and after finding merit in neither of them, the judgment of the trial court is hereby affirmed.

JUDGMENT AFFIRMED.

Kline, J.: Concurs in Judgment & Opinion (vote received 9-26-03)
Evans, P.J.: Concurs in Judgment & Opinion (vote received 12-15-03)

For the Court

[4] We acknowledge that, by the time the magistrate issued his decision, new counsel had entered an appearance in the case and that the magistrate erroneously failed to serve appellant's new attorney with the decision. However, the rule states that the decision may be served on "the parties or their attorneys." Civ.R. 53(E)(1). The magistrate's decision specifies that it was served on appellant and, hence, we do not find the failure to serve counsel to be a fatal defect. Nevertheless, the better practice is to make sure that counsel is served.

BY:_____
Peter B. Abele
Judge