

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

AUNE ROBINSON,	:	
	:	Case No. 16CA18
Plaintiffs-Appellant,	:	
	:	
vs.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
ANDREW ROBINSON,	:	
	:	
Defendant-Appellee.	:	Released: 11/09/17

APPEARANCES:

Natasha A. Plumly, Southeastern Ohio Legal Services, Steubenville, Ohio,
for Appellant.

Andrew H. Robinson, Pomeroy, Ohio, Pro Se Appellee.¹

McFarland, J.

{¶1} Aune L. Robinson appeals the trial court’s judgment entry dismissing her complaint for divorce, without prejudice, for failure to pay court costs. On appeal, Appellant contends that 1) the trial court erred in holding that she could afford to pay \$50.00 per month towards court costs when she filed an Affidavit of Inability to Prepay Court Costs, and her Affidavits of Property and Income and Expenses show no ability to pay \$50.00 per month towards court costs; 2) the trial court erred in failing to

¹ It does not appear from the record before us that Appellee participated in the trial court proceedings, nor has he filed a brief on appeal.

find her indigent in her divorce case because it was presented with undisputed affidavits that on their face showed her inability to pay and the court did not have a hearing on the merits or provide notice and a hearing on the Affidavit of Inability to Prepay Court Costs; 3) the trial court erred by failing to hold any hearings or decide the case on its merits and in dismissing her complaint for divorce because the court costs were not paid in full; 4) the trial court erred by dismissing her complaint for divorce under Civil Rule 41(B)(1) for failure to prosecute; 5) the trial court erred by dismissing her complaint for divorce under Civil Rule 41(B)(1) because she did not fail to comply with the Rules of Civil Procedure or a valid court order; and 6) the trial court erred in dismissing her complaint for divorce without providing her with prior notice that it was considering a dismissal under Civil Rule 41(B)(1).

{¶2} Because we conclude the trial court did not fail to find Appellant indigent, Appellant's first assignment of error is overruled. Because we conclude the trial court erred in ordering Appellant to pay \$50.00 per month toward courts prior to the date of the final hearing, and further erred in dismissing Appellant's complaint for divorce for failure to pay court costs, Appellant's second and third assignments of error are sustained and the judgment of the trial court is reversed and remanded for

further proceedings consistent with this opinion. Accordingly, because our disposition of Appellant's second and third assignments of error have resulted in a reversal of the trial court's decision, Appellant's fourth, fifth and sixth assignments of error have been rendered moot and we do not address them.

FACTS

{¶3} Appellant Aune Robinson filed a divorce complaint on April 7, 2016 and included an Affidavit of Inability to Pay Court Costs, Affidavit of Property, and Affidavit of Income and Expenses as required by Loc.R. 24.01(F) and Loc.R. 24.02. The Meigs County Clerk of Courts Rule 2.03 requires a \$270.00 advance deposit for a divorce complaint, but Loc.R. 24.01(F) allows a party to ask the court to waive prepayment of the deposit by presenting an Affidavit of Inability to Pay Court Costs. In Appellant's Affidavit of Inability to Pay Court Costs she stated that she was unable to give security or a cash deposit to pay court costs, could not afford an attorney to represent her, and owned no liquid assets or property of any substantial value to prepay court costs. On April 11, 2016, the court issued an Entry Regarding Costs ordering Appellant to pay court costs in full by making monthly payments of \$50.00. The court ordered Appellant to begin

payments on May 1, 2016 and stated, “All costs shall be paid in full on or before the date of the final hearing.” Entry Regarding Costs, April 11, 2016.

{¶4} Appellant did not make any payments on court costs. Neither party made any additional filings. On October 27, 2016, the court dismissed the case without prejudice:

"Now comes the Court, upon review of the file, and FINDS that the Court, by entry of April 11, 2016, ordered Plaintiff to pay the sum of fifty dollars (\$50.00) per month toward said costs until paid in full. It appearing to the Court that the Plaintiff has failed to do so and that no further pleadings have been filed. Upon review of this matter this case should be, and hereby, is DISMISSED without prejudice. Court costs incurred to date are ORDERED to be paid by Plaintiff. Plaintiff shall contact the Meigs County Clerk of Courts * * * for the balance of court costs. IT IS SO ORDERED."²

{¶5} After this appeal was filed, this Court sua sponte questioned whether the trial court's judgment entry dismissing Appellant's complaint for divorce without prejudice constituted a final appealable order. After determining that the order did, in fact, constitute a final appealable order made in a special proceeding under R.C. 2505.02(B)(1), the appeal proceeded. *Robinson v. Robinson* at ¶ 1. Appellant has now filed her brief, raising six assignments of error for our review.

² We recite the pertinent facts already determined in *Robinson v. Robinson*, 2017-Ohio-450, -- N.E.3d --, ¶ 2.

ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT COULD AFFORD TO PAY \$50.00 PER MONTH TOWARDS COURT COSTS WHEN APPELLANT FILED AN AFFIDAVIT OF INABILITY TO PREPAY COURT COSTS, AND HER AFFIDAVITS OF PROPERTY AND INCOME AND EXPENSES SHOW NO ABILITY TO PAY \$50.00 PER MONTH TOWARDS COURT COSTS.
- II. THE TRIAL COURT ERRED IN FAILING TO FIND MS. ROBINSON INDIGENT IN HER DIVORCE CASE BECAUSE IT WAS PRESENTED WITH UNDISPUTED AFFIDAVITS THAT ON THEIR FACE SHOWED HER INABILITY TO PAY AND THE COURT DID NOT HAVE A HEARING ON THE MERITS OR PROVIDE NOTICE AND A HEARING ON THE AFFIDAVIT OF INABILITY TO PREPAY COURT COSTS.
- III. THE TRIAL COURT ERRED BY FAILING TO HOLD ANY HEARINGS OR DECIDE THE CASE ON ITS MERITS AND DISMISSING [SIC] APPELLANT'S COMPLAINT FOR DIVORCE BECAUSE THE COURT COSTS WERE NOT PAID IN FULL.
- IV. THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S COMPLAINT FOR DIVORCE UNDER CIVIL RULE 41(B)(1) FOR FAILURE TO PROSECUTE.
- V. THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S COMPLAINT FOR DIVORCE UNDER CIVIL RULE 41(B)(1) BECAUSE APPELLANT DID NOT FAIL TO COMPLY WITH THE RULES OF CIVIL PROCEDURE OR A VALID COURT ORDER.
- VI. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT FOR DIVORCE WITHOUT PROVIDING PRIOR NOTICE TO APPELLANT THAT THE COURT WAS CONSIDERING DISMISSAL UNDER CIVIL RULE 41(B)(1)."

ASSIGNMENTS OF ERROR I, II AND III

{¶6} As Appellant's first, second and third assignments of error are interrelated, we will address them jointly. Taken together, these assignments of error essentially contend that the trial court erred in failing to find that she was indigent, in ordering her to pay \$50.00 per month towards court costs in connection with her divorce proceedings, and in dismissing her complaint for divorce because court costs had not been paid in full, without holding a hearing. In *Boddie v. Connecticut*, 91 S.Ct. 780, 401 U.S. 371 (1971), the Supreme Court of the United States held "that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship [marriage] without affording all citizens access to the means it has prescribed for doing so." In other words, due process of law prohibits a state from denying indigent individuals seeking judicial dissolution of their marriages access to the courts solely because of an inability to pay court costs. This holding has been acknowledged by the Supreme Court of Ohio, and has been further extended to include payment of costs of service by publication for indigent individuals seeking divorces. *State ex rel. Blevins v. Mowery, et al.*, 45 Ohio St.3d 20, 543 N.E.2d 99 at syllabus ("An indigent plaintiff in a divorce action may require the appropriate public officials to

effect service of process by publication in such action without prepayment by the indigent plaintiff of the costs of publication.") These holdings, however, do not specifically address the underlying determination of indigency.

{¶7} In *Yeager v. Moody*, 7th Dist. Carroll No. 11CA874, 2012-Ohio-1691, ¶ 7, the court noted as follows with respect to the initial determination of indigency of a party to a civil action:

"Under R.C. 2323.31, if the plaintiff 'makes an affidavit of inability either to prepay or give security for costs, the clerk of the court shall receive and file the petition. Such affidavit shall be filed with the petition, and treated as are similar papers in such cases.' 'The determination of indigence for purposes of whether a plaintiff should be required to pay filing fees and court costs "is typically granted liberally in order to preserve the due process rights of litigants and guarantee an access to judicial process and representation." ' *Guisinger v. Spier*, 166 Ohio App.3d 728, 2006-Ohio-1810, 853 N.E.2d 320, ¶ 6 (2nd Dist.), quoting *Evans v. Evans*, 10th Dist. Nos. 04AP-816, 04AP-1208, 2005-Ohio-5090, ¶ 23. '[W]here the trial court or the clerk of courts questions the truthfulness of such an affidavit, the court, on its own motion, or the clerk, on his motion, may request an oral hearing to investigate the litigant's indigency.' *Torres v. Torres*, 4 Ohio App.3d 224, 447 N.E.2d 1318 (8th Dist. 1982), paragraph one of the syllabus."

Thus, as further noted in *Yeager*, "[t]he mere filing of an affidavit of indigence does not constitute an automatic waiver of court costs." *Id.* at ¶ 8.

Rather, as *Yeager* explains, "Ohio's Common Pleas Courts have inherent power to secure the orderly administration of justice and safeguard against

conduct which would impair the free exercise of judicial functions[,]" and in furtherance of that inherent authority, "it is within the court's discretion to determine whether indigency status is proper in a particular case for waiving the deposit for security of costs." *Id.*; quoting *Nelson v. Rodriguez*, 3rd Dist. Hancock No. 5-10-20, 2011-Ohio-996, ¶ 5.

{¶8} Appellant herein contends that the trial court erred in failing to find that she was indigent. However, based upon the record before us, it is not clear that the trial court did, in fact, fail to find Appellant to be indigent. The Meigs County, Ohio, Rules of Practice for Common Pleas Courts provide in Rule 24 "Domestic Relations Practice" that security for costs in the form of filing fees must be deposited "at the time of filing the complaint or petition with the Clerk of the Common Pleas Court." Section 24.01. The Rules further provide in section 24.01(F) that "[a] party may request the Court to waive the prepayment of the costs deposit by the following procedure[,]" which involves the filing of an Affidavit of Inability to Prepay Court Costs, as well as an affidavit from the applicant's attorney stating he has not received any funds from the applicant, nor will he until after court costs have been paid in full.

{¶9} Here, Appellant filed a pro se complaint for divorce along with the required Affidavit of Inability to Prepay Court Costs. Additional

affidavits regarding property, income and expenses filed by Appellant disclosed that she subsisted on approximately \$3,800.00 per year from part-time employment at Walmart, with no other source of income, and that she owned no property or other assets. In response, the trial court filed an "Entry Regarding Costs" stating as follows:

"Now comes the Court, upon Plaintiff's Affidavit of Inability to Prepay Court Costs, and ORDERS Plaintiff to pay the sum of fifty dollars (\$50.00) per month toward said costs until paid in full, commencing May 1, 2016. All costs shall be paid in full on or before the date of the final hearing."

Because the trial court did not require pre-payment of the costs prior to the filing of the divorce complaint, we conclude that the trial court did, in fact, determine Appellant was indigent. However, instead of waiving costs, or simply allowing costs to accrue for payment at the conclusion of the proceedings, the trial court essentially put Appellant on a payment plan, which required her to pay \$50.00 per month and required full payment be made before the matter could proceed to a final hearing on the divorce. It does not appear the trial court or clerk questioned the validity of Appellant's affidavit of indigency through the process described in *Yeager v. Moody* and *Torres v. Torres* above, but rather the trial court seems to have accepted Appellant's indigency, waived *pre-payment* of the filing fees, and instead ordered all fees be paid after the initial filing of the complaint and before the

final divorce hearing. The trial court later dismissed Appellant's complaint for divorce, for what essentially appears to be failure to pay court costs, without holding a hearing either questioning Appellant's indigency status or on the merits. As set forth above, the trial court's dismissal entry stated as follows:

"Now comes the Court, upon review of the file, and FINDS that the Court, by entry of April 11, 2016, ordered Plaintiff to pay the sum of fifty dollars (\$50.00) per month toward said costs until paid in full. It appearing to the Court that the Plaintiff has failed to do so and that no further pleadings have been filed. Upon review of this matter this case should be, and hereby, is DISMISSED without prejudice. Court costs incurred to date are ORDERED to be paid by Plaintiff. Plaintiff shall contact the Meigs County Clerk of Courts * * * for the balance of court costs."

We conclude these actions by the trial court are contrary to the holding of *Boddie v. Connecticut, supra*.

{¶10} In *Burns v. Burns*, 12th Dist. Preble Nos. CA283 and CA285, 1981 WL 5282, *1, the appellant proceeded in forma pauperis in a divorce action and actually obtained a divorce decree from the court. However, the common pleas clerk refused to accept the judgment entries for filing based upon a local rule that required costs be paid in full prior to the filing of the judgment entries. *Id.* On appeal, the Twelfth District determined *Boddie* was applicable and, noting that the facts sub judice were "somewhat at variance" with *Boddie*, stated that "the local rule of the court requiring

payment of all costs before the judgment entry is journalized vitiates the accessibility to the court as effectively as if filing the complaint was proscribed as in *Boddie v. Connecticut, supra.*" We find the essential facts in *Burns* to be similar to the facts here. Here, although Appellant was permitted to file her complaint for divorce without pre-payment of court costs, she was nevertheless denied access to the courts when the trial court required all costs be paid prior to setting the matter for a final hearing. This process too vitiates the holding in *Boddie*, just as the process in *Burns* did. As such, we find the trial court's entry regarding costs deprived Appellant of her Fourteenth Amendment due process rights to the extent that it conditioned Appellant's right to proceed to a final hearing on her divorce upon her payment of courts costs in full.

{¶11} The trial court's subsequent dismissal of Appellant's complaint for divorce for failure to pay court costs further deprived her of her Fourteenth Amendment due process rights, and is contrary to the spirit of *Boddie v. Connecticut, supra.* It logically flows that if the filing of a complaint for divorce, proceeding to a final hearing on a divorce, and journalization of a divorce decree cannot be conditioned upon the pre-payment of court costs. And, that a pre-payment requirement deprives a litigant of their Fourteenth Amendment due process rights, then dismissing a

complaint for divorce for failure to pay court costs also results in a deprivation of due process to a litigant. Further, as set forth in *Yeager v. Moody, supra*, at ¶ 10, which we have found instructive and applicable to the facts here, the court stated that sua sponte dismissals must comport with the dictates of basic due process. To that end, the *Yeager* court reasoned that “[d]ue process requires that a complainant be given notice and a hearing prior to dismissal of the case when that dismissal is based on questions about the complainant’s indigence.” *Yeager* at ¶ 9; citing *Guisinger, supra*, at ¶ 6 (2nd Dist.) (holding that the trial court was required to provide *Guisinger* an opportunity to pay the filing fee or to provide additional information in support of her affidavit prior to dismissal of her action, and that a hearing was required before dismissal based on the failure to pay filing fees.).

{¶12} Based upon the foregoing, we conclude that the trial court did not err in failing to find Appellant indigent. As such, Appellant first assignment of error is overruled. However, the trial court did err in ordering Appellant to pay \$50.00 towards courts costs each month, with the full amount to be paid in full prior to the final divorce hearing. Thus, Appellant’s second assignment of error is sustained. Further, the trial court erred in dismissing Appellant’s complaint for divorce for failure to pay court costs, rather than allowing the divorce action to be litigated to its conclusion,

including journalization of the divorce decree, and permitting the costs to be paid by Appellant at the conclusion of the divorce proceedings. Thus, Appellant's third assignment of error is also sustained. Because we have found merit to Appellant's second and third assignments of error and have concluded that the trial court erred ordering Appellant to pay \$50.00 per month towards court costs and also in dismissing Appellant's complaint for divorce for failure to make those payments, the trial court's dismissal of Appellant's complaint for divorce, without prejudice, is reversed and this matter is remanded for further proceedings consistent with this opinion.

ASSIGNMENTS OF ERROR IV, V AND VI

{¶13} Here, Appellant's fourth, fifth and sixth assignments of error all allege error with respect to the trial court's dismissal of Appellant's complaint for divorce, and because we have already determined the trial court erred in dismissing Appellant's complaint, the arguments raised under these assignments of error are rendered moot and we do not reach them.

**JUDGMENT REVERSED AND
REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION.**

Harsha, J., concurring:

{¶14} I concur in judgment only. I would sustain the appellant’s sixth assignment of error and not address the remaining arguments. Mrs. Robinson cites and the majority opinion relies on the Seventh District’s decision in *Yeager v. Moody*, 7th Dist. Carroll No. 11CA874, 2012-Ohio-1691, ¶ 9, holding that “[d]ue process requires that a complainant be given notice and a hearing prior to dismissal of the case when that dismissal is based on questions about the complainant’s indigence.” “The trial court was required to at least provide Appellant an opportunity to pay the filing fee, or schedule a hearing to give her the chance to provide additional information in support of the affidavit prior to dismissal of her action.” *Id.*

{¶15} And as in *Yeager*, we need not address the other assignments of error at this time. *See State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005–Ohio–6432, 838 N.E .2d 658, ¶ 34, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration* (D.C.Cir.2004), 362 F.3d 786, 799 (Roberts, J., concurring in part and in the judgment) (“ ‘This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further’ ”); *State v. Brigner*, 4th Dist. Athens No. 14CA19, 2015–Ohio–2526, ¶ 18.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Abele, J.: Concurs in Judgment and Opinion.

Harsha, J.: Concurs in Judgment Only with Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.