[Cite as *Gabriel v. Gabriel*, 2009-Ohio-1814.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Pamela J. Gabriel	Court of Appeals No. L-08-1303
Appellee	Trial Court No. DR2000-0725
v.	
Grant E. Gabriel	**DECISION AND JUDGMENT**
Appellant	Decided: April 17, 2009

* * * * *

Thomas P. Goodwin, for appellee; John C. Intagliata, guardian ad litem.

Grant E. Gabriel, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Grant E. Gabriel, and appellee, Pamela J. Gabriel, were divorced under a judgment entry filed in the Lucas County Court of Common Pleas, Domestic Relations Division, on February 27, 2002. The decree designated Pamela Gabriel as the primary residential parent and legal guardian of their children. Disputes over custody of

their children followed. The parties settled their custody disputes in a stipulated order filed in the trial court on March 31, 2008.

{¶ 2} Despite the settlement, appellant argues that disputes remain with respect to orders to pay guardian ad litem fees, the trial court's denial of appellant's motion to remove the guardian ad litem, and the trial court's use of contempt to compel compliance with prior court orders requiring payment of guardian ad litem fees. We dismissed an earlier appeal concerning removal of the guardian ad litem and payment of guardian ad litem fees in *Gabriel v. Gabriel* (Mar. 14, 2008), 6th Dist. No. L-07-1405 due to lack of a final appealable order.

{¶ 3} Appellant asserts four assignments of error in this appeal:

{¶ 4} "I. The trial court abused its discretion in finding appellant in contempt of court.

{¶ 5} "II. The trial court erred in denying appellant's motion to remove the guardian ad litem.

{¶ 6} "III. The trial court erred in overruling appellant's objections to magistrate's order (and adopting the magistrate's decision) awarding guardian ad litem fees and classifying these fees as child support.

{¶ 7} "IV. Trial court erred in not providing appellant and appellant's children procedural and substantive due process prior to appellee's relocation."

{¶ 8} In this appeal, appellant appeals judgments of the trial court that were journalized on August 1, 2008 and October 9, 2007. In the October 9, 2007 judgment,

the trial court adopted the decision of the magistrate that denied appellant's April 2, 2007 motion to remove the guardian ad litem.

{¶ 9} In the August 1, 2008 judgment, the trial court approved and adopted the findings of fact and decision of the magistrate that was signed July 31, 2008, awarding guardian ad litem fees and holding appellant in contempt for failure to pay earlier fees that had been approved by the court and ordered paid. The trial court found appellant to be in contempt of prior orders of the court with respect to payment of guardian ad litem fees and sentenced him to serve up to 30 days in the Lucas County Correction Center unless he purged contempt by payment of $1,200 to the guardian ad litem within 30 days. The matters of contempt and sentence were continued for hearing on November 20, 2008.

Contempt

{¶ 10} Under Assignment of Error No. I, appellant argues that the trial court's order holding him in contempt of a prior court order to pay guardian ad litem fees is prohibited under Article I, Section 15 of the Ohio Constitution. The constitutional provision "forbids imprisonment for debt in civil actions" and the Ohio Supreme Court has held that it prohibits use of contempt powers to compel payment of court costs. *Strattman v. Studt* (1969), 20 Ohio St.2d 95, paragraphs six and seven of the syllabus. The Supreme Court has also held, however, that the "obligation to pay child support is not a 'debt' within the meaning of that term in Section 15, Article I of the Ohio Constitution" and that such orders may be enforced by contempt proceedings. *Cramer v. Petrie*, 70 Ohio St.3d 131, 1994-Ohio-404, syllabus.

{¶ 11} Appellant argues that for purposes of Article I, Section 15 analysis that guardian ad litem fees are to be treated as court costs, not child support, and, therefore, contempt proceedings may not be used to enforce their payment. However, we are unable to reach the issue in this appeal.

{¶ 12} The August 1, 2008 trial court judgment held appellant in contempt of a court order requiring payment of guardian ad litem fees and sentenced him to serve up to thirty days in the county jail. The order also provided that the finding of contempt would be purged by payment of the total sum of $1,200 within thirty days. The record reflects payment by appellant of $1,200 to the court on August 29, 2008. The payment rendered the issue of the propriety of the contempt order moot. *Faith C. v. Tim P.*, 6th Dist. No. L-05-1250, 2006-Ohio-3049, ¶ 3; *Davis v. Lewis* (Dec. 12, 2000), 10th Dist. No. 99AP-814.

{¶ 13} Assignment of Error No. I is not well-taken.

Guardian ad Litem

{¶ 14} Under Assignments of Error Nos. II and III, appellant argues trial court error in denying appellant's motion to remove the guardian ad litem and in awarding guardian ad litem fees. He also claims error in designating the fees as child support. Appellant has paid most, but not all, of the sums owed under the August 1, 2008 judgment. These issues have not been mooted by settlement of the custody dispute or by payment of the sum required to purge the contempt order.

{¶ 15} A trial court is granted broad discretion under Civ.R. 75(B)(2) with respect to appointment of guardians ad litem and orders for payment of their fees. *Schulte v.*

Schulte (June 11, 1993), 6th Dist. No. 91WD075; *Pruden-Wilgus v. Wilgus* (1988), 46 Ohio App.3d 13, 16. The trial court's refusal to remove the guardian ad litem and judgments requiring payment of his fees are subject to review on appeal on an abuse of discretion standard. *Schulte v. Schulte* (appointment and fees); *Pruden-Wilgus v. Wilgus* at 16 (appointment and fees); *Cavanaugh v. McCarthy* (Dec. 18, 1997), 8th Dist. No. 72378 (removal).

{¶ 16} We have reviewed the record and find no abuse of discretion in the trial court's overruling the motion to remove the guardian ad litem. Appellant offered no expert witness testimony to support his claim that the guardian ad litem had failed to perform his duties in a professional manner.[1] The trial court found that the guardian ad litem was a licensed practicing attorney with twenty-five years of experience as a guardian ad litem in Lucas County Juvenile Court and in both the Wood County and Lucas County Courts of Common Pleas, Domestic Relations Divisions. The court recognized that the guardian ad litem had served in the past where conflicts existed between the recommendations of the guardian ad litem and wishes of the children.

{¶ 17} The record reflects that the guardian ad litem performed an investigation and filed two reports with his recommendations. The guardian ad litem testified concerning the performance of his duties in the hearings on fees and on the motion to remove him.

[1]Appellant appeared pro se. Although he is an attorney, he does not engage in the practice of domestic relations or custody law.

{¶ 18} There is competent and credible evidence in the record supporting the trial court's conclusion that the "Guardian ad Litem is performing his required duties as Guardian ad Litem and pursuant to his investigation and recommendation he is protecting the best interests of the parties' minor children in this case."[2] Accordingly, we conclude that appellant's Assignment of Error No. II objecting to the trial court's failure to remove the guardian ad litem is not well-taken.

{¶ 19} In the trial court, appellant agreed to the manner of apportionment between the parties of the responsibility to pay guardian ad litem fees. He did not dispute the hours spent or activities performed as detailed in the guardian ad litem's motions for approval of fees for payment. Appellant's argument has been that the guardian ad litem breached his duties to the parties' children and is not entitled to payment of any fees.

{¶ 20} Appellant includes, in Assignment of Error No. III, claimed error in awarding guardian ad litem fees and in classifying them as child support. His argument under the assignment of error was limited, however, to a claim that the services had no value.[3]

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[2]Judgment Entry of magistrate signed September 27, 2007 and adopted by the court in the Judgment journalized on October 9, 2007.

[3]Whether the fees are classified as child support is relevant on the question of whether use of contempt is available to compel payment, as discussed under Assignment of Error No. I. The classification may be relevant to a court considering whether an obligation to pay such fees was discharged in bankruptcy. However, appellant has not claimed that he has filed bankruptcy.

{¶ 21} After a review of the record, we find competent credible evidence in the record supports the trial court's conclusion that the guardian ad litem was entitled to be paid for his services and that appellant's arguments opposing payment were without merit. The trial court did not abuse its discretion in awarding guardian ad litem fees.

{¶ 22} Accordingly, we find that Assignment of Error No. III is not well-taken.

Lack of Oral Hearing on Relocation

{¶ 23} On November 21, 2006, appellee provided notice of an intent to relocate to Licking County, Ohio, on or about December 26, 2006. Appellant opposed the relocation of the children and filed a motion to prevent it, with brief, on December 6, 2006. Appellant also filed a motion for an "emergency hearing" on the matter on December 19, 2006. The trial court denied the motion for an emergency hearing in a judgment entry journalized on December 20, 2006. Under Assignment of Error No. IV, appellant argues that the trial court erred in failing to conduct an oral hearing prior to the relocation.

{¶ 24} In our view, consideration of the relocation custody dispute now would serve no purpose. Custody is now governed by a settlement entry filed on March 31, 2008, by mutual consent. A ruling on issues raised under Assignment of Error No. IV would not allow for a present remedy that would affect any matter in controversy between the parties. The matter is moot. See *In re K.P.*, 8th Dist. No. 82709, 2004-Ohio-1448, ¶ 67 (stipulated order on pre-dispositional temporary custody rendered defect in original order moot).

{¶ 25} "[I]t is the duty of this court, as of every other judicial tribunal, to "'decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *BECDIR Construction Co. v. Proctor* (2001), 144 Ohio App.3d 389, 393, quoting *State ex rel Eliza Jennings, Inc. v. Noble* (1990), 49 Ohio St.3d 71, 74." *State v. Kirkwood*, 6th Dist. No. L-05-1195, 2006-Ohio-27, ¶ 10.

{¶ 26} Assignment of Error No. IV is not well-taken.

{¶ 27} On consideration whereof, the court finds that substantial justice has been done the party complaining and that appellant has not been denied a fair hearing. The judgment of the Lucas County Court of Common Pleas, Domestic Relations Division is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.
CONCUR.

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JUDGE