

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Aleatha R. Young (nka Johnson),	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-1148
Larry E. Young,	:	(C.P.C. No. 08DR-10-3983)
Defendant-Appellee,	:	(REGULAR CALENDAR)
(Andrea Dooley,	:	
Third-Party/ Defendant-Appellee).	:	
	:	

D E C I S I O N

Rendered on September 25, 2012

Joquetta S. Wells, for appellant.

Benita D. Reedus, for appellee Andrea Dooley.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations

CONNOR, J.

{¶ 1} Plaintiff-appellant, Aleatha R. Young (nka Johnson),¹ appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, establishing grandparent-grandchild visitation in favor of third-party defendant-appellee, Andrea Dooley.

¹ Appellant's name is given as Aleatha Johnson in some filings in this case. In this decision we will use the captioned name that appears in trial court proceedings.

{¶ 2} Ms. Young is the mother of M.H.D., the child at issue in this case. The child's father, Larry E. Young, was the defendant when this divorce and custody action began in 2008 but has not recently participated in the proceedings. Ms. Dooley is Ms. Young's mother and thus the maternal grandmother of M.H.D. In March 2011, Ms. Dooley filed her motion to join the action and seek grandparent visitation with M.H.D. pursuant to R.C. 3109.051(B)(1) and (2). After mediation the parties reached a memorandum of understanding filed in the record and dated March 22, 2011. The matter was set for a hearing before a magistrate with the expectation that the parties would produce an agreed entry reflecting the mediated agreement. On April 27, 2011, the magistrate heard the matter but Ms. Young did not appear. The magistrate proceeded to review the matter and set the case for a new hearing on June 27, 2011 to allow the parties additional time to prepare their agreed entry. On June 20, 2011, the magistrate continued the June 27, 2011 hearing until July 1, 2011. At the July 1, 2011 hearing, Ms. Young again did not appear. The circumstances of this non-appearance by Ms. Young are contested issues in this case and will be developed more fully below.

{¶ 3} The magistrate proceeded with the July 1, 2011 hearing and granted grandparent visitation for Ms. Dooley largely in accordance with the terms stated in the memorandum of understanding that resulted from mediation.

{¶ 4} Ms. Young filed timely objections to the magistrate's decision. These largely turning upon the magistrate's decision to go forward with the hearing in Ms. Young's absence. The trial court held a hearing on November 29, 2011 upon the objections, and Ms. Young appeared represented by counsel. Based upon the evidence in the record and testimony presented by Ms. Young and her current husband, Tyrone Johnson, the court concluded that Ms. Young was timely noticed of the July 1, 2011 hearing and was not denied due process by her own failure to appear. The trial court overruled all objections to the magistrate's decision and entered judgment adopting the magistrate's recommendations regarding grandparent visitation. Ms. Young has timely appealed and brings the following three assignments of error:

[I.] The trial court abused its discretion and erred to Appellant's substantial prejudice by conducting on July 1, 2011, in Appellant's absence, a hearing to enforce or otherwise

incorporate into a court order the terms of the parties' mediated Memorandum of Understanding.

[II.] The trial court acted contrary to law, committed plain error and abused its discretion to Appellant's prejudice by adopting and incorporating into a court order a purported mediated agreement for grandparent visitation without evidence that the agreement is binding as to all parties.

[III.] The trial court erred as a matter of law in determining to grant grandparent visitation to the appellee without evidentiary support in the record of all the relevant the [sic] factors set forth in RC 3109.051(D).

{¶ 5} The issues that are raised in Ms. Young's objections before the trial court and thus preserved for appeal concern whether Ms. Young was wrongfully denied a continuance of the July 1, 2011 hearing. The issues presented in Ms. Young's second and third assignments of error, therefore, are not properly before us and these assignments are overruled on that basis. Civ.R. 53(D)(3)(b)(iv); *Padgett v. Padgett*, 10th Dist. No. 08AP-269, 2008-Ohio-6815, ¶ 31 ("[E]xcept for plain error, a party shall not assign as error on appeal the court's adoption of a factual finding or legal conclusion unless the party has objected to that finding or conclusion.").

{¶ 6} The remaining question is whether the magistrate erred by going forward with the July 1, 2011 hearing in Ms. Young's absence. We review this question under an abuse of discretion standard. *State v. Unger*, 67 Ohio St.2d 65, 67 (1981). Upon appeal, we will reverse a trial court's decision as being an abuse of discretion only where the trial court's decision represents more than mere error in judgment or law, but demonstrates an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87 (1985).

{¶ 7} The factors set forth in *Unger* govern the trial court in determining whether a continuance must be granted:

In evaluating a motion for a continuance, a court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which

gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

Id. at 67. In the case of *In re Washington*, 10th Dist. No. 04AP-429, 2004-Ohio-6981, we applied these factors to find that a trial court had not abused its discretion in declining to grant a continuance in a grandparent visitation action. The trial court in *Washington* noted that the case had been pending for some time and the absent party to the proceedings had missed prior court dates. We found that the factors in *Unger* supported the trial court's decision to go forward with the hearing with those litigants and witnesses that were present.

{¶ 8} Similarly, in the present case, the trial court carefully examined the testimony at the hearing on Ms. Young's objections and noted inconsistencies in her statements regarding the circumstances under which she missed the July 1, 2011 hearing. The trial court noted that the court had mailed notice of the July 1, 2011 hearing to the latest current address available for Ms. Young. Ms. Young testified that she had verbally informed the magistrate's bailiff of her change of address on June 27, 2011 when she came to court expecting a hearing that had been continued by entry seven days before. The court observed that this did not resolve the problem caused by Ms. Young's failure to effectively inform the court of her move prior to the June 20, 2011 decision by the magistrate to continue the June 27, 2011 hearing.

{¶ 9} At the hearing, the trial court was disturbed by Ms. Young's unreliable testimony regarding the point at which she actually learned of the July 1, 2011 hearing date. The trial court noted that these inconsistencies were not resolved until Ms. Young's current husband testified that he listened to a conversation between Ms. Young and the magistrate's bailiff in which Ms. Young explained that she would be unable to attend the hearing on July 1, 2011, because she had a previously scheduled appointment to seek rent assistance on that day. Recalled to the stand, Ms. Young testified in direct conflict with her husband's testimony that she had never been informed of the July 1, 2011 hearing when she spoke with the bailiff on June 27, 2011. Ms. Young maintained this position until reminded that she was under oath, whereupon she contradicted her prior statements and admitted that she had learned of the July 1, 2011 hearing date no later than June 27, 2011. Ms. Young provided little explanation as to why her other engagements could not

be modified to accommodate the July 1, 2011 hearing date, considering the extent to which the case had already been continued and the matter appeared ripe for final resolution in light of the memorandum of understanding between the parties after mediation.

{¶ 10} Applying the factors in *Unger*, we find that the trial court did not abuse its discretion in concluding that the convenience of litigants, witnesses, opposing counsel, and the court weighed in favor of denying any continuance and proceeding with the hearing as scheduled. The circumstances of this case also support the conclusion that Ms. Young's own behavior had continued to her inability to attend the hearing. In light of the apparent understanding between the parties pursuant to mediation, the decision to go forward with the hearing was not unduly prejudicial to Ms. Young, a denial of her right to due process or otherwise an abuse of discretion. Ms. Young's first assignment of error is overruled.

{¶ 11} In summary, Ms. Young's three assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
