[Cite as *J.V.C.-N. v. M.P.D.*, 2012-Ohio-1418.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

J.V.C.-N.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-581 (C.P.C. No. 07JU-10-15350)
M.P.D.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
J.V.C.-N.,	:	
Plaintiff-Appellant,	:	No. 11AP-649 (C.P.C. No. 07JU-10-15350)
v.	:	(REGULAR CALENDAR)
M.P.D.,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 30, 2012

Briscoe Law Offices Co., L.P.A., and *Colleen H. Briscoe*, for J.V.C.-N.

Gallagher Sharp, *Timothy J. Fitzgerald*, and *Monica A. Sansalone*, for M.P.D.

APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

SADLER, J.

{¶ 1} In this consolidated appeal, defendant-appellant/defendant-appellee, M.P.D. ("Father"), and plaintiff-appellee/plaintiff-appellant, J.V.C.-N. ("Mother"), appeal

from judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, issuing various orders regarding the custody and parenting rights of their son W.C. For the following reasons, we affirm in part and reverse in part.

I. Background

{¶ 2} W.C. was born out of wedlock on September 19, 2003. During that year, Father filed two parentage actions in Franklin County, with each eventually being dismissed. In 2007, Father filed a complaint for allocation of parental rights and responsibilities in Cuyahoga County. While this third case was pending, Mother filed her own parentage action in Franklin County, which is the case at issue in this appeal. The parties subsequently agreed to dismiss the Cuyahoga County case and litigate all issues concerning W.C. in Franklin County.

{¶ 3} Father, through the first of several attorneys, filed an answer and counterclaim wherein he admitted being the natural father of W.C. and requested relief including the permanent allocation of parental rights and responsibilities, the change of W.C.'s surname, and an award of child support.

{¶ 4} Based on the results of genetic testing and upon agreement of the parties, the magistrate found Father to be the natural father of W.C. The magistrate's decision, which the trial court later adopted, further stated that "[t]he parties agreed to litigate all issues concerning the allocation of parental rights in this case without the necessity of filing a separate custody complaint." Temporary orders were imposed pending resolution of the custody, support, and parental rights issues.

{¶ 5} The matter was assigned to a visiting judge in December 2008 after the filing of various motions and cross-motions by the parties. On December 8, Mother filed a motion requesting that she be named residential parent and legal custodian, that she be granted child support both prospectively and retroactively, that Father help pay out-of-pocket expenses, both prospectively and retroactively, and such other relief as in the best interest of the minor child.

{¶ 6} Over the next three years, various delays prevented the trial court from deciding custody and allocating parental rights and responsibilities. The parties agreed to continue the matter in March and June of 2009. In October 2009, Father obtained a

continuance for the parental rights and support issues until March 2010 due to the death of a witness.

{¶ 7} Although trial on the custody and parental rights issues was continued until March 2010, the trial court heard testimony on several other motions in October 2009. On October 19, 2009, after five days of testimony, Father filed his first several attempts to disqualify the visiting judge in the Supreme Court of Ohio on the grounds of bias and prejudice. Each attempt was eventually denied by the Chief Justice.

{¶ 8} After the denial of Father's first affidavit of disqualification, the trial court resumed hearing testimony regarding the various pretrial motions in January and February 2010. Father filed a motion for change of venue on January 19, 2010, which was later denied. Father requested another continuance on February 25, 2010, and on March 5, 2010, he filed his second affidavit of disqualification in the Supreme Court of Ohio.

{¶ 9} Trial on the custody and parental rights issues was set to resume on March 15, 2010; however, on that same day, Father filed his third affidavit of disqualification in the Supreme Court of Ohio. According to the trial court's subsequently filed entry, Father appeared at the March 15, 2010 hearing and asked the trial court to recuse itself and continue the trial. The trial court denied the oral motion for recusal, but granted Father's continuance request and continued the trial until the end of April 2010.

{¶ 10} At a hearing on April 27, 2010, Father moved to withdraw his request for custody and parenting time and to dismiss Mother's motion for custody. According to the trial court's subsequently filed entry, Father appeared in open court and stated, "I am making an oral motion and a written motion to withdraw my counterclaim for custody, and therefore, I believe that will eliminate the whole trial." (Jan. 13, 2011 Entry.) The trial court allowed Father to withdraw his claims for custody and parenting time, but denied his motion to dismiss and retained "the residual parentage issues and the claims of [Mother]" for trial. (Jan. 13, 2011 Entry.)

{¶ 11} Father attempted to appeal the trial court's decision denying his motion to dismiss and requested a stay from the trial court and from a panel of this court. Both requests were denied, at which time Father asked the trial court for a continuance for health reasons. The request was granted and the matter was rescheduled for May 19,

2010. The case went forward again on May 19, 2010, but Father, once again, requested a continuance for health reasons. The hearing was rescheduled for January 18, 2011; however, six days before that date, Father requested another continuance for health reasons, which the trial court granted despite Mother's opposition. The new trial date was May 31, 2011.

{¶ 12} Four days before the May 31, 2011 trial date, Father filed a fourth affidavit of disqualification in the Supreme Court of Ohio.

{¶ 13} Father did not appear for the May 31, 2011 trial. At 10:05 a.m., the trial court acknowledged Father's absence on the record: "Apparently, he has phoned and said he is on his way, but we do not know what that means or where he is at this particular time." (May 31, 2011 Tr. 7.) The trial court began hearing testimony, but, at 10:20 a.m., the proceedings were interrupted by an attorney who, without making an appearance on behalf of Father, requested that the trial "be converted to a pretrial." (May 31, 2011 Tr. 27.) The attorney informed the trial court that Father was seeking an injunction of the trial in federal court in Cleveland. The attorney asked that the case be converted to a pretrial based on the federal suit and the filing of Father's fourth affidavit of disqualification in the Supreme Court. The trial court responded that it was unaware of any federal suit and informed the attorney that Father had not filed any motion for continuance prior to the start of trial.

{¶ 14} The attorney interrupted the proceedings again several minutes later, this time presenting the trial court with a time-stamped copy of Father's pro se "Motion for Modification of Trial to Pretrial." The time-stamp revealed that the motion was filed that day at 10:36 a.m. The attorney also provided the trial court a copy of the lawsuit filed by Father in federal court. Once the attorney finally acknowledged that she was not representing Father, the trial court excused her from the courtroom and resumed the trial.

{¶ 15} After the testimony was presented, Mother moved to withdraw her motions requesting that Father be held in contempt, except with respect to her requests for attorney fees. Mother also moved to dismiss the three contempt motions filed by Father. After allowing Mother to withdraw her motions, the trial court dismissed Father's

motions for failure to prosecute, reasoning that his motions have been pending for over two years and "he has still not appeared." (May 31, 2011 Tr. 59.)

{¶ 16} The trial court then addressed Mother's motions for attorney fees. After hearing the testimony of Mother's attorney, the trial court instructed Mother to provide a brief summarizing each of her requests for relief and advised her to await a written decision. Before concluding the hearing, the trial court dismissed all pending motions, including Father's motions.

{¶ 17} In a judgment entry filed June 1, 2011, the trial court dismissed Father's pending motions for "failure to appear and prosecute them." The trial court issued another judgment entry on June 30, 2011, wherein the court ordered Father to pay child support retroactive from the date of W.C.'s birth, future child support in the amount of $1,113.42 per month, 50 percent of Mother's past-due medical expenses, and attorney fees totaling $40,000. The trial court awarded Father access to any records, daycare center, and student activity related to W.C., and ordered Mother to provide notice of relocation in the event she moved to a residence not specified in the parenting time order.

{¶ 18} Father filed a notice of appeal on July 1, 2011; however, his filing only referenced the trial court's entry filed June 1, 2011 and not the trial court's decision and entry filed June 30, 2011. Mother filed her own notice of appeal on August 1, 2011, seeking to appeal from the trial court's June 30, 2011 decision and entry. This court consolidated both appeals.

II. Father's Motion to Amend Notice of Appeal

{¶ 19} Before turning to each party's respective assignments of error, we must address Father's November 8, 2011 motion for leave to amend his notice of appeal. Father claims that, although his July 1, 2011 notice of appeal correctly referenced the trial court's judgment rendered June 1, 2011, he also intended to appeal from the trial court's judgment rendered June 30, 2011. In opposition, Mother argues that the failure to reference the June 30 judgment is jurisdictional and prohibits Father from appealing from that judgment beyond the time limit in App.R. 4.

{¶ 20} App.R. 3(F) narrowly vests this court with discretion to allow the amendment of "a timely filed notice of appeal." The "timely filing of a notice of appeal" is the only jurisdictional requirement for a valid appeal. *Transamerica Ins. Co. v. Nolan*, 72

Ohio St.3d 320 (1995), syllabus. "When presented with other defects in the notice of appeal, a court of appeals is vested with discretion to determine whether sanctions, including dismissal, are warranted, and its decision will not be overturned absent an abuse of discretion." *Id*. Thus, our jurisdiction over the June 30, 2011 judgment depends on whether there exists "a timely filed notice of appeal" from that judgment.

{¶ 21} Here, while Father filed a timely notice of appeal from the judgment rendered June 1, 2011, he did not do so from the judgment rendered June 30, 2011. Instead, his notice of appeal unambiguously referred only to the June 1 judgment, and his docketing statement—which he did not file until August 24, 2011—also referenced only the June 1 judgment. Father gave the following description of his anticipated assignment of error in the docketing statement: "Trial court erred and abused its discretion by denying a continuance and entry of final judgment which deprived Appellant of the ability to present evidence at trial."

{¶ 22} We do not construe Father's notice of appeal from the June 1, 2011 judgment to also be a timely filed notice of appeal from the June 30, 2011 judgment. The purpose of a notice of appeal is achieved only if it apprises the opposing party of the existence of an appeal "beyond [the] danger of reasonable misunderstanding." (Internal quotations omitted.) *Maritime Mfrs., Inc. v. Hi-Skipper Marina*, 70 Ohio St.2d 257, 259 (1982). Unlike a case where the notice of appeal was vague and could have only been intended to reference one judgment, *see, e.g., Paasewe v. Wendy Thomas 5 Ltd.*, 10th Dist. No. 09AP-510, 2009-Ohio-6852, the notice of appeal in this case was expressly sought to appeal from one judgment to the exclusion of another. While Father's notice of appeal constituted a timely appeal of the June 1 judgment, it did not also constitute a timely appeal of the June 30 judgment.

{¶ 23} Because Father never filed a timely notice of appeal from the judgment rendered June 30, 2011, there is no notice of appeal from that judgment to amend under App.R. 3(F), and we lack jurisdiction to review his challenges to that judgment on appeal. Accordingly, Father's motion to amend is denied.

III. Father's Appeal

{¶ 24} Father presents the following five assignments of error for our consideration:

> I. The trial court abused its discretion by denying Appellant's motion for continuance of the May 31, 2011 trial.
>
> II. The trial court abused its discretion and deprived Appellant of due process by proceeding to conduct and complete, in less than an hour, an ex parte trial on May 31, 2011 when trial was scheduled for four days, despite being apprised that Appellant was en route to appear at the trial pro se.
>
> III. The trial court erred by awarding attorneys' fees to Appellee in the amount of $40,000.00 where there was insufficient competent evidence or testimony presented at trial supporting the amount of those fees.
>
> IV. The trial court lacked jurisdiction to consider and grant Appellee's Motion for Allocation of Parental Rights and Responsibilities once Appellant had dismissed his counterclaim.
>
> V. The trial court judge erred by not recusing herself to avoid the appearance of bias and prejudice against Appellant.

{¶ 25} Having determined that we lack jurisdiction to review his appeal from the judgment rendered June 30, we will not consider his third and fourth assignments of error, which specifically challenge that judgment.

A. Father's First and Second Assignments of Error

{¶ 26} Father's first two assignments of error are interrelated, and we will address them together. Father argues that the trial court abused its discretion by denying his "motion for continuance" of the May 31, 2011 trial and deprived him of due process by conducting the trial in his absence. We disagree.

{¶ 27} At the outset, Father did not move for a "continuance" in accordance with Loc.R. 2 of the Franklin County Court of Common Pleas, Juvenile Division. That rule requires all continuance requests to be "in writing" and "made as far in advance of hearing dates as practicable." The rule also expressly states that "[n]o case will be continued on the day of hearing except for good cause shown." In this case, however, Father did not request to continue the trial—in fact, he expressly opposed the trial court's attempts to hold a custody trial. Father instead filed a "Motion for Modification of Trial to Pretrial"

and did so *after* trial had already commenced that morning. This motion was unaccompanied by a showing of good cause or an explanation as to why it could not be filed earlier. Thus, the trial court could not have abused its discretion in denying Father's request because Father never actually sought a continuance. *See In re I.R.*, 10th Dist. No. 04AP-1296, 2005-Ohio-6622, ¶ 11 (citing cases for the proposition that denial of continuance is not an abuse of discretion where the request was in violation of local rule).

{¶ 28} Nevertheless, even if we were to construe Father's "Motion for Modification" as a properly filed continuance request, we find no error in the trial court's refusal to further delay a case that had already been pending for over three years and seven months. The denial of a continuance must not be disturbed absent an abuse of discretion. *In re J.C.*, 10th Dist. No. 10AP-766, 2011-Ohio-715, ¶ 37. " 'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). " 'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.' " *State v. Unger*, 67 Ohio St.2d 65, 67 (1981), quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841 (1964).

{¶ 29} "A party has a right to a reasonable opportunity to be present at trial and a right to a continuance for that purpose. A party does not, however, have a right unreasonably to delay a trial." *Hartt v. Munobe*, 67 Ohio St.3d 3, 9 (1993), citing *State ex rel. Buck v. McCabe*, 140 Ohio St. 535 (1942), paragraph one of the syllabus. To justify a continuance, the party's absence must be unavoidable and not voluntary. *Id*. Other factors to consider include the length of the delay requested, whether other continuances have been granted, 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. *Unger* at 67-68.

{¶ 30} In this case, Father's absence was voluntary and avoidable. *See Hartt* at 9. Despite being aware of the May 31, 2011 trial date for months, Father decided to seek an injunction of the custody trial in federal court rather than appear at the custody trial. This was not an unintentional scheduling conflict, but a direct attempt to prevent the custody trial from occurring. Moreover, Father contacted an attorney to appear at the hearing only four days earlier although he had known of the date long before.

{¶ 31} Moreover, the *Unger* factors strongly weighed against the granting of another continuance. First, the requested length of the delay was indefinite as Father did not actually seek to continue the trial. Second, the trial court granted Father a multitude of continuances on prior occasions. While some were requested by both parties, the majority in 2010 and 2011 were obtained by Father—most occuring after he withdrew his counterclaim in April 2010 and expressed his belief that the case should not proceed to trial. Many of the delays were caused by Father's unsuccessful attempts to disqualify the judge in the Supreme Court of Ohio, the firing of each of his attorneys, and his interlocutory appeal. Third, a continuance of the May 31, 2011 trial date would have caused substantial inconvenience to the witnesses, parties, counsel, and the trial court, especially given the preparation required for each of the trial dates. Fourth, the reason for Father's "continuance" request was for the purpose of delay. The request was admittedly obstructive: Father wanted to obtain a federal injunction of the trial and a ruling on his latest attempt to disqualify the trial court. Fifth, Father contributed to the circumstances giving rise to the delay because, as explained above, it is clear that he *never* intended to proceed with trial.

{¶ 32} Under the circumstances of this case, we find that the trial court's refusal to delay the proceedings further was neither an abuse of discretion nor a deprivation of due process. Accordingly, Father's first and second assignments of error are overruled.

B. Father's Fifth Assignment of Error

{¶ 33} Father's fifth assignment of error challenges the trial court's refusal to recuse herself on the grounds of bias and prejudice against him. However, "[t]his court lacks authority to consider issues of disqualification." *Herold v. Herold*, 10th Dist. No. 04AP-206, 2004-Ohio-6727, ¶ 20. " 'Pursuant to R.C. 2701.03, the Ohio Supreme Court, not the courts of appeals, has authority to determine a claim that a common pleas court

judge is biased or prejudiced.' " *Lakhi v. Healthcare Choices & Consultants*, 10th Dist. No. 07AP-904, 2008-Ohio-1378, ¶ 27, quoting *Wardeh v. Altabchi*, 158 Ohio App.3d 325, 2004-Ohio-4423, ¶ 21 (10th Dist.); *see also Beer v. Griffith*, 54 Ohio St.2d 440, 441 (1978). R.C. 2701.03 provides the exclusive means by which a litigant may claim that a common pleas judge is biased or prejudiced. *Wardeh* at ¶ 21. Accordingly, Father's fifth assignment of error is overruled.

IV. Mother's Appeal

{¶ 34} We now turn to Mother's appeal from the trial court's June 30, 2011 judgment. Mother presents the following three assignments of error for our consideration:

> ASSIGNMENT OF ERROR NO. I:
>
> IT IS CONTRARY TO LAW AND AN ABUSE OF DISCRETION TO GIVE ACCESS TO A CHILD'S SCHOOL, DAYCARE, AND RECORDS AS WELL AS REQUIRE A RELOCATION NOTICE IN A PARENTAGE MATTER WITHOUT ANY REQUEST BY APPELLEE-FATHER AND NO FINDING THAT IT IS IN THE BEST INTEREST OF THE CHILD.
>
> ASSIGNMENT OF ERROR NO. II:
>
> THE TRIAL COURT ERRED IN ORDERING THAT THE RESIDENTIAL PARENT GIVE NOTICE OF RELOCATION PURSUANT TO R.C. 3109.051(G)(2)(3) AND (4) WHEN APPELLEE-FATHER DID NOT REQUEST AND WAS NOT GRANTED PARENTING TIME.
>
> ASSIGNMENT OF ERROR NO. III:
>
> THE TRIAL COURT ABUSED ITS DISCRETION AND IT WAS CONTRARY TO THE EVIDENCE TO ORDER DAYCARE ACCESS PURSUANT TO R.C. 3109.051(I) WHEN APPELLEE-FATHER DID NOT REQUEST AND WAS NOT GRANTED PARENTING TIME.

A. Mother's First, Second, and Third Assignments of Error

{¶ 35} We will address Mother's three assignments of error together, as they challenge the trial court's June 30, 2011 judgment awarding Father the right to notice of

relocation as well as access to W.C.'s records, daycare centers, and student activities. Mother argues that a father cannot obtain such parenting rights without a specific request, and because Father withdrew all requests for parenting rights, the trial court had no authority to order such relief. We agree.

{¶ 36} Unlike divorced or separated parents, who presumptively share equal parenting and custody rights by statutory default, *see* R.C. 3109.03, an unwed mother is presumptively "the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian." R.C. 3109.042. Once paternity is established, the father may request parenting time rights pursuant to R.C. 3109.12(A). Specifically, R.C. 3109.12(A) states, "the father may file a complaint requesting that the court of appropriate jurisdiction of the county in which the child resides grant him reasonable parenting time rights with the child." Other parentage statutes also recognize that parenting rights are available to the acknowledged father *upon request*. *See* R.C. 3111.13(C) ("if the mother is unmarried, the father may file a complaint requesting the granting of reasonable parenting time rights * * * pursuant to section 3109.12 of the Revised Code"); R.C. 3111.26 ("If the mother is unmarried, the man who signed the acknowledgment of paternity may file a complaint requesting the granting of reasonable parenting time with the child under section 3109.12 of the Revised Code.").

{¶ 37} Pursuant to R.C. 3109.12(B), the trial court "may grant the parenting time rights or companionship or visitation rights *requested* under [R.C. 3109.12(A)]" as long as it determines that the granting of such rights "is in the best interest of the child." (Emphasis added.) In considering whether to grant reasonable parenting time rights or reasonable companionship or visitation rights, the trial court must consider all relevant factors, including, but not limited to, the factors enumerated in R.C. 3109.051(D).

{¶ 38} Here, it is undisputed that Father's paternity was established and that Father subsequently withdrew all requests for custody and parenting rights. Nevertheless, the trial court awarded Father the right to notice of relocation pursuant to R.C. 3109.051(G), access to all records relating to W.C. pursuant to R.C. 3109.051(H) and 3319.321(B)(5)(a), access to any daycare center that is or will be attended by W.C.

pursuant to R.C. 3109.051(I), and access to any student activity related to W.C. pursuant to R.C. 3109.051(J).

{¶ 39} Father maintains that Mother "invited" the trial court to award these rights by filing her parentage complaint. We disagree. As explained above, the mere filing of a parentage action by an unwed mother does not automatically entitle the acknowledged father to parenting time rights after the father specifically abandoned his requests for those rights. R.C. 3109.12, 3111.13(C), and 3111.26 make clear that a trial court cannot award a father such rights without being presented with a specific request. Moreover, it is unclear whether the trial court's award was "in the best interests of the child" pursuant to R.C. 3109.12(B), as such a determination is absent from that portion of the trial court's June 30, 2011 judgment.

{¶ 40} Under the circumstances of this case, we find that the trial court abused its discretion in awarding Father the right to relocation notice as well as access to W.C.'s records, daycare centers, and student activities when Father expressly abandoned his request for such rights. Accordingly, Mother's first, second, and third assignments of error are sustained.

V. Conclusion

{¶ 41} Having overruled Father's assignments of error in case No. 11AP-581, we affirm the trial court's judgment rendered June 1, 2011. Moreover, having sustained Mother's assignments of error in case No. 11AP-649, we reverse in part the judgment rendered June 30, 2011 to the extent it awards Father the right to notice of relocation as well as access to W.C.'s records, daycare centers, and student activities. We therefore remand this matter for further proceedings to occur in a manner consistent with this decision.

Father's motion for leave to amend notice of appeal denied;
judgment affirmed in case No. 11AP-581;
judgment affirmed in part, reversed in part,
and cause remanded with instructions in case No. 11AP-649.

CONNOR and DORRIAN, JJ., concur.
