

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

MARY FRANCES DUNAWAY, :  
 :  
 Plaintiff-Appellee, : CASE NO. CA2014-08-113  
 :  
 - vs - : OPINION  
 : 4/27/2015  
 :  
 RICHARD GENE DUNAWAY, :  
 :  
 Defendant-Appellant. :

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
DOMESTIC RELATIONS DIVISION  
Case No. 14DR36962

Mary Frances Dunaway, 6143 Greenacre Road, Toledo, Ohio 43615, plaintiff-appellee, pro se

Thomas G. Eagle, 3386 North State Route 123, Lebanon, Ohio 45036, for defendant-appellant

**PIPER, P.J.**

{¶ 1} Defendant-appellant, Richard Dunaway (Father), appeals a decision of the Warren County Court of Common Pleas, Domestic Relations Division, finding that Ohio has jurisdiction to hear a custody dispute involving Father's child.

{¶ 2} Father and plaintiff-appellee, Mary Dunaway (Mother), were married and had one child born issue of the marriage. The couple divorced in Georgia, and Father was given

custody of the child. In early 2013, the child and Father moved to Warren County, Ohio. Mother, who did not have any contact with the child, moved to Toledo, Ohio.

{¶ 3} During the summer of 2013, Father and the child visited West Virginia for a brief time in order for Father to pursue employment opportunities there. However, during the visit, Father committed a crime in West Virginia. By September 2013, the child moved to Montana to reside with her maternal aunt and uncle once Father was incarcerated in a West Virginia correctional institution. The child has remained in Montana since September 2013.

{¶ 4} In February 2014, Mother filed a motion to register the Georgia divorce decree in Warren County, as she believed Father and the child were living there at the time. Father, who returned to Warren County upon his release, objected to the motion. The trial court overruled Father's objections, and accepted the Georgia decree.

{¶ 5} In May 2014, Mother moved the court to change the custody provisions of the Georgia decree, and a few months later, filed a motion for temporary orders allowing her to have visitation or contact with the child while the change of custody motion was pending. Father opposed Mother's motions on jurisdictional and inconvenience of forum grounds, and argued that Montana held proper jurisdiction over issues regarding the child because the child had been in Montana and had established a life there since September 2013.

{¶ 6} A magistrate held a hearing to determine which state was the proper forum for Mother's motion, and Father appeared and testified. Mother later testified at a different hearing, and stated that she is unemployed and her only source of income is Social Security disability payments of approximately \$700 a month. Mother testified that she lives in Toledo, and that coming to Warren County for future hearings would be much easier than traveling to Montana. The magistrate issued a decision recommending that Ohio assert jurisdiction based on Father and Mother residing in Ohio and the child having resided in Ohio within the six months prior to Mother filing her motion to register the Georgia decree. Father filed

objections to the magistrate's decision.

{¶ 7} Based on the magistrate's recommendation, the Ohio trial court spoke with the Montana court regarding the question of jurisdiction. The trial court indicated to the Montana court that Ohio was prepared to move forward on Mother's motion and had determined through the magistrate that Ohio held proper jurisdiction. The Montana court indicated that the aunt and uncle caring for the child had filed a Petition for Temporary and Permanent Guardianship of the child in the Montana court, and that the matter was pending. In an entry from the Montana court, it indicated that the child was thriving in Montana, and that she was enjoying the most stable period of her young life. However, the Montana court also noted that Mother and Father lived in Ohio, and that it would "defer to the State of Ohio to exercise jurisdiction over the Motion to Modify Custody filed by the Mother." The Montana court then deferred jurisdiction to Ohio and noted that it would assert its jurisdiction if Ohio declined jurisdiction at any point in the future.

{¶ 8} The Ohio trial court then overruled Father's objections to the magistrate's determination that Ohio was the proper jurisdiction, and the matter proceeded. The magistrate scheduled a hearing on Mother's motion for interim orders. However, before the hearing was to occur, Mother's attorney entered a request to withdraw from the case, as Mother was no longer paying his fee. The trial court granted the motion for withdrawal, and Mother proceeded pro se.

{¶ 9} Mother did not appear at the hearing on her motion for temporary orders, and offered no reason for her failure to appear. The magistrate then recommended dismissal of Mother's motion for temporary orders, citing lack of prosecution of the motion. The trial court adopted the magistrate's decision, dismissing Mother's motion for temporary orders.

{¶ 10} The magistrate then scheduled a pretrial conference on Mother's still-pending motion for change of custody. Citing convenience issues on behalf of Mother, the magistrate

ordered the pretrial conference to occur by phone so that Mother could avoid the cost of traveling to Warren County. The magistrate ordered that Mother and Father be available to accept a call from the magistrate at a designated time to complete the pretrial conference. However, Mother did not answer the phone when the magistrate called her at the appointed hour.

{¶ 11} The magistrate then issued an order that both parents were to appear in person for the pretrial conference. The magistrate permitted Mother to request a continuance if she was unable to attend, and gave Mother eight days to contact the court in regard to a continuance or her unavailability to appear. In the order, the magistrate also expressly noted that Mother's failure to appear would result in a dismissal of her motion, and that if the motion was dismissed "the current case pending before the Warren County Domestic Relations Court regarding Mother's wish to change custody will be closed." Mother neither contacted the magistrate for a continuance, nor did she appear as ordered for the pretrial conference. The magistrate then issued a decision recommending dismissal of Mother's motion for change of custody for lack of prosecution, and the trial court adopted the recommendation as a "permanent judgment" of the court.

{¶ 12} In the meantime, Father appealed the trial court's decision finding Ohio the proper jurisdiction to hear Mother's custody motion. Mother did not file a brief, and did not participate in the appellate process in any manner. Father's appeal is specific to whether Ohio or Montana is the proper jurisdiction to hear matters involving the child. However, given the trial court's dismissal and closing of the case, we find the issues raised by Father to be moot.

{¶ 13} According to Civ.R. 41(B)(1), "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." Civ.R. 41(B)(3) further

provides that dismissal for failure to prosecute "operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies."

{¶ 14} The record clearly indicates that Mother took no action to prosecute either of her motions once they were filed, despite the magistrate's indication that failure to appear would result in dismissal. Mother failed to appear each time she was ordered to by the magistrate, even when the magistrate scheduled a telephone conference for Mother's convenience. The trial court was within its discretion to dismiss Mother's motion for failure to prosecute, and such dismissal acted as adjudication on the merits of Mother's motions.<sup>1</sup> As such, there is no longer a pending motion or continuing live controversy over which the trial court could preside.

{¶ 15} It is a general rule of law that a court's function is to render judgment in actual controversies where judgments can be carried into effect. *In re Mathias*, 12th Dist. Madison No. CA93-03-008, 1993 WL 282679, \*1 (July 26, 1993). A case is moot when the issues presented are no longer live, and "it is not the duty of the court to answer moot questions." *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St.3d 407, 2010-Ohio-1844, ¶ 10

{¶ 16} Given the lack of a pending motion and the trial court's dismissal, we find that the issues raised by Father are no longer live, and therefore present a moot question on which this court will not offer an opinion. At this point in time, Mother has no pending motion seeking custody, and she has not revived her attempt to change the custody awarded Father within the Georgia decree. As such, we find the jurisdictional issue to be moot, and we dismiss the appeal.

{¶ 17} Appeal dismissed.

HENDRICKSON and M. POWELL, JJ., concur.

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1. "The trial court retains jurisdiction over issues not inconsistent with the appellate court's jurisdiction to reverse, modify, or affirm the judgment appealed from." *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, ¶ 9. Father's appeal was not specific to the merits of Mother's motions so that the trial court had jurisdiction to dismiss Mother's motions for lack of prosecution.