

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JENNIE McGUIRE,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ALBERTO OJEDA,	:	
	:	
Appellant	:	No. 1625 EDA 2012

Appeal from the Order Entered May 11, 2012,
In the Court of Common Pleas of Montgomery County,
Civil Division, at No. 2011-24643.

BEFORE: FORD ELLIOTT, P.J.E., BENDER and SHOGAN, JJ.

MEMORANDUM BY SHOGAN, J.: Filed: February 21, 2013

Appellant, Alberto Ojeda, appeals *pro se* from the order entered on May 11, 2012 that made final a prior order denying his motion for a continuance pursuant to Pa.R.Civ.P. 216.¹ We affirm.

The record reflects that Appellant filed support exceptions on August 19, 2011. In an order dated September 21, 2011, the trial court scheduled a *de novo* hearing for October 24, 2011. For reasons that are not clear from the record, the hearing *de novo* was continued and rescheduled

¹ While this court is willing to liberally construe materials filed by a *pro se* litigant, an appellant is not entitled to any particular advantage because he or she lacks legal training. ***Branch Banking and Trust v. Gesiorski***, 904 A.2d 939, 942 (Pa. Super. 2006). Any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing. ***Id.*** (citation omitted).

for May 11, 2012. Order, 2/3/12. Appellant, who lives in Miami, Florida, filed a motion on April 19, 2012, requesting a hearing *via* telephone. The trial court apparently denied this motion,² and on May 3, 2012, Appellant filed a motion requesting reconsideration of the motion for a continuance. The trial court denied Appellant's motion for reconsideration in an order dated May 4, 2012. On May 11, 2012, the day of the scheduled *de novo* hearing on Appellant's exceptions, Appellee, Jennie McGuire, accompanied by counsel, appeared before the trial court, but Appellant did not. N.T., 5/11/12, at 2. The trial court waited 15 minutes, but Appellant failed to appear. Thereafter, the trial court entered an order dismissing Appellant's exceptions. Order, 5/11/12. Appellant filed the instant appeal, and in an order filed on June 11, 2012, the trial court instructed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) within 21 days. Appellant filed his Pa.R.A.P. 1925(b) statement on June 29, 2012.

Appellant's Pa.R.A.P. 1925(b) statement reads as follows:

On the basis that the Pennsylvania Rules of Civil Procedure where not adhered to by the lower court of common pleas on the Exceptions case heard by said lower court and dismissed on May 11th, 2012 by the Honorable Patricia E. Coonahan.

² There is no order denying the motion for a continuance in the certified record. However, because the trial court entered an order on May 4, 2012 that is in the record that denied reconsideration of the missing order, we will presume it exists.

Pa.R.Civ.P.216 provides that '(1) illness of counsel of record, a material witness, or a party' are grounds for a continuance.

Defendant provided in good faith various Motions for Continuance and Re-consideration due to illness including supporting exhibits as per Pa.R.Civ.P. 216 within which ALL were consequently denied by said lower court. Even though Defendant, Alberto Ojeda adhered to the rule and expediently provided ample notices, attending physician's affidavit detailing illness and strict instructions impeding travel, multiple schedules of numerous testing and procedures, follow-up examinations and appointments with specialists and blood tests to be conducted in which all motions for continuances and motions for reconsideration were denied.

Defendant, Alberto Ojeda respectfully submitted multiple motions requesting continuances and/or telephone hearings in order to facilitate the scheduled Exception hearing. Due to Defendant, Alberto Ojeda residing in Miami, Florida clearly over 1200 miles outside the venue of Montgomery County and under strict orders not to travel and to remain under constant observation until all scheduled testing could be completed and a determination could be made by the various attending Hepatologist, Liver Specialists, Gastroenterologist and attending physicians.

Defendant, Alberto Ojeda attempted through its many diligent efforts to provide the court with all and any substantive proof of illness and in-availability at the time which were subsequently denied by the court impeding all access to due process by said court.

Appellant's Pa.R.A.P. 1925(b) statement (verbatim).

It is apparent from the Pa.R.A.P. 1925(b) statement and Appellant's brief that he is not appealing the May 11, 2012 dismissal of his exceptions. Rather, Appellant is challenging the denial of his motion for a continuance. Because an order denying a motion for a continuance does not dispose of all

claims and all parties, it is not a final order pursuant to Pa.R.A.P. 341. However, the May 11, 2012 order dismissing Appellant's exceptions made final the prior child support order, and thus, it made the prior order denying the continuance appealable. **See *Quinn v. Bupp***, 955 A.2d 1014, 1020 (Pa. Super. 2008) (stating that "once an appeal is filed from a final order, all prior interlocutory orders become reviewable."), *appeal denied*, 605 Pa. 688, 989 A.2d 918 (2009).

The standard of review of an order denying a motion for a continuance is for an abuse of discretion. ***Baysmore v. Brownstein***, 771 A.2d 54, 57 (Pa. Super. 2001). "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the results [sic] of partiality, prejudice, bias or ill-will." ***Id.*** (citation omitted).

Upon review of the record, the briefs of the parties, and the applicable legal authority, we discern no abuse of discretion and conclude that the trial court opinion accurately addresses and disposes of Appellant's issues. Accordingly, we affirm the trial court's order and we do so on the basis of the trial court's August 13, 2012 opinion.

Order affirmed.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
FAMILY DIVISION

JENNIE MCGUIRE, PLAINTIFF/APPELLEE	:	SUPERIOR COURT DOCKET NO. 1625 EDA 2012
v.	:	
	:	LOWER COURT DOCKET NO. 2011-24643
ALBERTO OJEDA, DEFENDANT/APPELLANT	:	

OPINION

COONAHAN, J.

AUGUST 13, 2012

On April 19, 2011, Defendant filed a Motion for Modification of Child Support Order and Answer to Contempt Petition in the Domestic Relations Section of Montgomery County. On July 1, 2011, a hearing before a conference officer in support was held. Plaintiff was present at the support conference, and Defendant failed to appear, despite being served at his last known address. Defendant's April 19, 2011 Petition was therefore dismissed by the conference officer in an order dated July 8, 2011. On August 19, 2011, Defendant filed Exceptions to Recommendation of Conference Officer/Master from the July 8, 2011 Order. On September 21, 2011, a Notice of Scheduling was sent to Plaintiff and Defendant by the Montgomery County Court Administrator notifying the parties that a short list proceeding was scheduled for Defendant's support exceptions on October 24, 2011 at 1:30 p.m. before this court.

On October 6, 2011, Defendant faxed a Motion for Telephone Hearing to the court's chambers for the short list proceeding on October 24, 2011.¹ The reason

¹ This motion was not filed by Defendant in the Prothonotary's Office of Montgomery County, and therefore is not in the official record.

stated in the motion for the request was "Defendant's inability to travel at this time from Miami, Florida to Norristown, PA." October 5, 2011 Motion for Telephone Hearing (attached as Exhibit A). No supporting documentation was attached to this motion. The court directed her secretary to inform the Defendant by telephone that the short list proceeding would not be conducted by telephone conference, but, that his support exceptions would be scheduled for a half-day protracted hearing and that he must appear at that time. On October 25, 2011, the court issued an order directing the Court Administrator to list Defendant's support exceptions for a one half-day hearing. Copies of this order were mailed to Plaintiff and Defendant.

On February 3, 2012, the Court Administrator, Michael R. Kehs, issued a scheduling order listing Defendant's support exceptions for a one half-day protracted hearing on May 11, 2012 at 9:00 a.m. before this court. On the same day, February 3, 2012, copies of this scheduling order were mailed to Plaintiff and Defendant. On April 19, 2012, Defendant faxed a "Motion for Continuance on Exception in Support Filed 8/19/11 by Defendant" to the court's chambers (faxed to Court on April 19, 2012).² In this motion, Defendant requested a continuance of the May 11, 2012 hearing due to "scheduled necessary health testing and evaluations to determine medical condition due to problems of the liver. Defendant is scheduled for various necessary tests and evaluations during the period of May 5, 2012 through out May 16th, 2012 for blood examinations, arterial duplex testing and sonogram of corodid artery." April 19, 2012 Motion for Continuance (attached as Exhibit B). Defendant attached an April 17, 2012 note from H. David Shifrin, M.D. which states that Defendant is in the process of a medical evaluation and "will

²This Motion for Continuance was filed with the Prothonotary's Office of Montgomery County on May 9, 2012.

not be able to travel on May 10-16-2012." On April 19, 2012, the court instructed her secretary to notify Defendant by telephone that his motion for continuance was denied.

On May 3, 2012, Defendant faxed a "Motion for Reconsideration for Re-Scheduling on Exception Hearing in Support Filed 8/19/11 by Defendant" to the court's chambers. In this motion, Defendant requested reconsideration of his continuance request because Defendant "is in dire need of medical attention and is under constant hospital observation. Respondent is under strict orders by Dr. Shifrin to perform critical tests due to respondent's deteriorating condition of his liver." Defendant added that he had made every possible effort to re-schedule the tests, but he was unable to do so due to "massive lay-offs and budget cuts" at the medical center where he was to have the tests done. May 3, 2012 Motion for Reconsideration (attached as Exhibit C)(faxed to court on May 9, 2012)³.

Defendant attached a computer print out of his scheduled appointments, two "appointment reminders" from Jackson Health System, seven "appointment slips" from Jackson Health system, and a printout of an article entitled "Jackson Memorial to layoff over 1,000 workers."

On May 4, 2012, the court issued an order denying Defendant's request for a continuance. On May 9, 2012, Defendant faxed a "Motion for Re-Consideration for Telephone Hearing on Exception in Support Filed 8/19/11 by Defendant" to the court's chambers. In his motion, Defendant stated he was in receipt of the court's May 4, 2012 order, and requested that the court permit the hearing to be held "via telephone" due to his "inability to travel during this time." May 9, 2012 Motion for

³ This Motion for Reconsideration was filed with the Prothonotary's Office of Montgomery County on May 9, 2012.

Reconsideration (Attached as Exhibit D)⁴(Faxed to court on May 9, 2012).

Defendant stated that he received the court's order on May 8, 2012, and because the hearing was scheduled for May 11, 2012, it "only leaves 48 hours before I am scheduled to be present before your honor, which is physically impossible to commit to due to illness." Defendant also stated that he wished to "extend the hearing date due to doctor's orders previously submitted" and that the hospital has tried to reschedule the testing but they have been "unable to due to the fact that the procedures would be to far apart". The court had her secretary contact Defendant by telephone and inform him that it is not this court's practice to hold support hearings by telephone, and that he would need to be present in court for the hearing on May 11, 2012.

On May 11, 2012, Plaintiff was present for the support hearing, with counsel, Michael E. Eisenberg, Esquire. Defendant failed to appear. The court commenced the support hearing, which was scheduled for 9:00 a.m., at 9:17 a.m., by stating "Thank you for being here this morning. I waited until now. I just thought I'd give another fifteen minutes." N.T. May 11, 2012 at 2. The court then stated that Defendant had contacted chamber's several times for a continuance due to he medical testing, but "...I have not spoken to him because I don't speak to litigants unless I talk to both people together...when I looked through the Domestic Relations file, I see that about a year ago he couldn't make it to the conference there because he had a hernia or something like that. So, anyway, I've denied his request for a continuance." N.T. at 2. The court then stated "[T]here is no continuance. And Mr. Ojeda is not here. And they are his exceptions, am I right?"

⁴ This motion was no filed by Defendant in the Prothonotary's Office of Montgomery County, and therefore is not in the official record.

Mr. Eisenberg replied "You are correct, Your Honor." The court then stated "Therefore, I will dismiss them." N.T. at 3.

Mr. Eisenberg made a request to the court for counsel fees since "...he has the burden of persuasion. Without better evidence, this is a series of frivolous filings, actually." N.T. at 4. The court stated that the Defendant wanted to hold the hearing over the phone but that "I don't hold hearings over the phone. That's just not the way I do things...when you take exceptions...it's a de novo hearing. And when you have a de novo hearing...I expect the parties to come in not just to testify but have financial documents with them...so we cannot do that over the phone, anyway." N.T. at 5-6. The court then added that the Defendant "...doesn't say he's having a procedure done. It's just doctor's appointments. And in my mind when you know far in advance that you are ...scheduled for a hearing on exceptions that you have filed, you should not...make your doctor's appointments around the court hearing that you have asked for, and he has asked for it." N.T. at 6. Finally, the court stated that if it had been an emergency "...that's something different. It just delays and backlogs everybody else's cases if I would grant a continuance on a case like this. There are so many other people in the system that are waiting for hearings and want to come into court and want to have their hearings...I am just not going to do it. And I haven't done it. And that's it." N.T. at 7. The court issued an order dated May 11, 2012 dismissing Defendant's support exceptions and ordering Defendant to pay \$1,500.00 to Plaintiff for her attorney's fees.

On June 11, 2012, Defendant filed a Notice of Appeal to the Superior Court of Pennsylvania of the May 11, 2012 Order. On June 12, 2012, the trial court issued an Order directing Plaintiff to file with the Trial Court a Concise Statement of

Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925 (b) within twenty one (21) days of the date of the Order. On June 29, 2012, Defendant filed his Concise Statement of Matters Complained of on Appeal which states as follows:

"On the basis that the Pennsylvania Rules of Civil Procedure where not adhered to by the lower court of common pleas on the Exceptions case heard by said lower court and dismissed on May 11th, 2012 by the Honorable Patricia E. Coonahan.

Pa.R.Civ.P.216 provides that '(1) illness of counsel of record, a material witness, or a party' are grounds for a continuance.

Defendant provided in good faith various Motions for Continuance and Re-consideration due to illness including supporting exhibits as per Pa.R.Civ.P. 216 within which ALL where consequently denied by said lower court. Even though Defendant, Alberto Ojeda adhered to the rule and expediently provided ample notices, attending physician's affidavit detailing illness and strict instructions impeding travel, multiple schedules of numerous testing and procedures, follow-up examinations and appointments with specialists and blood tests to be conducted in which all motions for continuances and motions for reconsideration where denied.

Defendant, Alberto Ojeda respectfully submitted multiple motions requesting continuances and/or telephone hearings in order to facilitate the scheduled Exception hearing. Due to Defendant, Alberto Ojeda residing in Miami, Florida clearly over 1200 miles outside the venue of Montgomery County and under strict orders not to travel and to remain under constant observation until all scheduled testing could be completed and a determination could be made by the various attending Hepatologist, Liver Specialists, Gastroenterologist and attending physicians.

Defendant, Alberto Ojeda attempted through its many diligent efforts to provide the court with all and any substantive proof of illness and in-availability at the time which were subsequently denied by the court impeding all access to due process by said court."

This opinion is filed pursuant to and is in compliance with Pa. R.A.P. 1925 (a).

Pa.R.C.P. 216, Grounds for Continuance, states, in part; "The following are grounds for a continuance...Illness of counsel of record, a material witness, or a party. If requested, a certificate of a physician shall be furnished, stating that such illness will probably be of sufficient duration to prevent the ill person from participating in the trial." Pa.R.C.P.216(A)(2). The decision as to whether or not to grant a continuance request is within the discretion of the trial judge. Com. ex rel. Rivers v. Myers, 414 Pa. 439, 200 A.2d 303 (1964), Baysmore v. Brownstein, 771 A.2d 54, 2001 PA Super 97 (2001). The trial judge has broad discretion in granting, or denying, a continuance request, and the trial court's decision shall not be overturned unless a clear showing of an abuse of that discretion is shown. Baysmore, at 54; Corrado v. Thomas Jefferson University Hosp., 790 A.2d 1022, 2001 PA Super 363 (2001). In order to prove an abuse of discretion by the trial judge, the record must show that "the judgment exercised was manifestly unreasonable, or the results of partiality, prejudice, bias, or ill-will." Corrado at 1022. Furthermore, it is not an abuse of the trial court's discretion in denying a continuance which is requested due to illness of a party when "his condition is not such as would indicate that attendance at the hearing would involve a serious risk to his health." State Board of Medical Education and Licensure v. Williams, 172 Pa. Super. 448, 94 A.2d 61 (1953).

The court did not abuse its discretion in denying Defendant's requests for a continuance of the May 11, 2012 support hearing. Defendant failed to demonstrate to the court that the medical appointments he was scheduled for were done so on an emergency basis, that the rescheduling of these appointments would pose a

serious risk to his health, or that traveling to Pennsylvania for the hearing was not medically advisable.

None of the documentation provided to the court by Defendant indicates that "such illness will probably be of sufficient duration to prevent the ill person from participating in the trial". Pa.R.C.P. 216. Defendant incorrectly states in his 1925(b) statement that he provided the court with "attending physician's affidavit, detailing illness and strict instructions impeding travel". No such affidavit was provided to the court. The Defendant never provided the court with any letters or documentation from any physicians who could verify his allegations that he was "under strict orders not to travel and to remain under constant observation until all scheduled testing could be completed..." See 1925(b) statement at last paragraph on page 1 and first paragraph of page 2. In his April 19, 2012, (filed on May 9, 2012), Motion for Continuance, Defendant attached a April 17, 2012 letter from H. David Shifrin, M.D., which stated only that Defendant was "in the process of an eval. of his medical condition and will not be able to travel on May 10-16, 2012". However, this note does not state what Defendant's medical condition is, nor does it state that his inability to travel is due to his medical condition, nor that an illness prevents him from participating in the trial. The doctor does not state that Defendant's health is preventing him from traveling, that his medical condition is such that Defendant requires immediate medical treatment, or that the Defendant must remain under "constant observation" until his tests are complete. In his 1925(b) statement, Defendant states that he is under the care of a "Hepatologist, Liver Specialists, Gastroenterologist, and attending physicians", yet the Defendant did not provide the court with any documentation from any of these physicians or

specialists as to the current state of his medical condition or any information indicating that travel would pose a serious risk to Defendant's health.

The other documentation that was provided to the court by Defendant were appointment slips, appointment reminders, a computer print out of all his upcoming appointments from May 4, 2012 until June 18, 2012, and a copy of an article about hospital lay-offs.⁵ None of the documentation provided indicates when these appointments were scheduled by the Defendant. The notice from the Court Administrator of Montgomery County scheduling Defendant's support hearing for May 11, 2012, was sent to Defendant on February 3, 2102; however the Defendant did not send his Motion for Continuance to the court until April 19, 2012. If Defendant scheduled these appointments prior to receipt of the February 3, 2012 scheduling order, Defendant made the decision to wait over two months to inform the court, and the other party, of his request for a continuance. If the appointments were made after receipt of the February 3, 2012 scheduling order, specifically the appointment on May 11, 2012 (the date of the hearing), any resulting conflict was self-generated by the Defendant, and therefore, it would be prejudicial to the opposing party to grant a continuance and reschedule the hearing based solely on Defendant's decision to unilaterally create a scheduling conflict. As stated previously in this opinion, nothing provided to the court by Defendant indicated that these appointments were scheduled due to a medical emergency, which would have made the choice of dates of his appointments beyond the control

⁵ The dates for Defendant's medical appointments were May 4, 2012, May 10, 2012, May 11, 2012, May 16, 2012, May 22, 2012, June 14, 2102, June 15, 2012, and June 18, 2012. The court notes that only one of these dates, May 11, 2012, directly conflicts with the May 11, 2012 support hearing. The May 11, 2012 appointment refers to "Medical-Hep/GI-Foll-Up" where defendant was to report to an Ambulatory Care Center. The appointment list of Exhibit C also shows a rescheduled laboratory fasting appointment of May 10, 2012.

of the Defendant. In fact, most of the appointments were scheduled for dates which were over two weeks, and up to two months, after Defendant submitted his April 19, 2012 Motion for Continuance. Medical testing and follow up appointments that are necessary due to a medical emergency would be scheduled immediately, not within more than two weeks or a two month time frame.

Defendant's allegation that his residency in Miami, Florida is a basis for granting the continuance is without merit. Defendant filed his support exceptions in Montgomery County, Pennsylvania, and was informed by the court as far back as October of 2011 that his hearing would take place in Montgomery County Pennsylvania, and that he would need to be present in court for the hearing. The scheduling notice for the May 11, 2012 hearing was sent to Defendant on February 3, 2012, over three months before the hearing date. Defendant was provided with ample notice so that he could make arrangements to travel to Pennsylvania for the support hearing.

The court's denial of Defendant's April 19, 2012 Motion for Continuance, and the court's denial of Defendant's subsequent reconsideration motions on the denial of the continuance, were not an abuse of the court's discretion. The court's decision was not based on "partiality, prejudice, bias, or ill-will." Defendant has a history of failing to appear in this matter. Defendant failed to appear at his initial support hearing at the Domestic Relations Section of Montgomery County on July 1, 2011 before the Conference Officer in Support. Defendant filed exceptions to the dismissal by the Conference Officer of his petition for modification of support, and then requested to conduct the resulting short list conference on his exceptions by telephone so he would not need to travel to Pennsylvania. Plaintiff in this matter

was present at the July 11, 2011 support hearing, and was present, with counsel, and ready to proceed at the May 11, 2012 support hearing. Defendant failed to present any documentation or information to the court that he was unable to travel to Pennsylvania for the May 11, 2012 hearing due to a medical emergency or a serious medical condition, therefore, the court properly denied his request for a continuance of the matter. Defendant failed to appear at the May 11, 2012 hearing, therefore, the court dismissed his support exceptions. To do otherwise would have been prejudicial to the Plaintiff who was present and ready to proceed on Defendant's support exceptions for a de novo hearing or trial.

For the above reasons, the trial court respectfully requests that the May 11, 2012 order be affirmed by Your Honorable Court.

BY THE COURT:

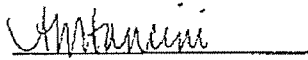

PATRICIA E. COONAHAN, J.

Copies of the above Opinion sent
on 8/13/12 to the following:

By First-Class Mail:

Michael Eisenberg, Esquire

Alberto Ojeda, 1426 SW 7th Street, Apt #3, Miami, FL, 33135


Secretary