[Cite as *Nyamusevya v. Nkurunziza*, 2011-Ohio-2614.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Leonard Nyamusevya,	:	
Plaintiff-Appellant,	:	
		No. 10AP-857
v.	:	(C.P.C. No. 09DR-05-1832)
Consolata Nkurunziza,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on May 31, 2011

Anelli Holford, Ltd., and *Dianna M. Anelli*, for appellant.

Susan Pam Brusk, for appellee.

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

SADLER, J.

{¶1} Plaintiff-appellant, Leonard Nyamusevya, appeals from the Agreed Entry Decree of Divorce ("Agreed Decree") entered by the Franklin County Court of Common Pleas, Division of Domestic Relations, on October 1, 2010.

{¶2} Appellant and defendant-appellee, Consolata Nkurunziza, were married in Nairobi, Kenya on April 26, 1995, and had three children born as issue of the marriage. On May 7, 2009, appellant filed a complaint for divorce, and on May 19, 2009, appellee filed an answer and counterclaim for divorce.

{¶3} According to the record, the matter came for trial on September 28, 2010. On that date, the trial court conducted an in camera review of Franklin County Children Services' ("FCCS") records held by the former guardian ad litem to determine whether or not the records should be disclosed. Thereafter, opening statements were waived, and appellant called his first witness, Kenneth Cohen, a hearing officer for FCCS. Prior to the completion of Cohen's direct examination, the trial court recessed for lunch. As reflected in the transcript, the matter did not resume on the record until September 30, 2010, whereupon the trial court inquired of appellant, "it's my understanding that after spending two days working out a settlement with the assistance of this court that you have decided that you are not going to settle this case and we're going to continue with the trial; is that correct?" (Tr. 20-21.) Appellant indicated that was not an accurate statement, and, thereafter, the parties discussed various issues on the record, which resulted in handwritten amendments to the Agreed Decree that was signed by both parties, and filed with the court on October 1, 2010.

{¶4} Appellant appeals from this entry, and brings the following four assignments of error for our review:

> [1.] The trial Court erred to Plaintiff-Appellant's prejudice by failing to journalize the entry of the September 29, 2010 proceeding, as ordered. All litigants have a clear legal right to have the proceedings they are involved in correctly journalized. Failing to journalize a proceeding entry or entering an incorrect journal entry is a clear abuse of discretion.
>
> [2.] The trial Court erred to prejudice mourning Plaintiff-Appellant, and forcing him to sign under duress the Agreed Divorce Decree, under Defendant-Appellee's counsel's threat, which is a clear abuse of discretion.

> [3.] Clerical mistakes:
>
> The trial Court erred to Plaintiff-Appellant's prejudice by improperly adopting the speedy and full of clerical mistakes October 01, 2010 Agreed Entry Decree of Divorce, because doing so was abuse of discretion. The clerical mistakes can be resolve[d] by direct appeal.
>
> The trial Court erred to Plaintiff-Appellant's prejudice by improperly adopting the speedy and full of clerical mistakes October 01, 2010 Shared Parenting Plan, because doing so was abuse of discretion. The clerical mistakes can be resolve[d] by direct appeal.
>
> [4.] The trial Court erred to prejudice Plaintiff-Appellant, by disregarding his preponderance and manifest weight of evidence, and Defendant-Appellee's falsity, dishonesty and coercion for the minor children. Its judgment decision is not supported by credible and convincing evidence, which is a clear abuse of discretion.

{¶5} In his first assignment of error, appellant contends the trial court erred in "failing to journalize" the proceedings held on September 29, 2010, as required by *State ex rel. Worcester v. Donnellon* (1990), 49 Ohio St.3d 117. *Worcester*, however, is wholly inapplicable to the matter at hand as that case concerned a journal entry that was contrary to the transcript of proceedings. Specifically, the journal entry at issue in *Worcester* indicated that the trial court was granting a continuance at the defendant's request while the transcript clearly reflected the continuance was not at the defendant's request and that the defendant expressly made note of the same for the purposes of the record. The Supreme Court of Ohio concluded that in such a circumstance the trial court's refusal to correct the journal entry amounted to an abuse of discretion and, therefore, granted the requested writ of mandamus and ordered the trial court to correct its journal entry.

{¶6} In the case sub judice, not only is there not an entry of September 29, 2010 to be corrected, there is not a transcript of what occurred on said date. According to appellee, when this matter reconvened after lunch on September 28, 2010, the parties informed the trial court that an agreement had been reached on all but two issues and, therefore, the parties proceeded with settlement discussions. The transcript supports appellee's version of events as the trial court stated on September 30, 2010, that the parties had spent two days working on a settlement with the trial court's assistance. Thus, the record reflects that on September 29, 2010, not a trial, a hearing, nor the taking of evidence occurred, but, instead, the trial court attempted to assist the parties in settling the outstanding issues; however, when it appeared a final settlement had not been reached, the trial court prepared to resume trial.

{¶7} Hence, it appears there was not a proceeding from September 29, 2010 that should have been "journalized." To the extent appellant's argument can be construed as a contention that the trial court erred in not making a record of the settlement negotiations, we note there is no requirement that the court do so, and the record does not reflect that appellant requested that a record be made of the same. Moreover, even if an actual hearing or trial occurred on September 29, 2010, but the record is lacking a transcript, App.R. 9(C) provides a remedy. Pursuant to App.R. 9(C):

> If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments

> shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

{¶8} As mentioned, there is no transcript for us to review, and appellant has not filed an App.R. 9(C) statement in lieu of a transcript. Consequently, we presume the validity of the trial court's actions. *Collier v. Stubbins*, 10th Dist. No. 03AP-553, 2004-Ohio-2819, ¶13.

{¶9} For the foregoing reasons, appellant's first assignment of error is overruled.

{¶10} In his second assignment of error, appellant contends he was forced to sign the Agreed Decree under duress. As evidence of duress, appellant directs us to the transcript of September 30, 2010, at which time a discussion occurred regarding appellant's failure to appear in court earlier in the day:

> THE COURT: And, yes, you were not here at 10:30 this morning as you were supposed to be.
>
> [APPELLANT]: Yes, Your Honor. And I will explain, Your Honor. Yesterday when I came –
>
> THE COURT: And it's my understanding that after spending two days working out a settlement with the assistance of this court that you have decided that you are not going to settle this case and we're going to continue with the trial; is that correct?
>
> [APPELLANT]: That is not true statement. If somebody told you that for sure, Your Honor, that is not what I said.
>
> THE COURT: You tell me what the true situation is then, please.
>
> [APPELLANT]: The true situation is I asked the defense to work with me so we can give you something done. That's

> what I ask. Yesterday when I came I told her my child died in Africa.
>
> THE COURT: It's my understanding that you don't have a child in Africa, but rather it's a nephew.
>
> [APPELLANT]: Yes. They are my kids.
>
> THE COURT: Go ahead.
>
> [APPELLANT]: That we have extended family.
>
> THE COURT: When did this happen?
>
> [APPELLANT]: It happened yesterday. That's when they notified me when I was coming to court. And when I left court, I went and begin to mourn and we begin the process of sending money for burial. Today I came here but they keep causing me problem. I left and went back and tried to solve the issue with the police regarding the death of the child. Then they called me back again. I came back here. But I'm very willing that we can resolve this, Your Honor, and if we can speak to them.

(Tr. at 20-22.)

{¶11} Thereafter, the parties and the trial court discussed the issues that remained outstanding and an agreement was reached on those issues. Absent fraud, duress, overreaching, or undue influence, a settlement agreement entered into by parties in a divorce is enforceable, if the parties intended to contract on its essential terms and intended to be bound by its terms. *Walther v. Walther* (1995), 102 Ohio App.3d 378. A settlement agreement " 'may be either written or oral, and may be entered into prior to or at the time of a divorce hearing. Where the agreement is made out of the presence of the court, the court may properly sign a journal entry reflecting the settlement agreement in the absence of any factual dispute concerning the agreement.' " *Haas v. Bauer*, 156 Ohio App.3d 26, 2004-Ohio-437, ¶16, quoting *Muckleroy v. Muckleroy* (Sept. 5, 1990), 9th Dist.

No. 14443. Furthermore, the Supreme Court of Ohio has held that " '[t]o avoid a contract on the basis of duress, a party must prove *coercion by the other party* to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party.' " *Kessler v. Kessler*, 10th Dist. No. 09AP-740, 2010-Ohio-2369, ¶7, quoting *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, syllabus (even if appellant felt pressured because trial was beginning, there is no evidence the appellant requested a continuance or demanded the trial go forward instead of signing the separation agreement). (Emphasis added.)

{¶12} Our review reveals nothing in the record indicating that appellant was coerced or pressured by appellee. The transcript portion to which appellant directs is providing an explanation for appellant's whereabouts and reasoning for why the settlement agreement was not yet complete. Additionally, while appellant may have been grieving due to the circumstances with his extended family in Africa, there is no evidence in the record that appellant was prevented from either demanding a trial if he was not in agreement with the parties' resolution of the issues or requesting a continuance. *Kessler*. From the record it appears as though it was appellant's decision regarding whether or not to proceed with settlement discussions and ultimately sign the Agreed Decree.

{¶13} Dissatisfaction with or general remorse about signing a consent agreement do not constitute "duress." *Murray v. Murray*, 6th Dist. No. L-09-1305, 2011-Ohio-1546, ¶26. Without evidence to support his contention that appellee had coerced him, appellant's argument indicates that he simply had a change of heart about signing the agreement. In this matter, we do not have evidence that appellant was under any

coercion which would constitute the kind of duress which would invalidate the consent agreement. Id.

{¶14} Finding that the record here is devoid of evidence of legal duress, we overrule appellant's second assignment of error.

{¶15} In his third assignment of error, appellant contends the trial court abused its discretion in adopting the Agreed Decree that is "full of clerical mistakes." Specifically, appellant directs us to page three of the Agreed Entry in which he contends the word "reasonable" was to be removed. Secondly, appellant contends that the last sentence of the third full paragraph on page ten of the Shared Parenting Plan ("SPP") that was incorporated into the Agreed Decree should read "Lisa" rather than "Simeon."

{¶16} When asserting the language in an entry is the result of a clerical mistake or an error arising from an oversight, the proper means of correcting such mistake or error is pursuant to Civ.R. 60(A), which permits a trial court to correct clerical mistakes that are apparent on the record. *Hodory v. Wood* (Nov. 10, 1975), 1st Dist. No. C-75356; *Ganley v. Ganley* (Jan. 6, 1986), 2d Dist. No. 85 CA 1. Pursuant to Civ.R. 60(A):

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

{¶17} Appellant has not requested relief from the trial court to correct what he alleges are clerical mistakes in the Agreed Entry and, as such, we have nothing yet to

pass on regarding this issue. Accordingly, we overrule appellant's third assignment of error.

{¶18} In his final assignment of error, appellant contends the record lacks credible evidence to support the trial court's custody and child support award and that the trial court's decision was based on "falsity, fraud and dishonesty." (Appellant's brief, 12.) Though the precise nature of appellant's argument is unclear, it appears appellant is arguing that appellee submitted "inadmissible hearsay evidence of false report of child abuse" and that appellee has denied appellant parenting time in the past, such that he should have been granted custody of the children.

{¶19} We note that because he does not specify, it is uncertain to what hearsay evidence appellant is referring. Regardless, the key fallacy of appellant's argument is that the trial court ordered shared parenting in accordance with *both* parties' request, and incorporated the SPP submitted jointly by the parties. R.C. 3109.04(D)(1)(a)(i) governs shared parenting and the approval of SPPs and provides:

> If both parents jointly make the request in their pleadings or jointly file the motion and also jointly file the plan, the court shall review the parents' plan to determine if it is in the best interest of the children. If the court determines that the plan is in the best interest of the children, the court shall approve it. If the court determines that the plan or any part of the plan is not in the best interest of the children, the court shall require the parents to make appropriate changes to the plan to meet the court's objections to it. If changes to the plan are made to meet the court's objections, and if the new plan is in the best interest of the children, the court shall approve the plan. If changes to the plan are not made to meet the court's objections, or if the parents attempt to make changes to the plan to meet the court's objections, but the court determines that the new plan or any part of the new plan still is not in the best interest of the children, the court may reject the portion of the parents' pleadings or deny their motion requesting shared

> parenting of the children and proceed as if the request in the pleadings or the motion had not been made. The court shall not approve a plan under this division unless it determines that the plan is in the best interest of the children.

{¶20} R.C. 3109.04(D)(1)(a)(i) does not contain a statutory requirement for the trial court to set forth findings of fact in regards to its best interest determination and decision to adopt the SPP. *Hardesty v. Hardesty*, 11th Dist. No. 2004-G-2582, 2006-Ohio-5648, ¶18. Here, the Final Decree of Shared Parenting, signed by both parties and the trial court, indicates the court was considering the "application of both of the parties for an order granting the parties shared parenting rights and responsibilities for the care of the minor children * * * and the Shared Parenting Plan submitted in this case." (Oct. 1, 2010 Final Decree of Shared Parenting, 1.) The entry further indicates the trial court reviewed the SPP, which states that "[t]he parties agree that they will have shared parenting" of their children. (Shared Parenting Plan, 1.) Additionally, the entry states that the trial court finds the SPP is in the best interest of the minor children.

{¶21} Albeit, there was limited evidence before the trial court with respect to custody of the children; however, this is so because there was no need for a trial and the submission of additional evidence in light of the parties' jointly submitted SPP and request for shared parenting. For appellant to complain on appeal that the trial court erred by ordering what he and appellee requested appears in contravention of the invited error doctrine which provides that a party may not take advantage of an error which he himself invites or induces the trial court to make. *Dunham v. Dunham*, 171 Ohio App.3d 147, 2007-Ohio-1167, ¶21; *Agarwal v. Bansal* (May 30, 2001), 10th Dist. No. 00AP-732.

{¶22} Appellant did not have to agree to either shared parenting or the SPP if he believed it was not appropriate. Had appellant objected to the agreement, then the matter

would have proceeded to adjudication pursuant to a trial and the taking of evidence. As stated by the court in *Osterling v. Osterling* (June 22, 1987), 12th Dist. No. CA86-06-083, "[i]t is fundamentally unfair for one party (here the appellant) to sit idly while a stipulation is presented to the court, to fail to object to an alleged inaccuracy, and then challenge the substance of the stipulation as being against the weight of the evidence caused by the misleading effect of his own failure to object."

{¶23} To the extent appellant believes shared parenting is no longer appropriate, he may request modification or termination of the same from the trial court in accordance with the appropriate civil rules.

{¶24} Accordingly, we overrule appellant's final assignment of error.

{¶25} Finally, we address appellee's motion for attorney fees. App.R. 23 allows this court to require an appellant to pay fees if we "determine that an appeal is frivolous." Here, appellee requests attorney fees in the amount of $1,000 on the basis that errors alleged by appellant are without merit. While we have affirmed the trial court's decision, we do not conclude, nor has appellee alleged, that this appeal was completely "frivolous." Therefore, we deny appellee's motion.

{¶26} In conclusion, we overrule appellant's four assignments of error, deny appellee's motion for attorney fees, and affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Motion for attorney fees denied;
judgment affirmed.

BRYANT, P.J., and DORRIAN, J., concur.