[Cite as *Dohm v. Dohm*, 2011-Ohio-1166.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN THE MATTER OF:	:	**O P I N I O N**
JENNIFER L. DOHM,	:	**CASE NO. 2010-L-091**
Petitioner-Appellee,	:	
- vs -	:	
STEVEN F. DOHM,	:	
Petitioner-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 10 DI 000405.

Judgment: Affirmed.

Jennifer L. Dohm, pro se, 9262 Chillicothe, Kirtland, OH 44094 (Petitioner-Appellee).

Steven F. Dohm, pro se, PID: 570-236, Richland Correctional Institution, P.O. Box 8107, Mansfield, OH 44901 (Petitioner-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Steven F. Dohm, appeals from a judgment of the Lake County Court of Common Pleas, Domestic Relations Division, dismissing Steven and Jennifer Dohm's petition for dissolution. The trial court dismissed the petition for the reason that Mr. Dohm was incarcerated and could not be present for a hearing on the dissolution petition. Mr. Dohm asserted that the court should have permitted his sister to appear at court on his behalf based upon a limited power of attorney given to her by Mr. Dohm for that very purpose. R.C. Section 3105.64 mandates that both parties to a dissolution

action appear before the court, and it does not provide for any other alternatives to such personal appearance; thus, we affirm the decision of the trial court.

{¶2} **Substantive and Procedural Facts**

{¶3} On June 24, 2010, the Dohms filed a petition for dissolution of marriage and an accompanying separation agreement. At that time, Steven was incarcerated at the Richland Correctional Institution in Mansfield, Ohio, serving a 36-month term of imprisonment that began on May 28, 2009.

{¶4} On July 13, 2010, the trial court issued a judgment entry dismissing the petition, stating that the petition "cannot proceed to hearing due to Petitioner Steven F. Dohm's incarceration."

{¶5} Mr. Dohm, proceeding pro se, timely appeals and asserts the following assignment of error:

{¶6} "The trial court abused its discretion when it dismissed the Dohm[s'] Petition for Dissolution predicated on the court's mis-beliefs (sic) versus the law."

{¶7} He asserts that the trial court abused its discretion in dismissing his petition because he was not required to attend a hearing for dissolution when he had executed a limited power of attorney designating his sister to appear at a hearing and to sign his name. The limited power of attorney was not filed with the trial court.

{¶8} Ms. Dohm did not file an opposing brief in this matter.

{¶9} **Standard of Review**

{¶10} Although Mr. Dohm couches his assignment of error in terms of the trial court's abuse of discretion, this case presents a question regarding the procedural mandates of a statute which creates an action for dissolution and the meaning of the provision requiring the parties to appear before the court for a hearing. R.C. 3105.64(A)

provides: “Except as provided in division (B) of this section, not less than thirty nor more than ninety days after the filing of a petition for dissolution of marriage, both spouses *shall appear before the court* and each spouse shall acknowledge under oath that he has voluntarily entered into the separation agreement appended to the petition, that he is satisfied with its terms, and that he seeks dissolution of the marriage.” (Emphasis added).

{¶11} The use of the word “shall” in a statute indicates the provision’s mandatory nature, leaving the court with no discretion. See *State ex rel. Law Office Pub. Defender v. Rosencrans*, 111 Ohio St.3d 338, 2006-Ohio-5793, ¶31 (the word “shall” establishes a mandatory duty while the word “should” requires the use of discretion and judgment).

{¶12} Thus, when a matter involves an interpretation of statutory authority, which is a question of law, our review is de novo. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶8.

{¶13} **Dissolution Procedure**

{¶14} In Ohio, an action for dissolution under R.C. 3105.63 is a form of no-fault divorce where the court can terminate a marriage pursuant to the mutual request of the parties. *Knapp v. Knapp* (1986), 24 Ohio St.3d 141, 144. “Agreement between spouses is the linchpin of the procedure,” and the petition must incorporate a separation agreement, which “delineate[s] the disposition of all property, set[s] forth the terms and amount of alimony (if any) and, if there are minor children *** provide for child custody, visitation and support.” *In re Adams* (1989), 45 Ohio St.3d 219, 220; R.C. 3105.63.

{¶15} “Once the separation agreement is executed, both parties must appear before the court, verify that each entered into the agreement voluntarily and that both

are satisfied with the terms of the agreement, and that they seek dissolution of the marriage. *Adams*, 45 Ohio St.3d at 220; R.C. 3105.64. The court may validate a dissolution and grant a decree, 'only if both parties are completely in accord' in assenting to the dissolution and the terms of the agreement. *In the Matter of Ord* (Oct. 29, 1982), 2d Dist. No. 1061, 1982 Ohio App. LEXIS 13644, at *12." *In re Means*, 11th Dist. No. 2004-T-0138, 2005-Ohio-6079, ¶19.

{¶16} The mandatory statutory provisions requiring a separation agreement and a personal appearance before the court after a 30-day "cooling-off" period was designed to assure that the parties, while under oath and in front of the court and each other, express their continued agreement as to the disposition of their property, the allocation of parental rights and responsibilities, and their continued desire to have their marriage dissolved. "The repeated use of the word 'shall' throughout the statutes *** suggests that the legislature intended them to be imperative. Without a clearly expressed intent to make the statutory provisions permissive only, provisions using the word 'shall' are construed to be mandatory." *In re Murphy* (1983), 10 Ohio App.3d 134, 137 (Internal citations omitted).

{¶17} Moreover, dissolution is a special statutory proceeding not found at common law; thus, the parties and the court are bound by the dictates of the statute and the statutory scheme must be followed. *Ashley v. Ashley* (1981), 1 Ohio App.3d 80, 81; *In re Spence*, 11th Dist. No. 2007-P-0070, 2008-Ohio-2127, ¶31. "[F]ailure to follow mandatory provisions of a statute may also render a judgment void and subject to collateral attack." *Starr v. Starr* (1985), 26 Ohio App.3d 134, 136.

{¶18} **The Limited Power of Attorney and Appearance at a Hearing**

{¶19} We first note that while Mr. Dohm submitted with his appellate brief a document entitled limited power of attorney which purports to designate his sister as his attorney-in-fact for purposes of the dissolution matter, this document was not a part of the trial court record and, therefore, could not have been taken into consideration by the trial court and cannot be considered by this court. Therefore, we will not consider the issue of whether Mr. Dohm could employ a power of attorney to meet the statutory requirement of a personal appearance at a hearing on the petition for dissolution.

{¶20} In order for a court to grant a dissolution, both parties must appear in court and express their continued assent to the separation agreement. The fact remains that Mr. Dohm was incarcerated at the time the petition was filed and would be incarcerated at the time a hearing on the petition would have been scheduled. The court correctly dismissed the petition approximately three weeks after it was filed, based solely upon the fact that Mr. Dohm was incarcerated. The trial court had no choice but to dismiss as the dissolution statute does not affirmatively provide for any alternative means of appearance.

{¶21} While the dissent correctly notes that many courts have held that a court must not dismiss a complaint from an incarcerated individual based solely on the fact that the individual is incarcerated, the dissent asserts, without authority specifically relating to a dissolution action, that the trial court should have considered "less drastic alternatives" before dismissing an incarcerated individual's case such as "video conferencing or other video or telephone methods to allow the incarcerated individual to appear before the court without being physically present."

{¶22} The trial court is not permitted by the statute to consider any other alternatives other than a personal appearance. Had the General Assembly intended for

such alternatives, it could have so provided as it has in other types of statutorily-created proceedings involving those who are incarcerated. For example, R.C. 2929.191(C) permits an inmate to appear at a post-release control hearing via video conferencing, "*if available and compatible.*" (Emphasis added.) There is nothing in this record to even indicate whether the trial court has such technology available even if the statute so permitted.

{¶23} The Dohms are not without a procedure for terminating their marriage through a divorce action. However, given the substantive and procedural facts of this case, the trial court had no other alternative but to dismiss the petition for dissolution.

{¶24} The sole assignment of error is without merit and the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J. dissents with a Dissenting Opinion.

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{¶25} The majority affirms the trial court's decision to dismiss the Dohms' Petition for Dissolution, finding that Steven Dohm's incarceration precluded his ability to appear before the court, as required by R.C. 3105.64. For the following reasons, I respectfully dissent.

{¶26} I disagree with the majority's conclusion that it was proper to dismiss the Dohms' Petition for Dissolution based solely on Steven's incarceration. It is "a basic tenet of Ohio jurisprudence that cases should be decided on their merits." *Perotti v.*

Ferguson (1983), 7 Ohio St.3d 1, 3. "Dismissal of a plaintiff's complaint is a harsh sanction and should not be done casually." *Boccia v. Boccia*, 11th Dist. No. 2005-T-0025, 2006-Ohio-2384, at ¶22 (citation omitted).

{¶27} Various courts have held that a court should not dismiss a complaint from an incarcerated individual based solely on the fact that the individual is incarcerated. See *Porter v. Rose*, 8th Dist. No. 79697, 2002-Ohio-3432, at ¶18 ("[W]e question whether a trial court may dismiss a civil complaint from an incarcerated pro se defendant without first considering other methods of providing the complainant access to the courts."); *Freeman v. Kimble-Freeman*, 8th Dist. No. 79287, 2001 Ohio App. LEXIS 5288, at *6 (the "dismissal of a pro se inmate's complaint for want of prosecution where no means of appearance is available is an abuse of the trial court's discretion"); *Jordan v. Ivanchak*, 11th Dist. No. 88-T-4102, 1989 Ohio App. LEXIS 4713, at *9.

{¶28} Instead of dismissing the Dohms' Petition, the trial court should have considered "less drastic alternatives" to dismissal. *Porter*, 2002-Ohio-3432, at ¶19. "Dismissing the action *** without considering less drastic alternatives [does] not advance the judicial principle of deciding cases on the merits. *** The trial court abused its discretion by dismissing the case *** without attempting a less drastic remedy which would give plaintiff his day in court." *Ivanchak*, 1989 Ohio App. LEXIS 4713, at *9.

{¶29} Many such alternatives may be considered by the trial court. The court should consider allowing a prisoner to be transported to court for hearings or trial. However, "[i]f the risks and expense involved in transporting the prisoner to the courthouse are prohibitive, *** courts have suggested a number of other alternatives to dismissal including a bench trial in the prison, *** postponement of proceeding if the

plaintiff's release is imminent, or dismissal without prejudice leaving open the possibility of the plaintiff's refiling his case at a later date." *Laguta v. Serieko*, 48 Ohio App.3d 266, 267. Similarly, a court may consider using video conferencing or other video or telephone methods to allow the incarcerated individual to appear before the court without being physically present. While all of these alternatives may not be feasible in every case, a trial court should at least consider these options.

{¶30} In this case, there is no evidence that the court considered such alternatives to dismissal prior to dismissing Steven's Petition. The court's Judgment Entry did not indicate whether the court would be able to accommodate Steven's situation.

{¶31} While I agree that appearance before the trial court in dissolution proceedings is governed by statute, R.C. 3105.64 does not expressly require personal and physical appearance before the court. The majority emphasizes that each party in dissolution proceedings "shall" appear before the court. However, the issue regarding R.C. 3105.64 is not the meaning of the word "shall," but instead of the word "appear." The statute does not specify whether such appearance must be made by physically coming before the court in the courtroom, or if the parties may appear in alternative ways, such as by a video conference. Without any express prohibition of such an alternative method of appearance stated in the statute, the foregoing analysis employed by courts requiring the consideration of other methods of appearance should be applicable not only in other civil proceedings but also in dissolution proceedings.

{¶32} The majority also asserts that there is nothing in the record to establish that video conferencing technology is available to the trial court. The trial court is in the best position to make this determination and should have made such a determination

prior to dismissing the Dohms' Petition. Additionally, this court should take judicial notice of the availability of such technology. Pursuant to Evid.R. 201(C), "[a] court may take judicial notice, whether requested or not" of adjudicative facts, or facts of the case. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evid.R. 201(B). This court should take judicial notice of the fact that videoconferencing equipment is available and has been used in Lake County, the county from which this appeal originates. See *State v. Walker*, 11th Dist. No. 2009-L-170, 2011-Ohio-401, at ¶¶6-8 (trial court records indicate that inmate appeared before the court via video conferencing equipment in postrelease control proceedings).

{¶33} The majority indicates that although the Dohms' Petition for Dissolution has been dismissed, they still have the ability to terminate their marriage through divorce. However, such an alternative will cause unnecessary cost and delay for the Dohms. It will require them to refile their suit in a different format, presumably costing additional money, as well as time. This would be avoidable if the trial court allowed Steven to appear before the court in an alternate manner and proceed with the dissolution.

{¶34} Refiling this matter as a divorce instead of a dissolution raises additional concerns. Divorce and dissolution proceedings are dissimilar. Due to the dismissal of the Petition for Dissolution, the Dohms may be forced to pursue an action that has different results than those they had anticipated.

{¶35} In divorce proceedings, a court may reject a separation agreement as unfair, while in a dissolution, the court cannot alter the agreement of the parties. See

Helman v. Helman, 11th Dist. No. 2007-T-0093, 2008-Ohio-2320, at ¶28 (in divorce proceedings "[a]lthough binding on the parties, a settlement agreement is not binding on the court, which has the discretion to adopt the agreement, reject the agreement, or adopt portions of the agreement while ruling separately on other issues"); *In re Valentine*, 5th Dist. No. CA-785, 1986 Ohio App. LEXIS 5635, at *5 ("[T]he trial court is limited in a dissolution [proceeding] in the remedies it may grant. *** The court may not *** alter or amend the agreement or the dissolution judgment that flows from it."). Similarly, courts in dissolutions do not "have the power to modify the terms of a separation agreement entered into between the parties." *Sundstrom v. Sundstrom*, 11th Dist. No. 2005-A-0013, 2006-Ohio-486, at ¶24 (citation omitted).

{¶36} Because of these differences, filing for divorce may result in a different, and inferior, outcome for the Dohms. In divorce proceedings, the court may decide that the Dohms' separation agreement is unfair and reject the terms they had agreed on. Therefore, divorce is not a fair or equal replacement for dissolution and the availability of divorce as a substitute for dissolution does not justify dismissing the Dohms' Petition for Dissolution.

{¶37} Finally, the majority's decision results in unequal treatment to incarcerated individuals with respect to dissolution of marriage. While the focus of the appearance requirement in R.C. 3105.64 is to provide a cooling off period, there is nothing in the statute that even hints that the General Assembly intended to prevent an incarcerated spouse from obtaining a dissolution of marriage. The majority's decision does just that. Participation by video conference still allows for a cooling off period and still allows an incarcerated spouse to obtain a dissolution. Moreover, the incarcerated party can be

administered an oath by an appropriate prison official to assure that the inmate is sworn in when he or she appears at the dissolution hearing.

{¶38} Accordingly, I respectfully dissent. This case should be remanded for the trial court to consider alternatives to dismissal, such as the possibility of allowing Steven to appear before the court in a method other than physical appearance at the courthouse.