

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

LEE REED (Deceased), :
 :
Plaintiff-Appellee, : CASE NO. CA2008-09-233
 :
- vs - : OPINION
 : 8/17/2009
 :
HENRY MORGAN, :
 :
Defendant-Appellant. :

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR83040700

Fiehrer & Fritsch, LLC, Lawrence P. Fiehrer, Robinson-Schwenn Bldg., Suite 400, 10 Journal Square, Hamilton, Ohio 45011-3459, for Paul Day (Executor)

Samuel D. Borst, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Henry L. Morgan, Sr. appeals the Butler County Domestic Relations Court's decision granting a Motion of Suggestion of Death and Motion of Substitution of Party in a continuing action for child support arrearage. We affirm the trial court's decision.

{¶2} On September 21, 1983, Lee A. Reed and Morgan were divorced. The trial court granted custody of the parties' then four-year-old son to Reed, and ordered Morgan to

pay \$150 per week in child support. On September 10, 1997, the Butler County Child Support Enforcement Agency (CSEA) recommended the child be emancipated, but also claimed Morgan was in arrears in his support obligations. On October 14, 1997, a magistrate filed a decision approving the emancipation and ordering Morgan to pay \$225 per month in child support arrearage.¹ The trial court adopted the magistrate's decision on October 28, 1997.

{¶3} Reed subsequently passed away on August 14, 2004, and plaintiff-appellee, Paul E. Day, was appointed as the executor of Reed's estate.

{¶4} On January 16, 2008, CSEA obtained an order from the trial court directing the Butler County Clerk of Courts to forward sums they were holding on Morgan's behalf to CSEA to pay off the child support arrearage.² On February 13, 2008, the magistrate issued a CSEA entry and order approving a distribution of lump sum funds towards the arrearage. Morgan filed objections to the magistrate's decision, arguing in part that he did not receive proper notice of the CSEA's arrearage determination.³ On March 19, 2008, the trial court overruled the magistrate's decision and remanded the matter to the magistrate to conduct a mistake of fact hearing.

{¶5} On April 21, 2008, CSEA sent a letter to Day, as the representative of Reed's estate, informing him of the pending hearing regarding support arrearage. Day contacted an attorney who met with Day on May 8, 2009. Day's attorney filed a Motion of Suggestion of Death on May 30, 2008. Day, as executor for Reed's estate, filed a Motion for Substitution of Party that same day. Memorandums in support of both motions were filed, as were Morgan's

1. A criminal court also ordered Morgan to pay \$225 per month to CSEA, presumably for arrears, when Morgan pled guilty to a misdemeanor nonsupport violation of R.C. 2919.21 on May 13, 2005.

2. The Butler County Clerk of Courts held a bond that Morgan had posted.

3. Morgan also alleged that he and Reed had entered into a settlement agreement regarding arrearages in May of 1999; however, the purported agreement was never presented to the trial court for approval.

oppositions to the motions. On July 8, 2008 the magistrate filed a decision recommending the motions be granted. Morgan responded with an objection to the magistrate's decision. On August 25, 2008, the trial court affirmed the magistrate's decision and granted both motions. Morgan filed an appeal raising two assignments of error.

{¶6} Assignment of Error No 1:

{¶7} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT IN OVERRULING HIS OBJECTION TO THE MAGISTRATE'S DECISION, SINCE THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO MAKE A DETERMINATION REGARDING CHILD SUPPORT ARREARS OF AN EMANCIPATED CHILD AS AN ESTATE ASSET, AND FOR THAT REASON THAT THE MAGISTRATE LACKED AUTHORITY UNDER CIV.R. 53(C)(3)(D), CIV.R. 75(B), AND R.C. 3223.05 TO ADD THE ESTATE OF LEE REED AS A THIRD PARTY TO THIS DIVORCE ACTION."

{¶8} In his first assignment of error, Morgan argues the trial court did not have jurisdiction, Reed's estate was not a proper party, joinder was improper, and the magistrate exceeded his authority. We find no merit to Morgan's arguments.

{¶9} "Both common and statutory law in Ohio mandate that a parent provide sufficient support for his or her child. Indeed, the obligation of support follows the parent." *Haskins v. Bronzetti* (1992), 64 Ohio St.3d 202, 205. "The court in which a decree of divorce is originally rendered retains continuing jurisdiction over matters relating to the custody, care, and support of the minor children of the parties." *Loetz v. Loetz* (1980), 63 Ohio St.2d 1, 2. See, also, *Jefferies v. Stanzak* (1999), 135 Ohio App.3d 176, 181 (finding a court that enters a child support decree has continuing jurisdiction over matters relating to child support). Thus, that same "court has full power to enforce its decree, to modify it as the parties' changing circumstances require, and to order the payment of support arrearages." *Jefferies*

at 181. See, also, R.C. 3121.35 and 3121.36 (courts that issue child support orders have authority to enforce the order, and collect arrearages owed even after termination of the order).

{¶10} Morgan first argues that the trial court has no subject-matter jurisdiction over the determination of whether a probate asset exists, and alternatively that the trial court lost jurisdiction over child support arrearage when the minor child turned 18 in 1997.

{¶11} In this case, the trial court is not determining the existence of a probate asset. Instead, the court is merely determining the proper parties in a child support arrearage case, which it clearly has jurisdiction over as it entered the original child support order. Moreover, the trial court has continuing jurisdiction over the matter until it is resolved. If we were to accept Morgan's argument that the trial court lost jurisdiction to collect arrearages when the child turned 18, we would effectively be creating a "statute of limitations" on child support obligations. This would essentially bar trial courts from enforcing uncollected child support orders once the child was emancipated. Not only is this an absurd result, but it would be in direct contradiction to the jurisdiction authorized by R.C. 3121.35 and 3121.36 and the Supreme Court's decision in *Smith v. Smith* (1959), 168 Ohio St. 447, 454, which found courts do not lose jurisdiction to enforce payment of arrearages even after the minor reaches the age of majority. Therefore, it is clear that the trial court has jurisdiction over the matter of child support arrearages.

{¶12} Morgan next argues that the proper party to the action is not Reed's estate, but the child for whom the obligation was made. In support, Morgan cites *In re Estate of Antkowiak* (1994), 95 Ohio App.3d 546, in which the Sixth Appellate District held that collected arrearages did not belong to the estate of a decedent obligee, but instead passed outside the estate directly to the child.

{¶13} *Antkowiak* is easily distinguished because it involved a dispute between the

adult child, who was a party to the proceedings, and both the Lucas County Child Support Enforcement Agency and the beneficiary of the obligee's estate. In this case, Reed's estate, not her son, is a party to the proceedings. As such, we are guided by the Fourth Appellate District when it stated: "[t]he duty of support runs from parent to child, and not directly from noncustodial parent to custodial parent. However, when the noncustodial parent fails to make payments as ordered and either the custodial parent or a public agency must assume that additional burden, the parent or agency is entitled to recoup its payments from the obligated parent. In the case at bar, absent evidence to the contrary, it is assumed that appellant provided the parties' child with the requisite support in the absence of timely child support payments from appellee. *Therefore, the right to child support arrearage payments was an asset owned by the custodial parent.*" (Emphasis added.) *Miller v. Miller* (1991), 73 Ohio App.3d 721, 724-25. In the case at bar, the only parties in this case are Reed's estate, CSEA and Morgan. Thus, consistent with *Miller*, Reed's estate is a proper party to this proceeding.

{¶14} Morgan contends that the trial court erred in joining the estate as a party in contravention of Civ.R. 75(B). We find this argument wholly without merit because Reed's estate was not joined pursuant to Civ.R. 75(B). Instead, Reed's estate was *substituted* for the decedent Reed, under Civ.R. 25(A).

{¶15} Finally, Morgan asserts that when the trial court overruled the magistrate's decision regarding the lump sum funds, and remanded the matter to the magistrate for a mistake of fact hearing, the trial court limited the magistrate's authority. In particular, Morgan alleges that the magistrate exceeded his authority by considering the motions during the mistake of fact hearing and later ruling on both motions in contravention of what the trial court specifically ordered. In support of this contention, Morgan cites Civ.R. 53(C)(3)(d) and R.C. 3123.05 as authority.

{¶16} Initially we note that Civ.R. 53(C)(3)(d) is no longer a part of the Ohio Rules of Civil Procedure after the rule was amended on July 1, 2006. See Historical and Statutory Notes to Civ.R. 53. Thus, Morgan's reliance on that rule is without basis and misplaced. See *Alexander Rand Alzheimer's Ctr. v. Ohio Certificate of Need Review Bd.* (1991), 72 Ohio App.3d 161, 164.

{¶17} R.C. 3123.05 outlines procedures for mistake of fact hearings after a default notice is issued to an obligor. In his argument, Morgan cites to that portion of the rule which states: "[t]he hearing shall be limited to a determination of whether there is a mistake of fact in the default notice." Morgan suggests that because the magistrate did not limit the hearing solely to the default notice, the magistrate exceeded his authority.

{¶18} We note that the lump sum request was the primary reason for the June 20, 2008 mistake of fact hearing. At that hearing, Morgan and the CSEA indicated the issue was moot because the money was disbursed rather than given to CSEA. After the lump sum issue was mooted, Morgan's attorney suggested that other issues, including the parties to the action, and the timeliness of the motions be discussed. Morgan cannot now argue that the magistrate should not have addressed the motions when he himself brought them to the magistrate's attention.

{¶19} Furthermore, the motions were filed a few weeks before the hearing, and since Day and the estate's attorney both attended the hearing, it was incumbent on the magistrate to at least partly review the matter in the interest of judicial economy and preservation of resources.

{¶20} In conclusion, we find the trial court had jurisdiction over the matter, Reed's estate is a proper party to the proceeding, joinder was not at issue, and the magistrate acted within his authority. Therefore, Morgan's first assignment of error is overruled.

{¶21} Assignment of Error No. 2:

{¶22} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT VIOLATED CIV. R. 25(A) AND THE DEFENDANT-APPELLANT'S DUE PROCESS RIGHTS BY OVERRULING HIS OBJECTIONS TO THE MAGISTRATE'S DECISION DUE TO AN UNTIMELY FILING OF A SUGGESTION OF DEATH AND UNTIMELY FILING OF A MOTION TO INTERVENE AS A SUBSTITUTION PLAINTIFF."

{¶23} In his second assignment of error, Morgan argues neither motion was timely filed. Specifically he asserts that either an attorney for CSEA or the probate attorney for Reed's estate should have filed a suggestion of death in 2004. We do not agree.

{¶24} A trial court's decision to grant motions filed pursuant to Civ.R. 25 is reviewed under an abuse of discretion standard. See *Ahlrichs v. Tri-Tex Corp.* (1987), 41 Ohio App.3d 207, 210. An abuse of discretion is more than simply an error of law or judgment; instead it is a finding that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶25} "Upon the death or incompetency of a party it shall be the duty of the attorney of record for that party to suggest such fact upon the record within fourteen days after he acquires actual knowledge of the death or incompetency of that party." Civ.R. 25(E). So long as the deceased party's claim is not extinguished, any party may file a motion to substitute with the court not later than 90 days after the suggestion of death is filed. Civ.R. 25(A). Despite these time limits, a party may still file a motion, under Civ.R. 25, upon a demonstration of excusable neglect. See, e.g., *Perry v. Eagle-Picher Industries, Inc.* (1990), 52 Ohio St.3d 168, 172; *Markan v. Sawchyn* (1987), 36 Ohio App.3d 136, 137-38; *Young v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1993) 88 Ohio App.3d 12, 15-16.

{¶26} Because Day, as executor for Reed's estate, filed a Motion for Substitution on the same day the Motion for Suggestion of death was filed, it is clear that the substitution

motion was filed within the time limits prescribed by Civ.R. 25(A). We now turn to the timeliness of the suggestion of death motion.

{¶27} When Reed passed away in August of 2004, she died without an attorney of record. While the CSEA was indeed pursuing a criminal nonsupport action against Morgan at the time of Reed's death, CSEA has not and cannot ever be considered Reed's attorney of record because CSEA only represents the state of Ohio in support matters. See *Blankenship v. Blankenship* (Dec. 8, 1992), Adams App. No. 528, 1992 WL 368838, at *2-4. Furthermore, Reed was not a party to the criminal action so no duty existed to notify any court of her death.

{¶28} In addition, the attorney who handled the probate of Reed's estate cannot be considered her attorney of record because he was not the domestic relations attorney.⁴ Moreover, an attorney of record in one particular matter, in one particular court, does not mean that he or she is an attorney of record in all possible proceedings, in all other courts. "Attorney of record denotes 'the attorney whose name must appear somewhere in permanent records or files of a case, or on the pleadings or some instrument filed in the case, or on appearance docket.'" *Savransky v. City of Cleveland* (Feb. 11, 1982), Cuyahoga App. No. 43664, 1982 WL 2341, at *1, citing Black's Law Dictionary 118 (5 Ed.1979). "Further, Ohio Civil Rule 11 requires that every pleading of a party represented by an attorney be signed by at least one attorney of record." *Id.*

{¶29} Between the date of Reed's death and the CSEA's request for the lump sum held by the Butler County Clerk of Courts -- a period of approximately three and one-half years -- there were no filings in this case. CSEA notified Day, as executor for Reed's estate,

4. Morgan asserts there was a pending motion for a reduction of child support arrears filed with the trial court. After a diligent search, we have been unable to locate the motion within the record, although we are aware of the magistrate's September 9, 2003 continuance motion which alludes to the matter. We note that the requests for, and grants of, continuances were served directly upon Reed, and not upon any counsel of record, which further supports the fact that Reed did not have an attorney of record at the time of her death. Even if the alleged motion was indeed pending, there was no way for the probate estate attorney to have any knowledge of the motion, as he was not her attorney of record at the time.

in April of 2008, about the arrearages issue and as a result, Day contacted an attorney about the matter. Day and the attorney met on May 8, 2008, whereupon the attorney was then made aware of Reed's death and her existence as a party in the arrearage action. As the trial court found, upon receipt of "actual knowledge" of Reed's death, the attorney timely served a Motion for Suggestion of Death on all parties on May 22, 2008.

{¶30} Because both motions were filed within the time periods contained within Civ.R. 25(A) and (E), the court properly exercised its discretion in granting each motion. Morgan's second assignment of error is overruled.

{¶31} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.

[Cite as *Reed v. Morgan*, 2009-Ohio-4130.]