

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

Brenda Heisler NKA Davis,	:	Case No. 09CA12
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND JUDGMENT ENTRY</u>
Bruce A. Heisler,	:	
Defendant-Appellant.	:	Released 1/13/10

APPEARANCES:

L. Jackson Henniger, Logan, Ohio, for appellant.

Steven F. Jackson, Logan, Ohio, for appellee.

Harsha, J.

{¶1} Bruce Heisler appeals the Hocking County Court of Common Pleas dismissal of his motion to modify a divorce decree allocating parental rights and responsibilities. When Bruce and Brenda Heisler divorced in 2000, Ms. Heisler received parental responsibility (custody) of her son. In 2008, Mr. Heisler sought to modify the custody order. A year later the parties reached an agreement, which they reduced to a handwritten entry signed by both parties. Mr. Heisler was to prepare a formal agreed document within fifteen days. Some fifty days later, Mr. Heisler's counsel finally forwarded a copy of the formal agreed entry to Ms. Heisler's counsel. However, before Ms. Heisler received her copies, their son became subject to delinquency and truancy charges in the Fairfield County Juvenile Court.

{¶2} Ms. Heisler then moved to dismiss the motion to modify the custody order. She argued that the entry was delivered to her in an untimely fashion and did not reflect

what was agreed to in the handwritten entry. She also argued that Hocking County had lost jurisdiction to decide the motion because of the action in the Fairfield County Juvenile Court. Two days later without comment, the court granted Ms. Heisler's motion to dismiss.

{¶3} Mr. Heisler argues that the trial court abused its discretion in dismissing the motion. First, he contends that the delinquency case in Fairfield County did not divest Hocking County of the ability to address the issues involving child support. Because R.C. 3109.06 provides for the continuing jurisdiction of Hocking County over the modification of parental rights and responsibilities previously established in its divorce decree, the Fairfield County Juvenile Court and Hocking County Court of Common Pleas share concurrent jurisdiction over the custody of the minor child. Thus, dismissal, to the extent that it was premised on lack of subject matter jurisdiction, was improper.

{¶4} Second, Mr. Heisler argues that, although he is in technical violation of a local rule of the Hocking County Court of Common Pleas concerning time limits to prepare entries, the trial court abused its discretion in dismissing the motion. We agree. Our review indicates that both parties failed to follow the strict time requirements of the local rule, and furthermore the court itself arguably failed to abide by the rule. Sanction by dismissal here frustrates the fundamental rule that cases should be decided on their merits. Moreover, the court failed to allow Mr. Heisler the opportunity to be heard before issuing the sanction.

I. Facts

{¶5} In 2000 the Heislars terminated their marriage by a dissolution that awarded custody of their son to Ms. Heisler and ordered Mr. Heisler to pay child support. In February of 2008, Mr. Heisler filed a motion to modify the custody award. After a number of court hearings and some delays, the court conducted a final hearing on February 11, 2009. At the conclusion of the hearing the parties reached an agreement, which they reduced to a handwritten “Memorandum Entry.”

{¶6} The Memorandum Entry purportedly resolves a number of the parties’ respective monetary claims for the support of the child. The entry does not address any issues pertaining to actual custody or visitation, which were resolved by a separate entry in 2008. The Memorandum Entry does indicate that Ms. Heisler’s obligation to pay child support “shall be in accordance with the attached worksheet,” which is a form titled “Sole Residential Parent or Shared Parenting Worksheet.” This worksheet details Mr. and Ms. Heisler’s respective gross incomes and calculates their child support obligations.

{¶7} The Memorandum Entry, which both parties signed, indicates that it was to be reduced to a formal journal entry by Mr. Heisler’s attorney within fifteen days. On March 20, 2009, Mr. Heisler’s attorney reduced the Memorandum Entry to a formal document. Mr. Heisler’s attorney claims that a copy of the Formal Entry was placed in the courthouse box of Ms. Heisler’s attorney on March 31, 2009. Ms. Heisler’s attorney claims that he did not receive the Formal Entry until April 3, 2009.

{¶8} On April 15, 2009, Ms. Heisler moved to dismiss Mr. Heisler’s motion. She argued that the Memorandum Entry was no longer in effect because of the fifteen-

day limitation it contained and that Mr. Heisler had taken fifty-one days to prepare the Formal Entry. Furthermore, Ms. Heisler argued that the Formal Entry did not reflect that she was providing health insurance for the child, which she claims was the topic of “much discussion” at the negotiation.

{¶9} The Memorandum Entry does not specifically resolve whether Ms. Heisler was providing health insurance for the minor child. Rather, the attached worksheet indirectly addresses this issue by listing two separate support amounts, contingent on whether the child is being provided with health insurance. Naturally, Ms. Heisler owes a greater monthly child support amount if she is not providing insurance. The Formal Entry states that “[a]t this time, the children are not being covered by a private health insurance policy.” It then indicates that Ms. Heisler’s obligation is the amount listed on the worksheet for when health insurance is not provided.

{¶10} Ms. Heisler also argued that Mr. Heisler’s motion should be dismissed because Hocking County no longer had jurisdiction to enter a modification of the decree. Apparently, sometime between the creation of the Memorandum Entry and when the Formal Entry was delivered to her, Fairfield County Juvenile Court initiated a truancy and delinquency proceeding against the Heislars’ minor child. Ms. Heisler argued that that case divested Hocking County of jurisdiction to modify its support order.

{¶11} On April 17, 2009, without a hearing or issuing a supporting rationale, the Court dismissed Mr. Heisler’s pending motion. Mr. Heisler then filed this appeal.

II. Assignment of Error

{¶12} Mr. Heisler raises the following assignment of error:

I. ASSIGNMENT OF ERROR – ABUSE OF DISCRETION

THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING
APPELLANT'S MOTION TO MODIFY DECREE AS TO THE
ALLOCATION OF PARENTAL RIGHTS AND RESPONSIBILITIES.

III. Legal Analysis

{¶13} Mr. Heisler offers two principal arguments. First, he claims that the Hocking County Court of Common Pleas retained jurisdiction over the allocation of parental rights and responsibilities notwithstanding the Fairfield County Juvenile Court action. He admits that Fairfield has assumed jurisdiction over his child by virtue of the truancy and delinquency charges filed in that court. But he contends that a court in which a decree of divorce is granted retains continuing jurisdiction over matters relating to the custody, care, and support of a minor child. Ms. Heisler does not offer an argument contra; she simply concludes that “Fairfield County Juvenile Court had exclusive jurisdiction of the minor child.”

{¶14} Next, Mr. Heisler contends that his admitted failure to abide by the time limitations in Hocking County Loc.R. 14 and Sup.R. 7 did not justify the court's decision to dismiss his motion to modify. He argues that neither rule contemplates that a failure to adhere to the strict time requirements will result in dismissal. He also alleges that in practice, cases are rarely dismissed for failure to prepare a formal entry within the time requirements. Ms. Heisler argues that the court acted within its discretion to dismiss the motion because of the delay in filing the Formal Entry. She contends that Mr. Heisler's failure to forward an entry in a timely manner put the court in a position of uncertainty concerning the status of the case.

A. Dismissal Based on Lack of Jurisdiction

{¶15} Subject matter jurisdiction is defined as a court's power to hear and decide cases. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 75, 701 N.E.2d 1002. Subject matter jurisdiction may be raised at any time and it may be raised sua sponte by the court. *State ex rel. Bond v. Velotta Co.*, 91 Ohio St.3d 418, 419, 2001-Ohio-91, 746 N.E.2d 1071. A motion to dismiss for lack of subject matter jurisdiction raises a question of law, subject to the de novo standard of review. *Groza-Vance v. Vance*, 162 Ohio App.3d 510, 2005-Ohio-3815, 834 N.E.2d 15, at ¶13; see, also, *State ex rel. Rothal v. Smith*, 151 Ohio App.3d 289, 2002-Ohio-7328, 783 N.E.2d 1001, at ¶110.

{¶16} A domestic relations court that enters an order allocating parental rights and responsibilities retains jurisdiction over those issues. R.C. 3109.06 provides, in part:

In any case in which a court of common pleas, or other court having jurisdiction, has issued an order that allocates parental rights and responsibilities for the care of minor children and designates their place of residence and legal custodian of minor children, has made an order for support of minor children, or has done both, the jurisdiction of the court shall not abate upon the death of the person awarded custody but shall continue for all purposes during the minority of the children. The court, upon its own motion or the motion of either parent or of any interested person acting on behalf of the children, may proceed to make further disposition of the case in the best interests of the children and subject to sections 3109.42 to 3109.48 of the Revised Code.

{¶17} But, somewhat contradictorily, a juvenile court obtains “exclusive original jurisdiction” concerning the custody of a child against whom delinquency is alleged. R.C. 2151.23(A). R.C. 2151.23(A)(1) and (2) provide that “[t]he juvenile court has exclusive original jurisdiction under the Revised Code as follows: (1) [c]oncerning any child who on or about the date specified in the complaint, indictment, or information is

alleged *** to be a juvenile traffic offender or a delinquent, unruly, abused, neglected, or dependent child *** to determine the custody of any child not a ward of another court of this state[.]”

{¶18} In *In re Poling*, 64 Ohio St.3d 211, 1992-Ohio-144, 594 N.E.2d 589, the Supreme Court of Ohio held that, despite the “not a ward of another court” language, a juvenile court may issue orders concerning the custody of a child who is the subject of a previous custody order contained in a separate domestic relations court’s divorce decree. *Id.* at syllabus. In effect, when a domestic relations court enters a decree addressing the allocation of parental rights and responsibilities concerning a child, the child does not become a “ward” of the domestic relations court for purposes of R.C. 2151.23. *Id.* at 214. The Court further held that where a domestic relations court has entered a decree regarding the custody of the child, and the child later comes under the jurisdiction of the juvenile court, the courts share “concurrent jurisdiction” over the custody of the child. *Id.* at 215.

{¶19} Where courts share concurrent jurisdiction, the general rule is that the court where proceedings are first properly initiated acquires the right to adjudicate the matter to the exclusion of all other courts. See *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St.2d 279, 364 N.E.2d 33, at syllabus; *Miller v. Court of Common Pleas* (1944), 143 Ohio St. 68, 70, 54 N.E.2d 130. Under this rule, the domestic relations court, which first established jurisdiction through the divorce decree, would retain exclusive jurisdiction to entertain custody issues involving a child the subject of an earlier divorce decree in that court. But in *Poling* the Court held that the legislative scheme set forth in R.C. 2151.23 (requiring juvenile courts to determine custody matters in accordance with

R.C. 3109.04) indicated that juvenile courts may nonetheless make “particularized determinations regarding the care and custody of children subject to its jurisdiction, while respecting the continuing jurisdiction of the domestic relations or common pleas court that makes a custody decision in a divorce case.” *Poling* at 216.

{¶20} The Court did not address the more troubling issue of what happens when a juvenile court and a domestic relations court, possessing concurrent jurisdiction over the issues of custody and allocation of parental rights, both assert jurisdiction and then enter different, potentially conflicting orders. But we need not address that quandary. We are only faced with the question of whether Hocking County retained jurisdiction over the support matters addressed in the Memorandum Entry. And based on *Poling*, we hold that it did. Fairfield County Juvenile Court shares concurrent jurisdiction over the issue of custody by virtue of the delinquency charges. But this action did not divest Hocking County of the ability to modify its existing divorce decree.

{¶21} Furthermore, the statutory concept of “certification” bolsters our conclusion that the domestic relations court retains jurisdiction to modify its own support order. Under the statutory scheme, if a domestic relations court certifies the issue of child support to a juvenile court, it thereafter loses jurisdiction to address support issues. R.C. 3109.06 provides that “[i]f the children are under eighteen years of age, [the court] may certify them, pursuant to this section, to the juvenile court of any county for further proceedings. After certification to a juvenile court, the jurisdiction of the court of common pleas, or other court, shall cease[.]” R.C. 3109.05(B) further states that “[t]he juvenile court has exclusive jurisdiction to enter the orders in any case certified to it from another court.” And R.C. 2151.23(D) provides that the juvenile court has jurisdiction “to

hear and determine all matters as to custody and support of children *duly certified* by the court of common pleas to the juvenile court after a divorce decree has been granted, including jurisdiction to modify the judgment and decree of the court of common pleas as the same relate to the custody and support of children.” (Emphasis added.)

{¶22} Hocking County did not certify the issues involving the allocation of parental rights and responsibilities to the Fairfield County Juvenile Court. In the absence of such a certification, Hocking County, although sharing concurrent jurisdiction with Fairfield County over the matters of custody, maintained continuing jurisdiction over the issue of support under R.C. 3109.06. Therefore the court erred to the extent that it dismissed Mr. Heisler’s motion for lack of subject matter jurisdiction.

B. Dismissal Based on Failure to Timely Submit Agreed Entry

{¶23} At the onset we must determine the appropriate standard of review to apply where a court sanctions a party with dismissal for failure to prepare an entry in a timely manner. Although neither Ms. Heisler nor the court referred to it, Mr. Heisler assumes the court may have been applying Hocking County Loc.R. 14. The Ohio Constitution states that “[c]ourts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court.” Section 5, Article IV, Ohio Constitution. In *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 431 N.E.2d 644, the Supreme Court of Ohio explained that local rules allow courts to “get right to the focal point of each case and expedite the orderly flow of its business, thus vindicating the public’s interest in the prompt and efficient dispatch of justice.” *Id.* at 191, citing *State v. Widner* (1981), 68 Ohio St.2d 188,

429 N.E.2d 1065; *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078. The Court further commented that, “it is a fundamental tenet of judicial review in Ohio that courts should decide cases on the merits.” *Id.* at 192, citing *Cobb v. Cobb* (1980), 62 Ohio St.2d 124, 403 N.E.2d 991. Accordingly, “[j]udicial discretion must be carefully- and cautiously-exercised before this court will uphold an outright dismissal of a case on purely procedural grounds.” *Id.* Thus, a trial court exercises a degree of latitude in sanctioning a party with dismissal for failure to abide by its own local rule. Our standard of review is abuse of discretion. Under this standard, a reviewing court will uphold the trial court’s decision unless it appears unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶24} Loc.R. 14 of the Hocking County Court of Common Pleas states:

14. JOURNAL ENTRIES

(A) When ordered or directed by the Court, counsel for the party in whose favor a calendar entry, order, judgment or decree is entered in a cause in Civil or Domestic Relations Division shall, within ten (10) days thereafter unless the time be extended by the Court, prepare a proper journal entry and submit the same to counsel for the opposite party who shall approve or reject the same within three (3) days after its receipt by him and may, in case of rejection, file objections thereto in writing to the Court.

The judgment entry specified in Ohio Civil Rule 58 shall be journalized within thirty (30) days of the verdict, decree or decision. If such entry is not prepared and presented for journalization by counsel, then it shall be prepared by the Court.

The Court shall approve a journal entry deemed by it to be proper, sign the same and cause it to be filed with the Clerk, and notice of the filing of each journal for journalization shall be mailed to all counsel of record.¹

¹ Mr. Heisler also points out that he was in technical violation of Sup.R. 7, which states:

The judgment entry specified in Civil Rule 58 and in Criminal Rule 32 shall be filed and journalized within thirty days of the verdict, decree, or decision. If the entry is not prepared and presented by counsel, it shall be prepared and filed by the court.

{¶25} Here there is no dispute that the entry prepared by Mr. Heisler's counsel and forwarded to Ms. Heisler's counsel was untimely under this rule. In fact it was significantly untimely. Even by Mr. Heisler's account, the entry was forwarded nearly forty days after it should have been under the local rule. Typically, we would have no trouble affirming the trial court for sanctioning a party for such a violation. Rule based time constraints are an important tool to ensure that courts may properly and efficiently manage their dockets. But we find it significant that the rule indicates that if the judgment entry is not prepared and presented for journalization by counsel, then within thirty days, it "shall be prepared by the Court." This portion of Loc.R. 14 embodies the principle underlying Civ.R. 58 – that it is the court that is ultimately responsible for the preparation of the judgment entry. See Civ.R. 58 and committee comments. We would be hard pressed to hold that a court may sanction a party for failure to abide by a local rule when the court itself made no attempt to follow the same rule. Moreover, we note that Ms. Heisler is in violation of the strict time requirements as well. The rule provides that she had three days after receipt to approve or file objections to the formal entry. She did not file objections. She filed a motion to dismiss nearly two weeks later.

{¶26} We also observe that Loc.R. 33.05(C) addresses sanctions by the court and states:

SANCTIONS. For the purposes of these Local Rules, the Trial Judge shall have the power, coextensive with the inherent powers of the Court and the enumerated powers in the Revised Code and Civil Rules, to impose sanctions on attorney, parties, or both. Sanctions can be monetary, non-monetary, or a combination of monetary and non-monetary. *No sanction shall be imposed without the offending party*

This language mimics, nearly verbatim, the language in the second paragraph of Loc.R. 14. Thus we confine our review to a technical violation of the more restrictive Loc.R. 14.

and/or attorney being given an opportunity to be heard, unless the conduct giving rise to the sanction amounts to a direct contempt.

ii. “Non-monetary sanction” means a legal ruling contrary to the interest of a party and/or attorney imposed by the Trial Judge for violation of the Local Rules and/or the Civil Rules. “Non-monetary sanction” includes, but is not limited to, dismissal with or without prejudice of the case or any claim or counterclaim, or any part of the case or claim, default judgment, exclusion of evidence, issues, or testimony, an order that certain issues or facts be taken as established for the balance of the case, an order striking pleadings or parts of pleadings, and a stay pending compliance with a court order. (Emphasis added.)

{¶27} Thus, even though Loc.R. 33.05(C) permits the trial court to dismiss a motion (“part of the case or claim”) as a sanction for violation of the local rules, no sanction is to be imposed without giving the offending party an opportunity to be heard. Ms. Heisler filed her motion to dismiss the case on April 15. The court dismissed the motion two days later. Mr. Heisler was not allowed a hearing or the opportunity to file a memorandum contra.

{¶28} Mr. Heisler also contends that cases are rarely dismissed, if ever, for violations of the strict time requirements contained in Loc.R. 14. Although this argument addresses facts that are beyond the scope of our review, we do note that the record lends indirect support to Mr. Heisler’s argument. On May 20, 2008, the parties agreed to a resolution of the custody and visitation issues. There, the parties used the same form entitled “Memorandum Entry” to memorialize the agreement. A formal agreed judgment entry, which indicates it was prepared by Mr. Heisler’s attorney on June 11, 2008, was thereafter accepted and filed by the court on July 14, 2008. That is fifty-six days after the Memorandum Entry was signed. No objections were filed and the court apparently had no issue journalizing the agreed entry.

{¶29} Finally, to the extent the court did not rely upon Loc.R. 14 and acted on an inherent power of the court to punish for delay and lack of prosecution of cases, our decision remains the same. We find no indication that Mr. Heisler's failure to submit a proposed entry in timely fashion was part of any ongoing dilatory scheme. And we see no apparent prejudice from the resulting delay. Ms. Heisler does not assert that she suffered any specific prejudice from the delay. Although not relevant to the delay, she does contend that the proposed entry did not reflect what was agreed to at the February 11 hearing. But the memorandum entry signed by both parties indicated that it incorporated the attached worksheet. That worksheet specified a specific support amount if the children were not covered by health insurance. The Memorandum Entry did not specifically resolve whether health insurance was being provided. This point of contention could have been addressed through the filing of objections, as envisioned by Loc.R. 14. Dismissal here clearly frustrates the fundamental policy that cases should be decided on their merits and not dismissed without an opportunity to respond.

{¶30} The trial court did not explain the basis of its decision. However, a reviewing court may look into the record and if the judgment being reviewed on appeal is right for any reason that was properly before the court, it is the duty of the reviewing court to affirm it. *In re Estate of Workman*, Lawrence App. No. 07CA39, 2008-Ohio-3351, at ¶18, fn. 2, citing *Reynolds v. Budzik* (1999), 134 Ohio App.3d 844, 846, fn. 3, 732 N.E.2d 485. Here, we can find no independent reason that was properly before the court to affirm the judgment of the trial court.

IV. Conclusion

{¶31} Mr. Heisler's sole assignment of error is well taken. We reverse the judgment of the Hocking County Court of Common Pleas and remand for further proceedings.

JUDGMENT REVERSED
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.