

[Cite as *Bradley v. Niro*, 2015-Ohio-1921.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

HEATHER L. BRADLEY

Appellant

v.

SAM M. NIRO, JR.

Appellee

C.A. No. 27475

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2007-01-0223

DECISION AND JOURNAL ENTRY

Dated: May 20, 2015

SCHAFFER, Judge.

{¶1} Appellant-Plaintiff, Heather Bradley, appeals from the judgment in the Summit County Court of Common Pleas, Domestic Relations Division, adopting the magistrate’s March 6, 2014 decision granting Appellee-Defendant, Sam Niro, Jr.’s, motion for change of custody and overruling her objections to same. For the reasons set forth below, we affirm.

I.

{¶2} Sam Niro, Jr. and Heather Bradley were involved in a relationship that resulted in the birth of their daughter, T.N., in 2003. Their relationship ended at some point after the birth of their child. Mr. Niro and Ms. Bradley have never been married to each other. T.N.’s primary residence for much of her life has been with Ms. Bradley, with Mr. Niro seeing her on an informal schedule as agreed by the parties.

{¶3} On January 25, 2007, Ms. Bradley filed, among other things, a Complaint to establish a parent and child relationship between Mr. Niro and T.N. On May 13, 2008, the trial court entered an order adopting the parties' Shared Parenting Plan.

{¶4} On June 28, 2013, Mr. Niro filed a post decree motion for change of custody and support. A Notice of Hearing was attached to Mr. Niro's motion stating that a hearing on the matter was scheduled for August 8, 2013 at 10:00 a.m. before Magistrate Dennis on the third floor of the Summit County Domestic Relations Court.

{¶5} The initial hearing was held on August 8, 2013. The hearing, however, was before Magistrate Foley, sitting for Magistrate Dennis, and in a courtroom on the fourth floor of the courthouse. Ms. Bradley was late to the hearing and was not represented by counsel. Mr. Niro, his attorney, and the bailiff searched the third and fourth floor common areas of the courthouse in search of Ms. Bradley, even calling out her name. She was nowhere to be found. Magistrate Foley then began the hearing at roughly 10:15 a.m.

{¶6} During the hearing, Mr. Niro and his attorney expressed several concerns about T.N.'s safety while she was in Ms. Bradley's care. Specifically, Mr. Niro testified about his suspicions that Ms. Bradley was abusing hard drugs and alcohol, neglecting T.N., and exposing T.N. to adult situations. At roughly 10:25 a.m., Ms. Bradley arrived at the hearing. Ms. Bradley testified that Mr. Niro was a good dad and addressed issues regarding allocation of payment for T.N.'s outstanding medical bills. Based on the testimony presented at the hearing, the magistrate issued a provisional order where she referred the matter to Family Court Services, appointed a Guardian ad Litem, ordered both parties to undergo drug screening, suspended Mr. Niro's child support obligation, and designated Mr. Niro as the temporary, sole custodial parent of T.N. Ms. Bradley did not object during the hearing, but did file a motion to stay and a motion to set aside

the magistrate's order. On September 13, 2013, the trial judge remanded the matter on the issue of whether the magistrate erred in ordering Mr. Niro to be the temporary, sole custodial parent of T.N., but kept the magistrate's order in place. A hearing on the matter was scheduled for September 20, 2013 at 9:00 a.m.

{¶7} Mr. Niro subpoenaed three witnesses to testify on his behalf at the September 20, 2013 hearing. Ms. Bradley, this time represented by counsel, did not subpoena any witnesses. Ms. Bradley's attorney informed the court that he was not prepared for an evidentiary hearing on the matter because the trial judge's remand order did not specify what type of hearing was to take place. Ms. Bradley's attorney stated that because the first hearing was an initial hearing, he believed that the remand hearing would also be an initial hearing, which is non-evidentiary in nature by local rule. Ms. Bradley's attorney then asked for a 30-day continuance in order to adequately prepare for the hearing. The magistrate denied that motion. Ms. Bradley's attorney then objected to the denial of his continuance motion and asserted that the lack of notice regarding the type of hearing being conducted amounted to a due process violation. The magistrate continued with the hearing as scheduled, but afforded Ms. Bradley and her attorney brief recesses after the testimony of each of Mr. Niro's witnesses in order to consult prior to cross-examination.

{¶8} At that September 20, 2013 hearing, the Guardian ad Litem testified that although Ms. Bradley's drug screening came back negative, the results reported that the specimen was "diluted" thereby negating the results. She recommended that the court order a hair analysis, which is more resistant to potential tampering. She further testified that Mr. Niro's drug screen came back negative.

{¶9} Mr. Niro's first witness, Paula Rafuse, testified that she often babysat T.N. and one of Ms. Bradley's other daughters. Mrs. Rafuse testified that Ms. Bradley was intoxicated on two occasions when she arrived to pick up her children and, out of concern for their safety, was forced to drive Ms. Bradley and the children home. Mrs. Rafuse further testified that she had to give Ms. Bradley a ride home from the bars on several occasions after Ms. Bradley had become too intoxicated to drive. Lastly, Mrs. Rafuse testified that she stopped babysitting for Ms. Bradley after observing one of Ms. Bradley's children pull a dollar bill containing what appeared to be cocaine residue out of a diaper bag that Ms. Bradley had provided.

{¶10} Mr. Niro's second witness, Emily Demko, testified that her daughter and T.N. were close friends. Mrs. Demko testified that Ms. Bradley once dropped T.N. off for a sleepover and did not return to pick up the child for almost four days, but only after being called and asked to do so. Ms. Demko testified that when Ms. Bradley did finally arrive to pick up T.N., she was clearly intoxicated. Ms. Demko further testified that Ms. Bradley had contacted her ahead of the hearing date and asked her to commit perjury regarding that incident.

{¶11} The magistrate gave Ms. Bradley the opportunity to testify at the hearing, but she declined to do so. Based on this testimony, the testimony from the initial hearing, the drug screening results, Mr. Niro's affidavit, and the representations from the parties' attorneys, Magistrate Foley provisionally ordered that Mr. Niro remain the temporary sole custodial parent of T.N. with Ms. Bradley having visitation, that neither parent discuss the legal proceedings in front of T.N., and that Ms. Bradley submit to a nine-panel finger nail drug test and random ETG/ETS alcohol tests. Magistrate Foley also scheduled a settlement conference for January 6, 2014 and a final evidentiary hearing on February 6, 2014. Ms. Bradley again filed a motion to set aside the magistrate's order, which the trial judge ultimately denied.

{¶12} The court held the settlement conference on January 6, 2014. Ms. Bradley was absent from the hearing, in violation of the court order, because she was attending a job interview in Maine. She was, however, represented by counsel. At the settlement conference, the magistrate issued an interim order modifying Ms. Bradley's visitation schedule based upon the recommendations of the Family Court Services Evaluator and the Guardian ad Litem.

{¶13} On January 27, 2014, the Guardian ad Litem filed an Emergency Ex Parte Motion to Suspend Ms. Bradley's visitation for her failure to submit to the nine-panel fingernail drug test, and for refusing to abide by the court's order prohibiting the parties from discussing the legal proceedings with T.N. The court denied the Guardian ad Litem's motion at that time.

{¶14} On February 5, 2014, Ms. Bradley's attorney filed a motion for continuance of the final evidentiary hearing that was to take place the following day for health reasons. The magistrate held a conference call with counsel for both parties and told them that she was denying the request for a continuance. The evidentiary hearing proceeded as scheduled on February 6, 2014. Neither Ms. Bradley nor her lawyer attended that hearing. Several witnesses testified on Mr. Niro's behalf at the evidentiary hearing. On March 6, 2014, the magistrate issued a Judgment Entry finding it to be in T.N.'s best interest to be in Mr. Niro's sole custody and for Ms. Bradley to have limited visitation, subject to her passing a drug test. The March 6, 2014 Judgment Entry also addressed the court's reasoning for denying Ms. Bradley's motion for continuance of the February 6, 2014 evidentiary hearing, as well as the issue of child support. Ms. Bradley filed objections to the magistrate's decision.

{¶15} On March 26, 2014, Mr. Niro filed a Motion for an Emergency Interim Order requesting the trial judge to adopt the magistrate's March 6, 2014 decision pending the trial judge's ruling on Ms. Bradley Objections. On March 28, 2014, the trial judge issued an Interim

Order adopting the magistrate's decision. On July 16, 2014, the trial judge issued a Journal Entry overruling Ms. Bradley's objections to the magistrate's decision and independently entered judgment.

{¶16} Ms. Bradley now appeals the trial judge's July 16, 2014 Journal Entry raising one assignment of error.

II.

ASSIGNMENT OF ERROR I

THE COURT ERRED AND ABUSED ITS DISCRETION IN DENYING PLAINTIFF HER DUE PROCESS RIGHTS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION BY FAILING TO GIVE MOTHER NOTICE OF THE LOCATION OF A HEARING, BY FAILING TO GIVE MOTHER NOTICE OF THE CHANGE OF MAGISTRATE, BY FAILING TO VACATE KNOWN ERRONEOUS INTERIM/TEMPORARY/PROVISIONAL ORDERS, BY PERMITTING ERRONEOUS ORDERS TO REMAIN IN EFFECT WHILE MATTERS ARE REMANDED, BY FAILING TO GIVE NOTICE OF THE TYPES OF HEARING SET, BY ACCEPTING EVIDENCE VIA TESTIMONY AND STATEMENTS OF COUNSEL AT TWO SEPARATE NON-EVIDENTIARY HEARINGS AND BY RELYING ON SAID EVIDENCE TO MAKE COURT ORDERS, AND BY FAILING TO GRANT CONTINUANCES WHEN THESE VIOLATIONS OF DUE PROCESS HAVE BEEN BROUGHT TO THE COURT'S ATTENTION.

{¶17} In her sole assignment of error, Ms. Bradley raises several instances in the proceedings below where she claims that the court abused its discretion by violating her due process rights. We address her arguments in turn.

{¶18} The standard of review in this matter is abuse of discretion. Abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *See Id.*

{¶19} The Fourteenth Amendment to the United States Constitution provides that state governments may not deprive any person of life, liberty or property without due process of law. Article I, Section 16 of the Ohio Constitution guarantees “due course of law,” which is virtually identical to the Fourteenth Amendment’s due process clause. *In re Hua*, 62 Ohio St.2d 227, 230 (1980). “Due process requires that a deprivation of life, liberty or property be preceded by notice and an opportunity for hearing appropriate to the nature of the case.” *In re A.N.B.*, 12th Dist. Preble No. CA2012-12-017, 2013-Ohio-2055, ¶ 12, citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

{¶20} At a minimum, “[d]ue process under the Ohio and United States Constitutions demands that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner where the state seeks to infringe a protected liberty or property interest.” *State v. Hochhausler*, 76 Ohio St.3d 455, 459 (1996). However, procedural due process is a concept that cannot be precisely defined. *See State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011, ¶ 28 (plurality opinion of O’Connor, J.), citing *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, ¶ 80. Due process “is not a technical conception with a fixed content unrelated to time, place and circumstances,” but rather “expresses the requirement of ‘fundamental fairness,’ a requirement whose meaning can be as opaque as its importance is lofty.” (Citations omitted.) *Id.* In other words, “the concept of due process is flexible and varies depending on the importance attached to the interest and the particular circumstances under which the deprivation may occur.” *Hochhausler* at 459.

August 8, 2013 Initial Hearing

{¶21} Ms. Bradley asserts that her due process rights were violated at the August 8, 2013 initial hearing when the court failed to notify her of the changes regarding the hearing’s

location and the presiding magistrate. Specifically, Ms. Bradley claims that she was unaware both that the hearing had been moved from the third floor to the fourth floor of the domestic relations court, and that Magistrate Foley would be sitting for Magistrate Dennis. Ms. Bradley speculates that she would not have been late to the initial hearing had the court notified her of these changes. However, in response to Ms. Bradley's motion to set aside Magistrate Foley's decision ordering Mr. Niro to be T.N.'s temporary, sole custodial parent, the trial judge remanded the matter for further hearing on September 20, 2013 on the issue of whether the magistrate erred in making this determination. As such, because the trial judge ordered a new hearing, we conclude that Ms. Bradley's arguments concerning the lack of procedural safeguards at the August 8, 2013 initial hearing were rendered moot.

{¶22} Ms. Bradley also claims that the trial judge erred by failing to vacate the magistrate's decision designating Mr. Niro as T.N.'s temporary, sole custodial parent when it remanded the matter for the September 20, 2013 hearing. We disagree. The August 8, 2013 hearing before the magistrate was an initial hearing which resulted in an interim order granting sole, temporary custody to Mr. Niro. On February 6, 2014, the magistrate conducted a full evidentiary hearing relative to Mr. Niro's motion for change of custody and entered a decision via judgment entry on March 6, 2014 and the trial court subsequently adopted the magistrate's decision. Therefore, any potential error that the trial judge may have committed in September of 2013 by not vacating the magistrate's decision while simultaneously remanding the matter for further hearing was cured by the February 6, 2014 full evidentiary hearing.

September 20, 2013 Remand Hearing

{¶23} Next, Ms. Bradley argues that the trial court erred by failing to give her adequate notice in its September 13, 2013 Judgment Entry as to the type of hearing that was to be

conducted on remand. Ms. Bradley further contends that the court erred by denying her motion for continuance and by accepting testimony of witnesses at the September 20, 2013 hearing. We agree.

{¶24} “The grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge.” *State v. Unger*, 67 Ohio St.2d 65 (1981), syllabus. An appellate court must not reverse the denial of a continuance absent an abuse of discretion. *Id.* at 67. In determining whether the trial court abused its discretion by denying a motion for a continuance, this Court must “apply a balancing test, weighing the trial court's interest in controlling its own docket, including facilitating the efficient dispensation of justice, versus the potential prejudice to the moving party.” *Burton v. Burton*, 132 Ohio App.3d 473, 476 (3d Dist.1999), citing *Unger*, at 67-68. In evaluating a motion for a continuance, a court should note, among other things:

the length of the delay requested; whether other continuances have been requested and received; the inconvenience to the litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the [moving party] contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors[.]

Kocinski v. Kocinski, 9th Dist. Lorain No. 03CA008388, 2004-Ohio-4445, ¶ 10, quoting *Unger* at 67-68.

{¶25} The August 8, 2013 hearing was conducted as an initial hearing pursuant to Loc.R. 14.03(B) of the Summit County Court of Common Pleas, Domestic Relations Division. That provision of the local rules reads in part:

14.03 Modification of parenting orders.

* * *

(B) Case management.

- (1) *At the initial hearing, which is not evidentiary*, the court shall determine whether the motion is contested and the basis of the motion.

* * *

(Emphasis added.). While we are cognizant of the fact that a trial court does not commit error when, in its sound discretion, it decides to deviate from its own rules, *see, e.g., Yanik v. Yanik*, 9th Dist. Summit No. 21406, 2003-Ohio-4155, ¶ 8-11, error does exist when a trial court's failure to comply with local rules implicates issues of due process, *Wallner v. Thorne*, 189 Ohio App.3d 161, 2010-Ohio-2146, ¶ 21 (9th Dist.), citing *Hillabrand v. Drypers Corp.*, 87 Ohio St.3d 517, 518-520 (2000).

{¶26} As the August 8, 2013 hearing was an initial, non-evidentiary hearing, Ms. Bradley's assumption that the September 20, 2013 remand hearing would also be non-evidentiary in nature was entirely reasonable. Ms. Bradley's argument is further supported by the fact that the trial judge's September 13, 2013 judgment entry lacked specificity as to the type of hearing that would occur on remand.

{¶27} Moreover, because the remand hearing was scheduled for September 20, 2013, just seven days after the trial judge's September 13, 2013 judgment entry, Ms. Bradley was not afforded adequate time to assemble evidence or witnesses to rebut, explain, or otherwise challenge Mr. Niro's serious allegations. The record also reflects that the magistrate was not initially opposed to continuing the remand hearing so that Ms. Bradley could better prepare, thus indicating that such a continuance would not have been a significant inconvenience to the court. In light of the fact that Ms. Bradley's attorney requested a short 30-day continuance and that Ms. Bradley did not have proper notice of the type of hearing being conducted that day, we determine that the magistrate should have granted Ms. Bradley some sort of continuance so that she could

have been provided with the opportunity to present witnesses and evidence at the remand hearing. We conclude that Ms. Bradley's due process rights were therefore violated. Thus, the trial court erred by denying Ms. Bradley's motion to set aside the magistrate's order following the September 20, 2013 hearing.

{¶28} However, we determine that the trial court's error was harmless for two reasons. First, the outcome of the September 20, 2013 hearing could have been ordered solely on the basis of Mr. Niro's motion. And second, Ms. Bradley has failed to show what harm she suffered as a result of the trial court's error. Ms. Bradley was provided an adequate opportunity following the September 20, 2013 hearing to demonstrate to the trial court that Mr. Niro's motion for change of custody and support should be denied. She failed to avail herself of that opportunity.

February 6, 2014 Final Evidentiary Hearing

{¶29} Lastly, Ms. Bradley asserts that the magistrate committed an abuse of discretion in denying her attorney's motion for continuance filed on February 5, 2014 for the final evidentiary hearing that was to be held the following day. Ms. Bradley's attorney stated in his motion that he was unable to walk following a bad reaction to a medical procedure. Ms. Bradley claims that the magistrate's denial of the motion for continuance violated her due process rights by denying her counsel at the final evidentiary hearing. This Court rejects Ms. Bradley's argument because, when appealing a trial court's adoption of a magistrate's decision, "[a]ny claim of trial court error must be based on the actions of the trial court," not the magistrate. *Citibank v. Masters*, 9th Dist. Medina No. 07CA0073-M, 2008-Ohio-1323, ¶ 9, quoting *Mealey v. Mealey*, 9th Dist. Wayne No. 95CA00093, 1996 WL 233491, *2.

{¶30} However, we note that while Ms. Bradley's counsel may have had a legitimate medical reason not to attend the final evidentiary hearing, no similar excuse exists in the record

for Ms. Bradley. Furthermore, following the phone conference on February 5, 2014, Ms. Bradley would have been aware that the final hearing was not continued. As a result, she should have attended the hearing. Ms. Bradley's failure to attend or participate in the final evidentiary hearing had a far greater impact on the outcome of this case than the magistrate's denial of the continuance.

{¶31} In light of the foregoing, Ms. Bradley's sole assignment of error is overruled.

III.

{¶32} Ms. Bradley's sole assignment of error is overruled, and the judgment of the Summit County Court of Common Pleas, Domestic Relations Division is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JULIE SCHAFER
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

RONALD T. GATTS, Attorney at Law, for Appellant.

DREAMA ANDERSON, Attorney at Law, for Appellee.

MARY E. RANDAZZO, Guardian ad Litem.