

[Cite as *Mills v. Mills*, 2011-Ohio-2848.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Angela I. Mills,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 10AP-495
	:	(C.P.C. No. 10DR-01-36)
Bryan L. Mills,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 9, 2011

Angela I. Mills, pro se.

Bryan L. Mills, pro se.

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

CONNOR, J.

{¶1} Defendant-appellant, Bryan L. Mills ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting plaintiff-appellee, Angela I Mills' ("appellee") complaint for divorce. For the reasons that follow, we affirm.

{¶2} Appellant and appellee were married in Franklin County, Ohio on March 23, 2001. The parties are the parents of two children: Kelsie T. Mills, born prior to the marriage on September 16, 1999; and Alec J. Mills, born April 1, 1995. Appellant is the

biological father of Kelsie and that relationship is established by the paternity registry. Appellee is the biological mother of Alec and appellant adopted Alec during the marriage.

{¶3} On January 6, 2010, appellee filed a pro se complaint for divorce against appellant, alleging abandonment and seeking a divorce, legal custody of the minor children, temporary and permanent child support, and an equitable division of the marital property. On January 29, 2010, appellant, who has been incarcerated in federal prison in Ashland, Kentucky, since September 2008, filed a pro se answer. Appellant's answer stated that he would be unable to make court appearances due to his incarceration and also requested that the proceedings be stayed to evaluate assets and custodial issues.

{¶4} Subsequent to the filing of an answer, appellant submitted numerous additional filings, seeking, inter alia, an order for marriage counseling, discovery on various marital property issues, continued spousal support and other temporary orders, and protection of his parental rights. In addition, on April 5, 2010, appellant filed an emergency motion to stay the proceedings. On April 9, 2010, appellant filed a motion for leave to participate telephonically in all legal proceedings.

{¶5} The trial court held a pre-trial hearing on April 9, 2010. According to a pre-trial hearing form contained in the record, appellee was present, as was appellant's mother, Johnnie Mills. The pre-trial form reflects that Johnnie Mills has power of attorney for appellant. However, the actual power of attorney document itself is not contained in the record. The pre-trial form also indicates appellant is incarcerated with a release date of October 15, 2013, and there is no indication that appellant was present at the hearing.

{¶6} Following the pre-trial hearing, the trial court scheduled this matter for a final hearing on May 7, 2010. Also, on April 12, 2010, the trial court filed an entry ordering the

parties to participate in mediation. The entry setting forth this assignment was signed by appellee and by Johnnie Mills, who was designated on the entry as appellant's power of attorney.

{¶7} On April 19, 2010, appellant filed a motion to prevent further proceedings from being held in his absence without his physical or telephonic presence. On April 27, 2010, appellant filed a motion for the appointment of a Guardian ad Litem. In a letter dated May 1, 2010 and filed with the clerk of courts on May 5, 2010, appellant informed the trial judge he had not been advised of the name of the mediator assigned to his case and he had never received any documents to review or sign. Finally, in a handwritten filing dated May 3, 2010 and filed with the clerk of courts on May 5, 2010, appellant stated he had revoked the power of attorney previously given to his mother, Johnnie Mills, and his sister, Alysia Starks, because he felt "they didn't handle my affairs the way I requested them to do so." (R. 127.) He further stated he did not believe the mediator had treated him fairly regarding his share of the marital assets.

{¶8} A final hearing on appellee's complaint for divorce took place on May 7, 2010. Notice of the hearing had been provided to all parties. Appellee and a witness appeared. Appellant was not present. On that same date, the trial court issued a judgment entry decree of divorce, granting appellee a divorce, designating appellee the residential parent and legal custodian of the two children, and dividing the parties' limited assets and liabilities. It is from this judgment entry that appellant has filed a timely appeal. He asserts a single assignment of error for our review:

[T]he Trial Court's [e]xclusion of [appellant] from the final evidenti[a]ry hearing in a contested divorce proceeding [is] in violation of [his] Constitutionally guaranteed due process rights.

{¶9} A divorce is a civil proceeding. *Crawford v. Crawford*, 5th Dist. No. 10CA35, 2010-Ohio-4239, ¶20; *Waites v. Waites* (Mar. 25, 1994), 11th Dist. No. 93-L-120; *Alexander v. Alexander*, 5th Dist. No. CT06-0061, 2007-Ohio-3933, ¶20. "An incarcerated individual does not have an unconditional due process right to attend the hearings and trial of a civil action to which he is a party." *Dale v. Dale*, 10th Dist. No. 02AP-644, 2003-Ohio-1113, ¶9, citing *Sweet v. Sweet* (April 24, 2001), 5th Dist. No. 00-CA-99; *Vild v. Vild* (Mar. 23, 2000), 8th Dist. No. 75730; *Fraley v. Fraley* (July 16, 1999), 2d Dist. No. 17496; *Nye v. Nye* (June 25, 1997), 1st Dist. No. C-960461; *Waites; Marshall v. Marshall* (May 12, 1989), 6th Dist. No. L-88-239. Furthermore, a prisoner's request that a trial court order his attendance at trial must be made by way of a motion, pursuant to Civ.R. 7(B)(1). *Dale* at ¶10.

{¶10} Although appellant does not specifically request that the trial court order his attendance at the final divorce hearing, nor does he specifically request that the court order him to be transported for the final hearing, his April 19, 2010 motion to prevent proceedings from being held in his absence without his physical or telephonic presence could arguably constitute a request that his attendance be ordered.¹ Nevertheless, the decision of whether or not to permit an incarcerated individual to attend a civil proceeding is a matter within the discretion of the trial court. *Waites*, citing *Mancino v. Lakewood* (1987), 36 Ohio App.3d 219; *Alexander* at ¶20, citing *Kampfer v. Donnalley* (1998), 125 Ohio App.3d 359, 363. An abuse of discretion is " 'more than an error of law or judgment;

¹ The record does not explicitly reflect that the trial court overruled this motion, aside from a general statement that all pending motions were dismissed. However, where the trial court does not explicitly rule on a motion, it is presumed that the motion was overruled. See *State v. Hillman*, 10th Dist. No. 06AP-1230, 2008-Ohio-2341.

it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶11} In the instant case, we note that appellant failed to file a transcript of any of the proceedings. Pursuant to App.R. 9, appellant is responsible for providing a transcript of the proceedings which are necessary for inclusion in the record. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶12} Whether an inmate should be brought to court to personally argue his case in a civil matter depends upon the particular and unique facts and circumstances of each case. *Tolliver v. Liberty Mut. Group*, 10th Dist. No. 04AP-226, 2004-Ohio-6355, ¶8, citing *Marshall*. In *Mancino*, the Eighth District set forth the following criteria to be weighed in making this determination, which is left to the sound discretion of the court:

* * * (1) whether the prisoner's request to be present at trial reflects something more than a desire to be temporarily freed from prison; (2) whether he is capable of conducting an intelligent and responsive argument; (3) the cost and convenience of transporting the prisoner from his place of incarceration to the courthouse; (4) any potential danger or security risk the prisoner's presence might pose; (5) the substantiality of the matter at issue; (6) the need for an early resolution of the matter; (7) the possibility and wisdom of delaying the trial until the prisoner is released; (8) the probability of success on the merits; and (9) the prisoner's interest in presenting his testimony in person rather than by deposition.

Id. at paragraph two of the syllabus.

{¶13} Numerous appellate districts have also applied these criteria. See *Tolliver* at ¶8; *Elkins v. Elkins* (Jan. 4, 1999), 12th Dist. No. CA98-03-019; *Nye*; *Carrion v. Carrion*, 9th Dist. No. 07CA009138, 2007-Ohio-6142; *Brown v. Weidner*, 3d Dist. No. 13-06-08, 2006-Ohio-6852; *Marshall*. The Eighth District later determined that a trial court need not assess the *Mancino* factors on the record where the record is sufficient to show the basis of the analysis. *E.B. v. T.J.*, 8th Dist. No. 86399, 2006-Ohio-441, ¶19, citing *In re Estate of Dezso* (Jan. 18, 2001), 8th Dist. No. 77903.

{¶14} As previously stated above, we do not have a copy of the transcript of the proceedings at the final hearing and, therefore, we do not know whether or not the *Mancino* factors were addressed. Without a copy of the transcript, we must presume the regularity of the proceedings. Yet, even without a transcript of the final hearing proceedings, there is sufficient evidence in the record to demonstrate that the trial court did not abuse its discretion in proceeding with the final divorce hearing in appellant's absence. This matter does not present issues which are so substantial as to require appellant's presence. See *Alexander* at ¶28. Appellant's presence at the final hearing would not have had any effect on the outcome of the divorce proceedings.

{¶15} Appellant was undisputedly incarcerated in a federal prison out-of-state, where he had been since September 2008. There would clearly be costs and risks involved in transporting appellant for the final hearing. In addition, appellant and appellee had undisputedly lived separate and apart, without cohabitation, in excess of one year, and there was no evidence that appellant could have produced which would have altered the conclusion that appellee was entitled to a divorce on that ground. The record also demonstrates that at the time of the hearing, appellant had more than two years, and

possibly more than three years,² remaining on his sentence, so delaying the proceedings was not prudent. And, due to appellant's imprisonment, he could not exercise his parental rights and thus could not be granted custody of the two children. However, the judgment entry indicated appellant could petition the court for parenting time or custody upon his release from prison.

{¶16} Furthermore, given the parties' very limited assets, which did not include any real estate, bank accounts, financial accounts, or retirement accounts, as well as very limited personal property items, and given that appellant was held harmless on all debts in appellee's individual name or incurred by her, appellant was not prejudiced by his absence from the final hearing. Also, see generally, *Dale* at ¶12.

{¶17} Moreover, we note there are documents in the record which reflect that appellant had given his mother, Johnnie Mills, power of attorney to act on his behalf, thus providing an alternative method for appellant's participation in the proceedings. Appellant's own filings and letters also reflect this,³ although the actual document setting forth the power of attorney authority is not contained in the record. Regardless, the trial court obviously proceeded with the understanding that appellant's mother was acting on his behalf throughout the proceedings and during the mediation. It appears it was not until after the mediation that appellant notified the clerk of courts via a letter filed two days before the final hearing that he was revoking the power of attorney given to his mother,

² The record indicates appellant's release date is October 2012 in one place, and October 2013 in other places.

³ Appellant's April 9, 2010 motion for leave to participate telephonically states in relevant part: "Respondent further requests that this Court subpoena Respondent's mother, Johnnie Mills, and his sister, Alysia J. Starks, for they have full personal knowledge of the entire situation. They have also been given full power of attorney, and they know what Respondent is asking for." (R. at 99.)

presumably because he was not satisfied with her negotiations or the outcome of the mediation.

{¶18} Based upon the foregoing, we find the trial court did not err in proceeding with the final divorce hearing without appellant. Accordingly, appellant's single assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
