[Cite as *Clelland v. Cartman*, 2009-Ohio-6514.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JAMES CLELLAND,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-024**
- vs -	:	
JENNIFER C. CARTMAN,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2008 PR 00836.

Judgment: Affirmed.

John S. Salem, Denman & Lerner Co., L.P.A., 8039 Broadmoor Road, #21, Mentor, OH 44060 (For Plaintiff-Appellee).

James W. Reardon and *James R. Flaiz*, Carrabine & Reardon Co., L.P.A., 7445 Center Street, Mentor, OH 44060 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jennifer C. Cartman, appeals the judgment of the Lake County Court of Common Pleas, Juvenile Division, overruling her objections to and motion to vacate the court's judgment determining paternity and designating appellee as the residential parent and legal custodian of the parties' two minor children. At issue is whether appellant was notified of the trial of this matter. For the reasons that follow, we affirm.

{¶2} On April 16, 2008, appellee filed a complaint to establish paternity, an emergency motion for temporary restraining order, a motion for temporary and permanent allocation of parental rights and responsibilities, and an ex parte motion to establish temporary custody. On that same date, the trial court entered an ex parte judgment designating appellee as the residential parent and legal custodian of the children until further order of the court. The court also ordered appellant to immediately return the children to Ohio and to surrender them to appellee. The court served the complaint, motions, and ex parte judgment entry on appellant by certified mail at her residence in Georgia on April 18, 2008. She subsequently filed various responsive pleadings.

{¶3} On May 12, 2008, appellant filed an objection to the ex parte judgment and asked for a hearing. The court set a hearing on appellant's objection for May 27, 2008, at 2:30 p.m. The court sent notice of the hearing to appellant at her record address and to her attorney. On May 14, 2008, appellant filed an amended objection to the ex parte judgment.

{¶4} On May 21, 2008, appellant filed a motion to continue the May 27, 2008 hearing date because she said she needed more advance notice of the hearing in order to ask for time off from work to attend the hearing. On May 23, 2008, the court granted appellant's motion for continuance by judgment entry in which the court reset the hearing for June 6, 2008, at 8:00 a.m. The court sent a copy of this judgment entry and also a separate notice of the June 6, 2008 hearing to appellant at her address of record and also to her attorney on May 23, 2008.

{¶5} On June 3, 2008, appellant's counsel, Marc Stolarsky, filed a motion to withdraw as appellant's counsel because appellant had failed to pay him for his services; he had had difficulty dealing with her; and she had threatened to file a grievance against him with the bar association. On that same date the trial court granted counsel's motion to withdraw.

{¶6} On June 6, 2008, the court held the hearing on appellant's objection to the court's ex parte judgment. Appellee and his attorney were present, but appellant failed to attend the hearing, although it had been continued at her request. The court found that appellant "failed to appear, though duly served and notified." The court denied appellant's objection and amended objection for want of prosecution, and ordered the ex parte judgment entry to remain in effect.

{¶7} Also, on June 6, 2008, the court set the case for trial on the complaint to establish paternity and allocation of parental rights and responsibilities on September 19, 2008, at 9:00 a.m. On June 6, 2008, the court mailed written notice of this date and time to appellant. The notice itself indicates that the court mailed this notice to appellant at her address of record in Georgia. This notice, like all others mailed to appellant, was not returned to the court as undeliverable. The court's docket also reflects that on June 6, 2008, the trial court scheduled the trial in this case for September 19, 2008, at 9:00 a.m.

{¶8} On September 19, 2008, the magistrate conducted the trial of this matter. Appellee and his counsel appeared, but appellant did not. Based on the testimony presented, the magistrate found that appellee is the natural father of M.C., then age 5, and B.C., then age 4. The magistrate found the children had resided with appellee and

appellant in Lake County, Ohio, until appellant abandoned the children on February 19, 2005. The magistrate further found that from that date until March 1, 2008, appellant had virtually no contact with the children. Also, since February 19, 2005, appellant had provided no financial support for the children. Since that time appellee has been the de facto custodian of the children, taking care of all their needs.

{¶9} After not hearing from appellant for three years, on March 1, 2008, she showed up unannounced at appellee's home on B.C.'s fourth birthday. She told the children that she was their mother and that she was taking them to Chuck E. Cheese restaurant for lunch. B.C. did not recognize appellant and both children were upset. Appellant said she would return the children in one hour, but she never came back. Appellant then absconded with the children and took them to Georgia with her. After not seeing the children for two months, appellee travelled to Georgia with the court's April 16, 2008 judgment entry trying to retrieve the children, but was unsuccessful.

{¶10} The magistrate found that appellee had raised the children since birth and has a close relationship with them. He found it was in the children's best interests to remain in appellee's custody, and recommended that appellee be awarded custody of both children. The magistrate also recommended that the court's April 16, 2008 judgment entry remain in full force, and that appellant, who had never complied with that judgment, be ordered to return the children immediately as previously ordered. The court mailed the magistrate's decision to appellant on September 22, 2008.

{¶11} On September 22, 2008, the court entered its judgment adopting the magistrate's decision. The judgment entry reflects that the court mailed the judgment adopting the magistrate's decision to appellant on September 22, 2008. On October 3,

2008, appellant, through her new counsel, James Reardon, filed "Objections to the Magistrate's Decision/Motion to Vacate Judgment Entry." In support, appellant filed an affidavit in which she stated she did not attend the trial because she did not receive notice of it.

{¶12} The court set the matter for hearing on appellant's objections and motion to vacate on January 21, 2009. Appellee and his attorney appeared. Appellant's new counsel also appeared, but, once again, appellant failed to attend. As a result, appellant failed to testify in support of her objections. Following the hearing, the court found that appellant was properly served and notified of the September 19, 2008 trial, but chose not to attend. As a result, the court in its judgment, dated January 21, 2009, denied appellant's objections and motion to vacate, and ordered its September 22, 2008 judgment adopting the magistrate's decision to remain in full force.

{¶13} Appellant appeals the trial court's judgment, asserting two assignments of error. Because the assigned errors are interrelated, we shall consider them together. They allege:

{¶14} "[1.] The trial court erred when it conducted a trial and adopted the magistrate's decision following the trial wherein appellant was not made aware of the trial date.

{¶15} "[2.] The trial court erred when it failed to conduct an evidentiary hearing on the issue of whether appellant was properly served with notice of the hearing."

{¶16} Our standard of review of the trial court's decision under Civ.R. 53 is limited to a determination of whether the court abused its discretion in adopting the magistrate's decision. *In re Gibbs* (Mar. 13, 1998), 11th Dist. No. 97-L-067, 1998 Ohio

App. LEXIS 997, *12. The appellate standard of review following a decision on a Civ.R. 60(B) motion to vacate is also whether the trial court abused its discretion. *Ludlow v. Ludlow*, 11th Dist. No. 2006-G-2686, 2006-Ohio-6864, at ¶24. An abuse of discretion is more than a mere error in judgment or law; rather, it implies the court's attitude in making its decision was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶17} Appellant argues the court erred by not vacating its judgment adopting the magistrate's decision because she did not receive notice of the September 18, 2008 trial date. She also argues the trial court erred in not conducting a hearing on whether she received notice of the trial. We do not agree with either contention.

{¶18} Before addressing these issues, we must determine whether the record supports the trial court's decision to overrule appellant's objections and motion to vacate. We observe that appellant provided no transcript of either the September 19, 2008 trial or the January 21, 2009 hearing on her objections and motion to vacate. App.R. 9(C) mandates that the party challenging the trial court's decision prove the alleged error through reference to the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. It is incumbent upon an appealing party to provide a record of the lower court's proceedings from which his or her assigned errors emanate. *Kistler v. Kistler*, 11th Dist. No. 2003-T-0060, 2004-Ohio-2309, at ¶23. Because the record contains neither a transcript of the trial or hearing, nor some acceptable alternative under App.R. 9, our review is confined to those matters which are contained in the record before us. See, e.g., *Ostrander v. Parker-Fallis Insulation Co*. (1972), 29 Ohio St.2d 72, 74.

{¶19} Our review of the record in this matter demonstrates that the trial court sent numerous judgment entries and notices to appellant at her address of record in Georgia other than the notice of trial. On April 18, 2008, the court mailed a copy of the complaint, appellee's motions, and its April 16, 2008 ex parte judgment to appellant by certified mail. On May 12, 2008, the court mailed a "notice of hearing" to appellant for a hearing to be held on May 27, 2008, on her objections to the April 16, 2008 ex parte judgment. On May 23, 2008, the court mailed to appellant a copy of its judgment granting her motion to continue the May 27, 2008 hearing and resetting it to June 6, 2008, at 8:00 a.m. Also, on May 23, 2008, the court mailed to appellant a "notice of hearing" for a hearing to be held on June 6, 2008, at 8:00 a.m., on appellant's objections to the ex parte order. On September 22, 2008, the trial court mailed to appellant a copy of the magistrate's September 22, 2008 decision and also a copy of the court's judgment adopting the magistrate's decision. On October 28, 2008, the court mailed a "notice of hearing" to appellant for a hearing on her objections to the magistrate's decision and motion to vacate to be held on January 21, 2009, at 8:00 a.m. None of these notices or judgment entries was returned to the court as undeliverable.

{¶20} In overruling appellant's objections and motion to vacate, the trial court found in its January 21, 2009 judgment that appellant was properly served and notified of the September 19, 2008 trial, but chose not to attend. By making this finding, the court obviously chose not to believe appellant's contention that, while she received all of the judgment entries and notices outlined above, she did not receive the notice of trial. We note that appellant has not alleged that she moved at any time during the proceedings or that the court mailed the notice of trial to an incorrect address.

{¶21} In the affidavit filed by appellant in support of her objections to the court's September 22, 2008 judgment adopting the magistrate's decision, she offered no explanation in support of her contention that she had not been served with notice of the trial date. She simply made the conclusory statement that she did not receive notice and was unaware of the trial.

{¶22} The trial court held an oral hearing on appellant's objections and motion to vacate on January 21, 2009, at which appellee, his attorney, and counsel for appellant appeared, but appellant did not. Since appellant's counsel attended and the court mailed notice of the January 21, 2009 hearing to her, we must presume she was also aware of the hearing. Thus, contrary to appellant's argument, the trial court provided appellant with a hearing to explain why she was not served with notice of the trial. She simply chose not to attend.

{¶23} The issue before the trial court at the January 21, 2009 hearing was whether appellant received sufficient notice of the September 19, 2008 trial such that the magistrate could properly proceed with an ex parte trial on the merits of appellee's complaint for allocation of parental rights. The trial court determined that notice was adequate, and that appellant's reason for failing to appear in her affidavit was not.

{¶24} Before considering appellant's arguments, we first point out that the trial court had personal jurisdiction over appellant and therefore the magistrate's decision was voidable, not void. *Schilling v. Ball*, 11th Dist. No. 2006-L-056, 2007-Ohio-889, at ¶25. "Service of process or a defendant's voluntary appearance are independently sufficient to confer upon a court jurisdiction over a person." Id., citing *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. Here, appellee perfected certified-mail service on

appellant; she made voluntary appearances through counsel; and she filed various pleadings in the underlying matter. We therefore hold the court had personal jurisdiction over appellant and, thus, the magistrate could properly render a valid decision in the ex parte trial. The Supreme Court of Ohio has held: "The proper action for a court to take when a defending party who has pleaded fails to show for trial is to require the party seeking relief to proceed ex parte in the opponent's absence." *Ohio Valley Radiology Associates, Inc. v. Ohio Valley Hosp. Ass'n* (1986), 28 Ohio St.3d 118, 122.

{¶25} Therefore, appellant's reliance on *Rafalski v. Oates* (1984), 17 Ohio App.3d 65 and *Nationwide v. Barrett*, 7th Dist. No. 08 MA 130, 2008-Ohio-6588, in support of her first and second assignments of error, respectively, is misplaced because both cases involved an alleged failure of service of process. There is no dispute here that appellee properly served appellant with the complaint and his initial motions. Thereafter, *Rafalski*, supra, and *Nationwide*, supra, are not pertinent.

{¶26} "An elementary and fundamental requirement of due process in any proceeding *** is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co*. (1950), 339 U.S. 306, 314. "Moreover, both the Fourteenth Amendment to the United States Constitution and Section 16, Art. I of the Ohio Constitution guarantee due process of law, and thus assure 'a reasonable opportunity to be heard after a reasonable notice of such hearing.'" *Schilling*, supra, at ¶26, quoting *State ex rel. Allstate Ins. Co. v. Bowen* (1936), 130 Ohio St. 347, at paragraph five of the syllabus.

{¶27} Ohio appellate districts have considered the notice requirements for defending parties who have filed a responsive pleading, but have failed to appear for trial. In such situations, "the defendant is only entitled to reasonable notice of the hearing date." *In re Crabtree*, 1st Dist. No. C-010290, 2002-Ohio-1135, 2002 Ohio App. LEXIS 1156, *6, citing *Ohio Valley Radiology Associates, Inc.*, supra, at 123-125. In this respect, "*** while some form of notice of a trial date is required to satisfy due process, an entry of the date of trial on the court's docket constitutes reasonable, constructive notice of the fact." Id. at 124. In *Hasch v. Hasch*, 11th Dist. No. 2007-L-127, 2008-Ohio-1689, this court held: "'the entry of the trial date upon the trial court's docket is sufficient to satisfy the requirements of due process because a party is responsible for keeping track of the status of her case.'" Id. at ¶32, quoting *Nalbach v. Cacioppo*, 11th Dist. No. 2001-T-0062, 2002-Ohio-53, 2002 Ohio App. LEXIS 83, *12.

{¶28} As noted above, the record indicates the trial court mailed written notice of the trial date to appellant at her address of record on June 6, 2008. Also on that date, the court entered the scheduling of the trial date on the court's docket.

{¶29} We therefore hold the trial court did not abuse its discretion in overruling appellant's objections and motion to vacate. If not actual notice, appellant received reasonable, constructive notice of the trial. She was also afforded a hearing, at which, if she had chosen to attend, she would have had an opportunity to present whatever evidence or explanation she wished concerning the alleged non-service of notice of the trial date. In our estimation, the court's efforts were sufficient to meet the dictates of due process.

{¶30} Appellant's assignments of error are therefore overruled.

{¶31} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas, Juvenile Division, is affirmed.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.