

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

AMY L. RYMERS,	:	O P I N I O N
Plaintiff-Appellant,	:	
- VS -	:	CASE NO. 2009-L-160
JEFFREY G. RYMERS,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 09 DR 000158.

Judgment: Reversed and remanded.

Walter J. McNamara, III, McNamara & Loxterman, 8440 Station Street, Mentor, OH 44060 (For Plaintiff-Appellant).

Joseph G. Stafford and Gregory J. Moore, Stafford & Stafford Co., L.P.A., The Stafford Building, 2105 Ontario Street, Cleveland, OH 44115 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} The instant matter concerns a notice of appeal filed by appellant, Amy L. Rymers, from the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, dismissing her complaint for divorce without prejudice pursuant to Civ.R. 41(B)(2). For the reasons discussed below, the trial court's judgment is reversed and the matter is remanded for further proceedings.

{¶2} On March 18, 2009, appellant filed a complaint for divorce against appellee, Jeffrey G. Rymers. The complaint sought a final order of divorce, custody of the parties' three children, temporary child support during the pendency of the proceedings and an order of child support after entry of the final decree, spousal support, and a fair and equitable division of all marital property. On April 29, 2009, appellee filed his answer. Neither party filed a motion for shared parenting.

{¶3} On October 7, 2009, the matter came before the court for hearing. Prior to taking testimony, stipulations were entered regarding the trial court's jurisdiction and venue. The parties further stipulated the date of the marriage, the names and ages of the children born as issue of the marriage; grounds for the divorce; and date of the parties' separation. The parties also agreed that their respective pensions should be divided, but disagreed on the date the parties' mutual interest in these plans ceased, i.e., whether on the date of trial or the date of separation.

{¶4} With respect to the value of the retirement plans, counsel for appellee indicated he possessed the most recent information regarding the value of each party's "defined contribution plans," and stated appellant's employer had faxed him "all the information" pertaining to any remaining information relevant to appellant's retirement plans. The record reflects appellee's counsel would put this information into evidence during the hearing.

{¶5} In light of these points, counsel for appellant set forth the following issues for the court to adjudicate: (1) the nature of the child custody arrangement; (2) the propriety of child support; (3) the division of marital debt; and (4) the date the parties' pensions should be split.

{¶6} During her case-in-chief, appellant's counsel called both parties as witnesses. The parties testified to their respective assets as well as to their respective debts and post-separation monthly expenses, itemized in documents marked Joint Exhibit 1 (appellee's debts and expenses) and Joint Exhibit 2 (appellant's debts and expenses). Appellant additionally testified to the medical, dental, and optical insurance benefits she received from her employer, supported by documentation marked Exhibit A.

{¶7} With respect to the couple's three children, appellant testified she has had sole custody since the parties separated. Appellant also testified she has made all educational, medical, and recreational decisions since the separation. Appellee testified he has had limited contact with the children since the parties' separation due to financial problems. Appellee further testified he defers all parental decisions to appellant because he trusts appellant's judgment on important matters pertaining to their daughters' lifestyle and well-being.

{¶8} Each party testified to their current income and debt. Appellee stated his debt and expenses at the time of trial well exceeded his income; he also testified he was over \$2,500 in arrears on his child support obligations. Alternatively, appellant testified her debt at the time of trial included a \$295 per-month car payment and attorney fees. With respect to her income, appellant introduced two paystubs from July of 2009 into evidence, marked as Exhibits B and C, respectively. Appellant testified the paystubs did not accurately reflect her current income because her pay had recently increased by \$0.90 per hour, from \$33.10 to \$34.00 per hour. Moreover, appellant's counsel indicated she possessed appellant's tax returns from 2007 through 2008, but

did not have additional copies for the court. Counsel for appellee subsequently represented he had copies of the tax returns and told the court he would introduce them and “present all the information” when he put on evidence.

{¶9} After appellant rested she sought admission of her exhibits. Counsel for appellee objected to their admission, complaining that appellant’s counsel failed to properly “identify or authenticate” the documents. The objection was overruled, but prior to the court formally admitting the exhibits, counsel for appellee moved to dismiss the case. In support of his motion, counsel argued appellant failed to present sufficient evidence for the court to allocate parental rights and responsibilities under R.C. 3109.04. He further claimed appellant failed to offer any information regarding her retirement assets. Counsel emphatically concluded that appellant “*** has presented no evidence whatsoever even for this Court to proceed on any issues. *** This case must be dismissed, Your Honor. They haven’t met the burden of proof on anything.”

{¶10} In response, appellant’s counsel argued:

{¶11} “Your Honor, we both stipulated the parties were incompatible. We stipulated as to the date of the marriage, the date of separation, that there are three children of this marriage. We’ve had testimony as to support, we’ve had testimony as to where the children are living, what basis they’ve been seeing their parents.”

{¶12} Counsel for appellee pressed his point, arguing, as the defendant, he had no obligation, nor did he intend to submit any evidence. And, according to counsel, the evidence offered by appellant was insufficient for the court to render a judgment on any of the disputed issues. Notwithstanding the testimony the court possessed, as well as the representations of appellee’s counsel that he would be submitting documentation

after appellant rested to assist the court in resolving the issues at trial, the court apparently agreed with appellee's argument, stating: "I don't think I have sufficient information, if he doesn't want to go forward, to grant you a decision ***."

{¶13} Counsel for appellant subsequently moved to reopen her case, to which counsel for appellee acrimoniously responded: You can't do - - you don't do a do-over in reference to a trial ***." Counsel for appellant noted her belief that the court possessed the discretion to permit a party to reopen his or her case after that party rested. Unphased by counsel's accurate statement of the law, counsel for appellee irascibly countered: "I asked repeatedly did she rest. She rested. Then when I make the motion, she says she wants to reopen. You're not allowed to reopen a case. There is no basis to reopen. There is no issue."

{¶14} Evidently persuaded by counsel's insistence, the court did not allow appellant to reopen the case and dismissed the matter without prejudice. The court ruled it did not possess "the proper information" to render judgment. The court continued: "[a]ll the way through, property retirement, debts, bankruptcy, support. I think that it would be best if you would come back prepared and it may be to everybody's advantage." On October 28, 2009, the court formally entered its judgment of dismissal without prejudice pursuant to Civ.R. 41(B)(2).

{¶15} On November 11, 2009, appellant filed a motion to stay arguing the order was necessary to preserve the temporary orders previously issued pending appeal. The court granted the motion and appellant timely noticed this appeal. After the appeal was filed, however, appellee moved to dismiss the matter for lack of a final, appealable order. Appellant filed a timely response to appellee's motion to dismiss. And, after

considering the motion, this court overruled the motion, concluding the trial court's judgment was a final, appealable order pursuant to R.C. 2505.02(B)(1), and therefore the appeal could proceed.

{¶16} For her sole assignment of error, appellant argues:

{¶17} "The trial court abused its discretion in dismissing the complaint for divorce."

{¶18} A trial court's order dismissing an action pursuant to Civ.R. 41(B) is subject to appellate review under an abuse of discretion standard. *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 47. A court abuses its discretion when its judgment comports with neither reason nor the record. See, e.g., *Grae v. Grae*, 11th Dist. No. 2010-L-013, 2010-Ohio-4083, at ¶19.

{¶19} At trial, the parties stipulated to the court's jurisdiction as well as the grounds for divorce, viz., incompatibility. Prior to trial, appellant's counsel set forth the issues the trial court was required to resolve: child custody; a determination on the propriety of child support; a division of remaining marital debt; and an order establishing a date to divide the parties' respective retirement plans.

{¶20} With respect to the issue of the custody of the parties' three children, appellant, in her complaint for divorce, sought an order declaring her the "temporary residential parent and the legal custodian of the minor children." Prior to trial, appellant's counsel represented appellant was seeking sole custody. Appellee's counsel stated that appellee desired a "[b]asic shared parenting plan with a standard order." In response to this representation, appellant's counsel stated:

{¶21} “There has been no plans filed, no plan proposed. I don’t know what they’re proposing about what. I don’t know what a standard shared parenting plan is.”

{¶22} R.C. 3109.04(A)(1) provides, in relevant part:

{¶23} “If neither parent files a pleading or motion in accordance with division (G) of this section [requesting shared parenting] *** the court, in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children, including, but not limited to, the responsibility to provide support for the children and the right of the parent who is not the residential parent to have continuing contact with the children.”

{¶24} Appellant’s counsel was correct that no motion for shared parenting with an accompanying plan was filed with the court. Without such a pleading filed on appellee’s behalf, shared parenting was not an issue before the court and, to the extent sufficient evidence was presented for the court to make a determination regarding the children’s best interests, it possessed the discretion to allocate parental rights and responsibilities. *Id.*; see, also, R.C. 3109.04(B)(1); *Boyer v. Boyer* (1976), 46 Ohio St.2d 83, 86.

{¶25} With respect to the children’s best interests, the record reflects that the children had continuously lived with appellant since the date of separation. During that time, appellant has made all decisions pertinent to the children’s lifestyles and general well-being. The record indicates appellee, while ostensibly interested in his children’s welfare, has been voluntarily uninvolved in the children’s day-to-day routine as well as

personally removed from all parental decision-making. Although he stated he wishes to be kept abreast of important developments in his children's lives, he testified he trusts and has always trusted appellant's ability to specifically manage and care for their children.

{¶26} The record shows appellant has a steady job, income, insurance, and an apparently stable residence in which to care for the children. Alternatively, appellee, while employed, has had his hours cut, has been evicted from his apartment, and, in his own words, is "completely flat broke." Although the trial court ruled "[p]arenting issues were not resolved and further evidence was necessary pursuant to [R.C.] 3109.04(F) factors," we hold appellant put forth sufficient evidence to establish a prima facie case that she was entitled to sole custody of the couple's children.

{¶27} With respect to the issue of marital debt, the record indicates Joint Exhibits 1 and 2 contained the necessary information for the court to issue judgment. Counsel for appellee offered these exhibits for the court and counsel for appellant used them during her case-in-chief to establish, via testimony, each parties' relative debt. The court was asked to resolve what aspects of this debt should be divided as marital debt. Unfortunately, these exhibits were not included as part of the appellate record as the case was dismissed on appellee's motion prior to their formal admission. Regardless of the absence of the exhibits, however, we hold the testimony of the parties, which was derived from Exhibits 1 and 2, was sufficient to survive appellee's Civ.R. 41(B)(2) motion on the issue of how to equitably divide marital debt.

{¶28} Regarding the issue of child support, appellant and appellee each testified to their personal income and debt. Appellant also precisely testified to the children's

specific living expenses. Additionally, near the close of her case-in-chief, appellant offered testimony relating to her tax returns from 2006 through 2008. The transcript of proceedings indicates appellant's counsel possessed copies of appellant's returns from 2007 and 2008, as required by the computation requirements of R.C. 3119.05. When appellant's counsel indicated she did not have the return from 2006 (which may have been unnecessary because the parties separated in July of 2007), counsel for appellee announced: "If counsel doesn't have it, Your Honor, in my case I'll present all the information." The court accepted counsel's offer and, in doing so, decided not to accept appellant's copies of the 2007 and 2008 returns. Based upon counsel's representations and the court's approval of the offer, appellant moved on with her case-in-chief.

{¶29} After appellant rested, however, appellee's counsel moved to dismiss the case. Counsel supported his motion to dismiss, in part, by arguing appellant failed to provide the necessary tax returns for the court to compute a child support order. Despite his offer to provide the forms, counsel for appellee emphasized that, because appellee was not the plaintiff in the case, he was not obligated to produce any evidence. Counsel for appellant moved to reopen the case in order to provide further evidence. Appellee's counsel, however, strenuously urged the court to deny the request, essentially arguing such action was unfair and, in any event, outside the court's authority. The court subsequently denied appellant's request and dismissed the case.

{¶30} Counsel's argument that appellant's case should be dismissed because she failed to submit the tax returns was obviously disingenuous. Appellee's counsel could not legitimately assert appellant failed to submit evidence which he induced her not to produce for the court. Counsel's offer to provide "all the information" pertaining to

the parties' tax returns rendered any dismissal based upon the lack of this information both unjust and unreasonable. Because the information relating to appellant's 2007 and 2008 returns could have come in via appellant's counsel (absent opposing counsel's offer to introduce this evidence), we hold the trial court erred in dismissing the case for lack of sufficient evidence on this issue.

{¶31} Of course, the court could have allowed appellant to reopen her case to introduce the returns in her possession. Contrary to the representations of appellee's counsel, it is well-established that a trial court has the discretion to allow a party to reopen his or her case. *Grein v. Grein*, 11th Dist. No. 2009-L-145, 2010-Ohio-2681, at ¶62, citing, *Longo v. Longo*, 11th Dist. No. 2004-G-2556, 2005-Ohio-2069, at ¶22. Had the court granted appellant's oral motion to reopen, the record indicates appellant would have met her burden of production on the issue of child support.

{¶32} Next, the court was asked to determine the date at which the parties' respective pensions should be divided. The record indicates the parties agreed that their retirement benefits should be divided equally and, as a result, proof of the values of these plans was not directly before the court. With respect to this issue, the trial court's judgment entry provides:

{¶33} "While there was an agreement that the parties had lived separate and apart since July 2007 and they were incompatible regarding the grounds for this divorce, there was no agreement on other issues. [R.C] 3105.171(A)(2) states that the Court must determine 'the duration of the marriage.' These dates were in dispute. Plaintiff's counsel argued that the marriage ended when the parties separated. This Court needed more facts about the separation and the two years the parties lived

separate and apart. This issue had to be resolved before the Court could divide the pensions as to the marriage's duration."

{¶34} Although the court indicates it required more information regarding what occurred between July 1, 2007 and the date of the hearing, it is unclear what additional information it needed. Appellant put forth evidence of where she has been living, her work schedule, her income and expenses, as well as her debt. She further testified she did not consult appellee on any debt she had incurred since the separation. She established the children had resided with her since the separation and offered testimony regarding the children's living expenses. Appellee similarly testified to his assets, debts, employment, his relationship with his children. He likewise stated that he had not consulted with appellant on any debt he had accumulated since the separation. Given these facts, we hold the court possessed enough information to set forth a date at which the pensions should be divided.

{¶35} Moreover, prior to trial, appellee's counsel indicated he possessed the information relating to the relative values of the parties' retirement plans and would put the evidence on record during his presentation of evidence. Further, even after appellee moved to dismiss the case, counsel asserted she was prepared to "put on evidence as to retirement" were she allowed to reopen her case. Similar to the tax return issue, it appears appellant would have been able to put forth some evidence on the issue of the value of the pensions had appellee not arbitrarily withdrew his offer to do so after appellant rested.

{¶36} Finally, prior to the commencement of trial, appellant's counsel indicated appellant was withdrawing her prayer for spousal support and stated, on record, that the

case was *not* a spousal support case. In response to this point, counsel for appellee indicated appellee was seeking spousal support, stating “*** it seems I have the burden to show that this is a spousal support case.” Clearly, spousal support was an issue only to the extent appellee made it an issue. Amazingly, however, counsel for appellee supported his motion to dismiss by repeatedly emphasizing that he had no obligation, as the defendant, to put on any evidence. Despite counsel’s contradictory positions, the trial court made the following finding in its judgment entry:

{¶37} “Before a court can determine if spousal support is reasonable and appropriate, the court must know the assets and liabilities of the parties, and it needs detailed facts as to each relevant spousal factor pursuant to [R.C.] 3105.18(C)(1) (a through n). *** This Court needed financial documents *** to decide if spousal support was appropriate and reasonable. Considering the sparse testimony on all these issues, this Court had inadequate facts with which to make a final order.”

{¶38} The record clearly reflects that appellee had the burden to establish the propriety of spousal support. When counsel for appellee refused to go forward, the issue of spousal support was no longer before the court. Even though appellant was not seeking spousal support and believed it was not an issue, the trial court seemed to blame her for failing to put forth adequate testimony on the issue. By highlighting a non-issue as a partial basis for its dismissal, we believe the court acted in a manner that was both fundamentally unfair and unreasonable.

{¶39} In light of the analysis above, this court concludes that appellant either produced enough evidence or would have produced enough evidence, absent the gamesmanship of opposing counsel, on all issues submitted for trial to overcome

appellee's motion to dismiss pursuant to Civ.R. 41(B)(2). We therefore hold the trial court abused its discretion in granting appellee's motion to dismiss the underlying case.

{¶40} Appellant's sole assignment of error is sustained.

{¶41} For the reasons discussed above, the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, is reversed and the matter remanded for proceedings to resume in accordance with this opinion.

MARY JANE TRAPP, P.J.,

PATRICIA A. DELANEY, J.,
Fifth Appellate District,
Sitting by Assignment,

concur.