[Cite as *Cireddu v. Clough*, 2012-Ohio-2242.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JAMES V. CIREDDU, et al.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2011-L-121**
- vs -	:	
STEPHANIE Y. CLOUGH,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2008 CV 02029.

Judgment: Affirmed.

Hans C. Kuenzi, Hans C. Kuenzi Co., L.P.A., 1660 W. Second Street, Suite 410, Cleveland, OH 44113 (For Plaintiff-Appellant).

James P. Koerner, 10 West Erie Street, #106, Painesville, OH 44077 (For Defendant-Appellee).

Rebecca Castell, 1360 W. Ninth Street, Suite 200, Cleveland, OH 44113 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, James V. Cireddu, appeals from the Judgment Entry of the Lake County Court of Common Pleas, Juvenile Division, vacating its June 24, 2010 Judgment Entry and denying Cireddu's motion to change his children's surname. The issue to be determined by this court is whether an entry that is not a final order may be vacated under Civ.R. 60(B) and whether a trial court abuses its discretion in vacating its

judgment entry pursuant to a motion for reconsideration. For the following reasons, we affirm the decision of the trial court.

{¶2} Cireddu and Stephanie Clough have two children, J.C., born January 18, 2006, and G.C., born December 11, 2008.

{¶3} On October 14, 2008, Cireddu filed a Complaint in the Lake County Court of Common Pleas, Juvenile Division, requesting custody of J.C. On January 2, 2009, Cireddu filed an Amended Complaint, also requesting custody of G.C. In this Complaint, Cireddu also requested an order changing the surname of the children to his own surname.

{¶4} On August 13, 2009, following a hearing, the magistrate issued a Decision, granting legal custody of the children to Cireddu and ordering Clough to pay child support. The Decision did not address the issue of the children's surname.

{¶5} Objections to the Magistrate's Decision were filed by both parties. Clough objected to the custody and child support findings. In a Supplemental Objection to Magistrate's Decision, filed on November 25, 2009, Cireddu asserted that the magistrate failed to address the issue regarding the surnames of the minor children and argued that the evidence presented at the hearing supported a finding that it was in the children's best interest to change their surnames.

{¶6} In its December 22, 2009 Judgment Entry, the trial court upheld the findings as to custody and child support and overruled Clough's Objections to the Magistrate's Decision. Regarding Cireddu's Objections, the trial court granted them as they related to the children's surname. The trial court stated that "[t]he issue of the children's surname presented in Plaintiff's Objections * * * shall be referred back to

Magistrate Bell. The Magistrate shall make findings, conclusions and recommendations based on the transcript, without further evidence."

{¶7} On January 14, 2010, a Magistrate Order was issued regarding the surname issue. The Order stated that "there was no evidence presented regarding the children's surname" during the prior hearings. The only evidence was in the form of closing argument, which was not admissible. The magistrate concluded that since the record did not contain evidence regarding the name change issue, Cireddu did not demonstrate that it was in the children's best interests to change their surname and denied his request for the name change.

{¶8} Cireddu filed a Motion to Vacate Magistrate's Order, asserting that the ruling should have been made in a Magistrate's Decision. On January 29, 2010, the trial court interpreted this as a Motion to Set Aside the Magistrate's Order, and referred the matter to the magistrate to render a decision. On May 15, 2010, the magistrate issued a Magistrate Decision, making the same findings as it made in the Order.

{¶9} On May 21, 2010, Cireddu filed Objections to the Magistrate Decision, asserting that there was evidence presented at the hearings to support a finding in favor of changing the children's surnames.

{¶10} On June 24, 2010, the trial court issued a Judgment Entry, finding Cireddu's objections to be well-taken and referring the matter "back to the magistrate to take evidence as it relates to the surname of the minor children."

{¶11} On July 7, 2010, Clough filed a Motion for Reconsideration, arguing that the trial court should not order the matter back to the magistrate to take new evidence relating to the surname, as the court had previously ordered that the magistrate not take

any additional testimony as to this issue. The trial court denied this motion on August 4, 2010.

{¶12} On August 30, 2010, the surname proceedings were stayed, pending the decision of this court on Clough's appeal.

{¶13} In *Cireddu v. Clough*, 11th Dist. No. 2010-L-008, 2010-Ohio-5401, decided on November 5, 2010, this court affirmed the trial court's custody and child support decision, but altered the start date of the support payments. *Id.* at ¶ 56. The issue of the children's surname was not before this court on appeal.

{¶14} On July 25, 2011, Clough filed a Motion to Vacate Judgment Entry and a Renewed Motion for Reconsideration. In the Motion, Clough asserted, among other arguments, that the June 24, 2010 Entry should be vacated and that Cireddu should not be allowed to present new evidence on the surname issue, since the trial court had previously ordered that the surname issue be decided without presenting new evidence.

{¶15} On August 16, 2011, the trial court found that the June 24, 2010 Entry, referring the matter to the magistrate to take evidence and make further findings on the surname issue was "contrary to" the December 22, 2009 order, referring the surname issue back to the magistrate to make findings, conclusions, and recommendations based on the transcript without further evidence. The court ordered that "the Judgment Entry of June 24, 2010 is hereby vacated. The surname issue has been litigated and decided by the magistrate." Cireddu timely appealed from this judgment.

{¶16} On April 11, 2012, this court issued a Judgment Entry, finding that the court's August 16, 2011 entry did not comply with the requirements for issuing final judgment, as it did not adopt, reject, or modify the magistrate's decision as required by

Civ.R. 53(E), but instead stated only that the issue had been "litigated and decided by the magistrate." This court remanded to the trial court for the issuance of a final order. On April 20, 2012, the trial court issued a Judgment Entry on remand, finding the Magistrate's Decision of May 11, 2010, to be "proper in all respects" and holding that it "adopts the Magistrate's Decision in full." The court also stated that the Plaintiff's Objection to the Magistrate's Decision, filed May 21, 2010, was "not well taken" and ordered that the request to change the children's surname "is not well taken and is hereby denied."

{¶17} Cireddu raises the following assignments of error on appeal:

{¶18} "[1.] The trial court committed prejudicial error in vacating its order of June 24, 2010.

{¶19} "[2.] The trial court committed prejudicial error in approving the decision of the magistrate without ruling upon objections filed by Appellant to this decision."

{¶20} In his first assignment of error, Cireddu argues that Clough's Motion to Vacate failed to demonstrate a meritorious defense or claim, as required pursuant to Civ.R. 60(B), and the trial court erred by granting the 60(B) motion.

{¶21} Clough argues that there was a meritorious defense, in that she showed to the court that Cireddu failed to present evidence on the surname issue, and that his motion to change the surname of the children should have been denied.

{¶22} Although the parties both assert arguments regarding whether the judgment entry was properly vacated under Civ.R. 60(B), we find that Civ.R. 60(B) was not applicable to the present matter. A Civ.R. 60(B) motion is proper only with respect to final judgments. *Fleenor v. Caudill*, 4th Dist No. 03CA2886, 2003-Ohio-6513, ¶ 12;

Jarrett v. Dayton Osteopathic Hosp., Inc., 20 Ohio St.3d 77, 78, 486 N.E.2d 99 (1985) (a motion for relief was improperly labeled a Civ.R. 60(B) motion because it did not seek relief from a final judgment). Thus, "Civ.R. 60(B) is not the proper procedural device a party should employ when seeking relief from a non-final order." *Vanest v. Pillsbury Co.*, 124 Ohio App.3d 525, 533, 706 N.E.2d 825 (4th Dist.1997)

{¶23} In the present matter, the entry from which relief was sought was not final. The June 24, 2010 Entry, which Clough successfully sought to have set aside or vacated, simply ordered the magistrate to take further evidence as to the surname issue. It did not rule on the merits of the surname issue or enter judgment as to that issue. The entry did not affect a substantial right in an action that in effect determined the action and did not fall under any of the other categories of final orders under R.C. 2505.02. Since the order was not final, we cannot evaluate the merits of Clough's motion as a Civ.R. 60(B) motion. Instead, since a Civ.R. 60(B) motion was not the proper procedural device, we construe Clough's motion as a motion to reconsider, which is the proper device to seek relief from a non-final judgment. *See Jarrett* at 78 (since the trial court's judgment was not final, the subsequent motion to vacate was improperly labeled as a Civ.R. 60(B) motion); *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 379, 423 N.E.2d 1105 (1981), fn. 1 (where the entry from which relief was sought pursuant to 60(B) was not final, the motion is construed as a motion to reconsider).

{¶24} Orders ruling on a motion to reconsider do not become appealable until the court renders a final judgment. *See Fleenor* at ¶13. In the present matter, since a

final judgment has now been reached, we will consider whether the trial court properly granted Clough's motion, which we construe as a motion for reconsideration.

{¶25} The trial court's determination of a motion for reconsideration will not be disturbed on appeal absent an abuse of discretion. *Helman v. EPL Prolong, Inc.*, 139 Ohio App.3d 231, 241, 743 N.E.2d 484 (7th Dist.2000); *Vanest* at 535 ("[A] trial court has plenary power in entertaining a motion for reconsideration prior to entering a final judgment. A reviewing court, therefore, should not reverse a trial court's judgment absent an abuse of discretion.").

{¶26} "Civ.R. 54(B) allows for a reconsideration or rehearing of interlocutory orders. The rule, when discussing interlocutory orders, states, in pertinent part, that they are 'subject to revision at any time before the entry of judgment adjudicating the claims and the rights and liabilities of all the parties.'" *Drillex, Inc. v. Lake Cty. Bd. of Commrs.*, 145 Ohio App.3d 384, 389, 763 N.E.2d 204 (11th Dist.2001), citing *Pitts*, 67 Ohio St.2d at 379, fn. 1.

{¶27} In the present case, we cannot find that the court abused its discretion in determining that no further hearing was required on the matter of the surname issue and by vacating its June 24, 2010 Judgment Entry. The magistrate fully considered the surname issue and issued a Decision. Although the trial court ordered that additional evidence be taken on this issue, it was free to determine that no further evidence must be presented on the issue and to make a ruling based on the evidence presented. *See* Civ.R. 54(B) (the trial court's interlocutory order is "subject to revision" prior to entry of final judgment); *Cybulski v. Ramsey*, 11th Dist. No. 2000-A-0061, 2001 Ohio App. LEXIS 2966, *9-10 (June 29, 2001) ("[b]ecause the judgment entry was an interlocutory

order, the trial court was permitted to reconsider it any time prior to final judgment"). Cireddu was given the opportunity to present evidence on the surname issue at the August 2009 hearings, which were held to consider, among other issues, the merits of the surname motion. The court found that there was not sufficient evidence presented to show that a change in surname was warranted and the court could properly find that Cireddu was not entitled to another evidentiary hearing to prove the merits of his motion. *See* Juv.R. 40(D)(4)(b) (when determining whether to adopt, reject, or modify a magistrate's decision, the court "*may* hear a previously-referred matter, take additional evidence, or return a matter to a magistrate") (emphasis added). Cireddu points to no law that prevented the trial court from determining that no further hearing or taking of evidence was required prior to issuing a final judgment.

{¶28} The first assignment of error is without merit.

{¶29} In his second assignment of error, Cireddu asserts that the trial court erred by leaving unresolved an objection to the Magistrate's Decision filed by him on May 21, 2010, since the trial court vacated its original June 24, 2010 order finding his objection to be well taken.

{¶30} Pursuant to Juv.R. 40(D)(4)(d), "[i]f one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law."

{¶31} In the present matter, as noted above, the initial Judgment Entry of the trial court was not final, pursuant to the trial court's failure to properly adopt the

Magistrate's Decision. On remand, however, the trial court both properly adopted the Magistrate's Decision and also explicitly ruled on Cireddu's May 21, 2010 Objection to the Magistrate's Decision, finding it to be not well taken and overruled. Since the trial court has ruled on the objection and stated that it undertook an independent review of the magistrate's decision, its judgment is final and it cannot be said that the court failed to comply with the requirements of Juv.R. 40(D)(4)(d).

{¶32} The second assignment of error is without merit.

{¶33} Based on the foregoing, the judgment of the Lake County Court of Common Pleas, Juvenile Division, vacating its June 24, 2010 Judgment Entry, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J,

CYNTHIA WESTCOTT RICE, J.,

concur.