[Cite as *Warren v. Warren*, 2011-Ohio-3083.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kenneth J. Warren,	:	
Plaintiff-Appellee,	:	
		No. 10AP-837
v.	:	(C.P.C. No. 04DR-06-2336)
Karen Warren,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on June 23, 2011

Eugene R. Butler Co., LPA, and *Eugene R. Butler*, for appellee.

Kristin E. Rosan, for appellant.

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

BROWN, J.

{¶1} Karen Warren, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, in which the court denied appellant's motion to set aside the settlement agreement she entered into with Kenneth J. Warren, plaintiff-appellee.

{¶2} The parties were married in 1990, and two children were born as issue of the marriage. Appellee filed for divorce in June 2004. On December 31, 2008, the court

journalized a judgment entry-decree of divorce. On January 6, 2009, the trial court journalized a "nunc pro tunc" judgment entry-decree of divorce. Appellee appealed that judgment, and in *Warren v. Warren*, 10th Dist. No. 09AP-101, 2009-Ohio-6567, this court affirmed in part and reversed in part.

{¶3} On remand, the matter was continued several times and was finally scheduled for a hearing June 3, 2010. The parties engaged in negotiations that afternoon, eventually reaching a settlement agreement that was signed by the parties. Appellant was represented by counsel during the negotiations.

{¶4} On June 23, 2010, appellant filed a pro se motion to set aside the settlement agreement. Appellant asserted in her motion that she was under the influence of medications at the time of the agreement and was not able to understand the terms of the agreement. Appellant also claimed she felt pressured and coerced to sign the agreement by the trial court. Appellant further asserted appellee had threatened to file a contempt motion against her if she did not settle that day. The motion was originally scheduled to be heard August 10, 2010, and appellant claims her doctor was ready to testify on that date regarding her medical condition on June 3, 2010.

{¶5} On July 9, 2010, appellee filed a contempt motion. On that same day, the court issued an order striking the August 10, 2010 hearing date for the motion to set aside and scheduled the contempt and motion to set aside for July 19, 2010. The clerk's certificate of service issuance indicates the clerk sent appellant notice of the order on July 12, 2010. The ordinary mail stub was filed by the clerk July 13, 2010. Appellant said she did not receive the notice until several days later.

{¶6} At the hearing on July 19, 2010, appellant attempted to have the matter continued so she could reschedule her doctor to testify, but the court refused to do so. A hearing was held, and appellant testified as to her mental and physical condition on June 3, 2010. The court orally denied her motion to set aside the settlement agreement at the hearing. On August 11, 2010, the court filed a judgment denying appellant's motion to set aside the settlement agreement. Appellant asserts the following assignments of error:

> I. THE TRIAL COURT ERRED IN EX-PARTE RESCHEDULING APPELLANT'S MOTION TO SET ASIDE THE SETTLEMENT AGREEMENT FROM AUGUST 10, 2010 TO JULY 19, 2010 BY ONLY GIVING APELLANT THREE (3) BUSINESS DAYS NOTICE OF THE RESCHEDULED HEARING.
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> II. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SET ASIDE THE SETTLEMENT AGREEMENT WHEN THE TESTIMONY ESTABLISHED THE APPELLANT WAS UNDER MEDICATION AND SUFFERED FROM PHYSICAL AND PSYCHOLOGICAL CONDITIONS PREVENTING HER FROM COMPREHENDING THE AGREEMENT.

{¶7} Appellant argues in her first assignment of error that the trial court erred when it rescheduled the hearing on her motion to set aside the settlement agreement from August 10 to July 19, 2010, while giving her only two or three business days notice of the rescheduling. Trial courts are afforded considerable discretion when scheduling hearings. *In re Disqualification of Aubry*, 117 Ohio St.3d 1245, 2006-Ohio-7231, ¶4. Thus, a trial court is vested with broad discretion when granting or denying a continuance. *Ham v. Ham*, 3d Dist. No. 16-09-24, 2010-Ohio-1262, citing *State v. Jones*, 91 Ohio St.3d 335, 342, 2001-Ohio-57, citing *State v. Unger* (1981), 67 Ohio St.2d 65. An appellate court will not reverse the denial of a continuance unless the trial court abused its discretion. Id.

Abuse of discretion is more than a mere error of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} We nonetheless recognize that both the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution guarantee due process of law, and thus guarantee a reasonable opportunity to be heard after a reasonable notice of such hearing. *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 125. Thus, a fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo* (1965), 380 U.S. 545, 552, 85 S.Ct. 1187, 1191. Due process of law implies, in its most comprehensive sense, the right of the person affected to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. *Williams v. Dollison* (1980), 62 Ohio St.2d 297.

{¶9} When reviewing a trial court's decision on a continuance, the appellate 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, 1999-Ohio-844. The trial court may consider several factors when determining whether to grant a continuance, including: (1) the length of the delay requested; (2) whether previous continuances have been granted; (3) the inconvenience to the parties, witnesses, attorneys, and the court; (4) whether the request is reasonable or purposeful and contrived to merely delay the proceedings; and (5) whether the movant contributed to the

circumstances giving rise to the request. Id., citing *Unger*; *State v. Hines*, 3d Dist. No. 9-05-13, 2005-Ohio-6696, ¶12.

{¶10} In the present case, appellant's June 23, 2010 motion to set aside the settlement agreement was originally scheduled to be heard on August 10, 2010. On July 9, 2010, appellee filed a contempt motion. On that same day, a Friday, the court issued an order striking the August 10, 2010 hearing date and scheduled both the contempt and motion to set aside the settlement agreement for hearing on July 19, 2010, a Monday. The clerk's certificate of service issuance indicates the clerk sent appellant notice of the order on July 12, 2010, a Monday. The ordinary mail stub was filed by the clerk on July 13, 2010, a Tuesday. Appellant said she did not receive the notice until several days afterwards, leaving her with only two or three days notice.

{¶11} At the hearing on July 19, 2010, appellant attempted to have the matter continued. After being sworn, appellant testified that she was not prepared to have a hearing on her motion to set aside on that day. She said she had been expecting to have the hearing on her motion on August 10, 2010, and present the testimony of doctors and medical records at that time, but she did not have time to schedule her medical witnesses for July 19 on such short notice.

{¶12} In denying appellant's motion for a continuance of the hearing, the trial court stated that its order was journalized July 9, 2010, and believed it was mailed to appellant by the clerk's office by ordinary mail service on that same day. The trial court then said "effectively you have had – you have had notice. We will give you three days pursuant to Rule since July 12th, and today is July the 19th, so you have had seven days notice." However, based upon the evidence in the record before us, as detailed above, it is clear

that the trial court was mistaken as to how many days appellant had had notice of the hearing. It appears, consistent with appellant's contention, that she received notice only two or three business days prior to the hearing. We find this notice was not sufficient to allow appellant to prepare her case and secure witnesses, particularly an expert medical witness who would require reasonable notification.

{¶13} Furthermore, the factors from *Unger* greatly weigh in favor of the granting of a continuance. Appellant's reasonable request was that the original hearing date be enforced, which was approximately 20 days after the rescheduled hearing date. Appellant had also never before requested a continuance on this matter. There was no evidence in the record that appellee would have been prejudiced or inconvenienced by enforcing the original trial date, or that appellant's request was contrived to merely delay the proceedings. Appellant also did not contribute to the circumstances giving rise to the request. She did not participate in any discussion to move the August 10, 2010 hearing date to July 19, 2010. In addition, although the trial court indicated that it did not want to "drag" the case out any longer, as appellant notes, appellant's motion to set aside had been pending less than one month. Although the divorce was filed originally in 2004, part of the time it had been pending the case was on appeal before this court, and it had only been pending before the trial court after our remand for approximately seven months. We understand the trial court's desire to address cases promptly and move them expeditiously toward final resolution, but we believe, in this instance, it pursued such laudable goals in an unreasonable fashion.

{¶14} It is also clear from the transcript of the hearing that appellant was prejudiced by her inability to prepare her case and call her medical witnesses. The following conversation took place between appellant and the trial court at the hearing:

> THE COURT: And so without the health care providers here to testify, I am going to be – you're going to be very limited in what you're going to be able to establish other than you certainly are able to tell me about your own physical health.
>
> MRS. WARREN: Hmm.
>
> THE COURT: But I am not going to take that as medical testimony from a professional. Do you understand?
>
> MRS. WARREN: Yes.
>
> THE COURT: All right. I assume that you don't have a doctor here or anything else; is that right?
>
> MRS. WARREN: I have lots of statements from doctors.
>
> THE COURT: But I understand you don't have a doctor here to actually authenticate those documents?
>
> MRS. WARREN: No.

Therefore, the trial court admitted that it would be very difficult for appellant to present her case without the testimony of her physician and his ability to authenticate medical documents.

{¶15} There was also evidence that there existed medical doctors that could have provided relevant testimony as to appellant's mental and physical condition the day she entered into the settlement agreement. Appellant testified at the hearing that she had been under the care of doctors for many issues leading up to June 3, 2010. She said on the day she entered into the settlement agreement, she had been suffering from poor health, including Graves disease, hot flashes, an ulcer, pain, and hyperthyroidism, and

she was taking medications for some of these conditions that affected her mental and physical state. She was also experiencing a lack of comprehension, confusion, anxiety, and nausea. Furthermore, the morning after she entered into the settlement agreement, she went to the emergency room because she was in pain, and she was admitted to the hospital for two days. She was released from the hospital on the condition that she follow-up with a gastrointestinal specialist. Thus, because there was evidence that there existed doctors that could have served as witnesses to support her motion, and appellant indicated she had intended to call these doctors as witnesses at the August 10, 2010 hearing, we find appellant was prejudiced by the trial court's denial of her request to continue the matter. For the foregoing reasons, we sustain appellant's first assignment of error.

{¶16} Appellant argues in her second assignment of error that the trial court erred when it denied her motion to set aside the settlement agreement. Because the matter must be remanded for another hearing on appellant's motion to set aside, after proper notice to the parties, this assignment of error is moot.

{¶17} Accordingly, appellant's first assignment of error is sustained, appellant's second assignment of error is moot, and the judgment of the trial court is reversed. This matter is remanded to the Franklin County Court of Common Pleas, Division of Domestic Relations for another hearing on appellant's motion to set aside the settlement agreement.

Judgment reversed and cause remanded.

KLATT and FRENCH, JJ., concur.

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