



("CCDJFS") filed a complaint for emergency shelter care alleging that D.M. was a dependent child pursuant to R.C. 2151.27 and 2151.31. D.M. was placed in a foster home. On December 26, 2002, temporary custody of D.M. was granted to CCDJFS. In April of 2003, CCDJFS requested the juvenile court to modify temporary custody of D.M. to permanent custody. Legal custody of D.M. was awarded to D.M.'s paternal uncle and aunt by order of October 15, 2003.

{¶ 3} On October 26, 2007, Manuel filed a complaint seeking custody of D.M. A final evidentiary hearing on the complaint was scheduled. After four days of the evidentiary hearing were completed, a fifth day was scheduled for October 16, 2008. Manuel and his attorney failed to appear at the October 16, 2008 hearing. In an October 22, 2008 entry, the juvenile court dismissed the complaint filed by Manuel based on the failure of Manuel and his attorney to appear at the hearing. Manuel filed a notice of appeal.

ASSIGNMENT OF ERROR

{¶ 4} "IT WAS AN ABUSE OF DISCRETION TO DISMISS THE CASE WITHOUT GIVING THE PARTY AN OPPORTUNITY TO BE HEARD."

{¶ 5} In its October 22, 2008 entry, the juvenile court explained its decision to dismiss Manuel's complaint:

{¶ 6} "At the last hearing on September 26, 2008, this

Court coordinated today's hearing with counsel for both parties, just as it had for each of the four previous days of testimony herein, which were all attended by the Movant, James Anthony Manuel, and his attorney, Karl Paulig, and Brett and Sheena Baker and their attorney, Kevin Talebi. Neither of the biological parents appeared at any of the prior hearings herein.

{¶ 7} "After the date of the last hearing on September 26, 2008, this Court received, by regular mail, an unfiled motion by Mr. Paulig seeking leave of this Court to withdraw as counsel for James Anthony Manuel, therein citing that his services had been terminated by Mr. Manuel. At no time herein had this Court granted leave for Mr. Paulig to withdraw as counsel for Mr. Manuel. Likewise, no one filed a motion to continue the hearing scheduled on this date and accordingly, Brett and Sheena Baker and their attorney and their witnesses were present for the hearing which had been scheduled since September 26, 2008.

{¶ 8} "Since the last hearing on September 26, 2008, attorney Michael Murphy has filed an Entry of Appearance in the within matter, despite the fact that attorney Paulig has not been granted leave by this Court to withdraw as Movant's counsel and the fact that four days of testimony have already

taken place in this case, none of which were attended by attorney Murphy. Similarly, neither the Movant, James Anthony Manuel, nor attorney Paulig or attorney Murphy have filed with this Court a Motion to Continue the hearing which was scheduled on this date and none of the aforementioned appeared on this date. In consideration of the foregoing, this Court finds that it is appropriate to dismiss the Complaint for Custody filed on behalf of James Anthony Manuel on October 26, 2007."

{¶ 9} The dismissal by the juvenile court was an involuntary dismissal of Manuel's complaint. Civ.R. 41(B) governs involuntary dismissals. "The Rules of Civil Procedure apply to custody proceedings in juvenile court except when they are clearly inapplicable." *In re H.W.*, 114 Ohio St.3d 65, 2007-Ohio-2879, at \_11, citing Civ.R. 1(C)(7) and *State ex. rel. Fowler v. Smith*, 68 Ohio St.3d 357, 360, 1994-Ohio-302. See also Juv.R. 45(B).

{¶ 10} Civ.R. 41(B)(1) provides:

{¶ 11} "(1) Failure to prosecute. Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim."

{¶ 12} "Notice to the plaintiff or plaintiff's counsel of the court's intention to dismiss is an absolute prerequisite to a dismissal for failure to prosecute or comply with court order. The requirements of notice to the plaintiff's counsel applies to dismissals with or without prejudice." 1 Ohio Jurisprudence 3d (2008) 617-18, Actions, Section 194 (internal citations omitted).

{¶ 13} "The purpose of notice is to 'provide the party in default an opportunity to explain the default or to correct it, or to explain why the case should not be dismissed with prejudice.'" *Logsdon v. Nichols*, 72 Ohio St.3d 124, 128, 1995-Ohio-225 (citation omitted). "Notice allows the dismissed party to explain the circumstances causing his or her nonappearance." *Id.*

{¶ 14} The juvenile court did not provide Manuel with the notice required by Civ.R. 41(B)(1) or the opportunity to explain why he and his attorney failed to appear at the fifth day of the evidentiary hearing. Therefore, the court erred when it dismissed Manuel's complaint.

{¶ 15} The assignment of error is sustained. The judgment of the trial court will be reversed and the cause remanded for further proceedings consistent with this Opinion.

DONOVAN, P.J. and FAIN, J., concur.

Copies mailed to:

Michael B. Murphy, Esq.

Karl Paulig, Esq.

Kevin Talebi, Esq.

Hon. Thomas J. Capper