SIXTH DIVISION
June 3, 2011

No. 1-09-0315

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF LUCY NEWSOME,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Cook County.
	)	
and	)	No. 94 D 15371
	)	
GREGORY NEWSOME,	)	Honorable
	)	Barbara A. Riley,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court:
Justice McBride concurred in the judgment.
Presiding Justice Garcia specially concurred.

O R D E R

***Held*:** Trial court erred in denying motion for substitution of judge as of right, rendering all subsequent orders void.

Respondent appeals a series of orders entered by the trial court in a dissolution of marriage proceeding that began in 1994 and continues to this day. Among the orders appealed is a denial of a motion for substitution of judge as of right entered on July 15, 2008. We believe the trial court erred in denying that motion, rendering all subsequent orders void. We reverse in part, vacate in part and remand.

Lucy and Gregory Newsome divorced in January 1999. This court affirmed the judgment

of dissolution and a joint parenting agreement that addressed the health, welfare and education of the couple's two children. *In re Marriage of Newsome*, No. 1-99-2763 (March 29, 2002) (unpublished order under Supreme Court Rule 23). There followed between 2003 and 2008 a series of post-decree proceedings that addressed disputes over some of the financial terms of the parenting agreement. In April of 2008, Lucy sought a finding of indirect civil contempt against Gregory for an alleged failure to pay half of the children's medical and miscellaneous expenses. This motion was pending when, on July 15, 2008, Gregory filed a motion for a substitution of judge as of right, alleging that the judge then presiding "has made no ruling of any substantial nature." On July 22, 2008, the trial judge denied the motion without explanation. The trial judge continued to preside over the case and in an order dated November 24, 2008, found Gregory in indirect civil contempt and ordered him to pay $70,865 in college expenses, $56,116 in medical expenses and $13,000 in attorney fees. Gregory filed a motion to vacate, reconsider or modify this order on December 22, 2008, which was denied on January 5, 2009. It is from this January 5 order and the order of July 22 denying his motion for a change of judge as of right that Gregory filed a timely notice of appeal on February 2, 2002. Petitioner Lucy has not filed a brief.

Illinois law governing substitutions of a judge as of right is codified and, with one exception we note below, well settled:

> "An application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties." 735 ILCS 5/2-1001 (a)(2)(ii) (West 2006).
>
> "A petition for substitution of judge as of right is untimely if filed after the judge has ruled on a substantive issue in the case. *In re Daniel R.*, 291 Ill. App. 3d 1003, 1014, 684 N.E.2d 891 (1997). The purpose of the rule is to prevent a

> litigant from 'judge shopping' after forming an opinion that the judge may be unfavorably disposed toward her cause. *Daniel R.*, 291 Ill. App. 3d at 1014. A ruling on a substantive issue is one that directly relates to the merits of the case. *Rodisch v. Commacho-Esparza*, 309 Ill. App. 3d 346, 350-51, 722 N.E.2d 326 (1999). A motion for substitution may also be denied, in the absence of substantive ruling, if the movant had the opportunity to form an opinion as to the judge's reaction to her claims. *In re Estate of Gay*, 353 Ill. App. 3d 341, 343, 818 N.E.2d 860 (2004)." *Curtis v. Lofy*, 394 Ill. App. 3d 170, 176, 914 N.E.2d 248 (2009). But see *Illinois Licensed Beverage Ass'n, Inc. v. Advanta Leasing Services*, 333 Ill. App. 3d 927, 933, 776 N.E.2d 255 (2002); *Scroggins v. Scroggins*, 327 Ill. App. 3d 333, 336, 762 N.E.2d 1195 (2002).

Our review of the denial of a motion for the substitution of judge as of right is *de novo*. *In re D.M.*, 395 Ill. App. 3d 972, 977, 918 N.E.2d 1091 (2009). A *de novo* review of the denial of a motion for change of judge as of right is not dependent on trial court reasoning. The trial court's failure to provide reasoning does not prevent appellate review. *Makowski v. City of Naperville*, 249 Ill. App. 3d 110, 116, 617 N.E.2d 1251 (1993). When, as here, the appellee has not filed a brief, our review is circumscribed by advice first set out in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493 (1976). We may take the case on the appellant's brief alone "if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief." *First Capitol Mortgage*, 63 Ill. 2d at 133. The record before us contains no transcript of the dispositive hearing in this case. We could conclude that the trial court's order was in conformity with the law and that there was a sufficient factual basis underlying the court's order. *Marriage of Gula and Cheneville*, 234 Ill. 2d 414, 422, 917 N.E.2d 392 (2009). But there is a cautionary note in *First Capitol Mortgage*:

> "We do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judgment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed." *First Capitol Mortgage*, 63 Ill. 2d at 133.

Before the trial judge in this case denied the motion for a change of judge as of right, the record shows that commencing May 5, 2004, the judge made the following rulings: 13 continuance orders, 5 agreed continuance orders, and 1 order granting respondent 21 days to respond to one of petitioner's motions. Since petitioner-appellee has not filed a brief, there are no allegations that contradict the record or respondent's claim that the trial court made no substantive rulings. Nor is there anything in the record to suggest pre-trial conferences where the appellant had the opportunity to form an opinion as to the judge's reaction to his position. See *In re Estate of Gay*, 353 Ill. App. 3d at 341, under the testing the waters doctrine cited with approval by some appellate courts.

Under Supreme Court Rule 366, we could remand this matter to the trial court to enter an order containing a factual basis for the denial of a motion for a change of judge as of right. This would be appropriate in a case where the appellant is confronted with a judgment exceeding $140,000 that could be attacked as void at any time. *Illinois Licensed Beverage Ass'n*, 333 Ill. App. 3d at 933; *Wheaton National Bank v. Aarvold*, 16 Ill. App. 3d 193, 195, 305 N.E.2d 541 (1973). See also *In re Estate of Wilson*, No. 108487, slip op. at 38-39 (October 21, 2010) (wherein our supreme court discusses the issue of void/voidable in the contest of a substitution of

judge for cause); 735 ILCS 5/2-1001(a)(3) (West 2006). Unfortunately, the trial judge in this case has retired and we are left with what the record tells us. Given the state of the record and the admonitions of *First Capitol Mortgage*, we conclude that the order of the trial court denying the motion for a change of judge as of right must be reversed and all subsequent orders of the trial judge vacated as void.

Reversed in part and vacated in part; cause remanded.

PRESIDING JUSTICE GARCIA, specially concurring:

I add another reason to reverse the judgment of the trial judge.

I agree with the respondent that the trial court abused its discretion in going forward to a trial on November 24, 2008, without following the dictates of Supreme Court Rule 13(c)(3) in its earlier orders. Ill. S. Ct. R. 13(c)(3) (eff. July 1, 1982); see *In re Marriage of Ehgartner-Shachter and Shachter*, 366 Ill. App. 3d 278, 289, 851 N.E.2d 237 (2006) (failure to provide 21 days to arrange for substitute counsel as required under Rule 13 may constitute reversible error).

A trial on the petitions of the petitioner was scheduled to be heard on October 16, 2008. On October 15, 2008, the trial judge entered an order granting trial counsel for respondent leave to withdraw, over his objection. The motion to withdraw was filed on October 14, 2008, and ruled upon the following day, as a purported "emergency" motion. The trial court order of October 15, 2008, granting counsel leave to withdraw, made no reference to Supreme Court Rule 13, mandating that a litigant left unrepresented, as respondent here was, be given no less than 21 days to obtain substitute counsel "after the entry of the order of withdrawal." Ill. S. Ct. R. 13(c)(2) (eff. July 1, 1982). In the order of October 15, 2008, the respondent was told nothing more than his counsel was allowed to withdraw and that the trial date of October 16, 2008, would be kept. *Cf. In re Marriage of Humphrey*, 121 Ill. App. 3d 701, 702, 460 N.E.2d 52 (1984) (circuit court violated Rule 13 when it granted motion to withdraw by counsel on behalf of the husband and held a hearing on the wife's motion for sanctions on the same day).

On October 16, 2008, the trial was continued to October 23, 2008. On October 23, 2008, the trial was continued to November 24, 2008. Neither the order of October 16 nor the order of October 23, made mention of Rule 13(c) providing for the filing of "a supplementary appearance." Ill. S. Ct. R. 13(c)(4) (eff. July 1, 1982); *In re Marriage of Ehgartner-Shachter*, 366 Ill. App. 3d at 289 (Rule 13 "has been interpreted to require a continuance of at least 21 days after the entry of the order granting withdrawal, so that the party can retain other counsel or enter

his own supplementary appearance"). With the respondent unrepresented, the order of October 23, 2008, expressly provided that no continuance of the November 24, 2008, trial date would be granted. As the respondent points out, the continuance from October 16 to October 23 did not satisfy the requirement of Supreme Court Rule 13 of providing at least 21 days to obtain substitute counsel from the date of the order of withdrawal of October 15, 2008. See *In re Marriage of Ehgartner-Shachter*, 366 Ill. App. 3d at 289 ("[d]uring this 21-day transition period, the circuit court should not render any rulings prejudicing the party's rights").

The order of November 24, 2008, acknowledged that the respondent sought a continuance, which the trial court denied, prompting him to leave the courtroom. The order of November 24, 2008, was typewritten and originally provided that the respondent "is in default for failure to timely file his appearance within twenty-one (21) days of his counsel's withdrawal," a provision which was stricken in favor of a handwritten finding that the respondent "appeared in court, sought a continuance and then voluntarily left the Courtroom." The record reflects no *pro se* or "supplementary" appearance by the respondent on file. The judgment order provides no findings that in denying the continuance request the trial court exercised its discretion. See *People v. Bryant*, 176 Ill. App. 3d 809, 813, 531 N.E.2d 849 (1988) ("With no indications to the contrary [in the record], we conclude that the trial court erred by failing to properly exercise its discretion"); *Clay v. McCarthy*, 73 Ill. App. 3d 462, 465, 392 N.E.2d 693 (1979) ("where the record contains no support for the discretion exercised, [the abuse of discretion] burden is met"). Rather, the order suggests that the trial court denied the continuance request as a mechanical application of its order of October 23, 2008, which provided that no continuance of the November trial date would be granted, even though the October 23, 2008, order was entered eight days after the respondent's counsel was granted leave to withdraw over his objection.

Supreme court rules are not mere suggestions. *Bright v. Dicke*, 166 Ill. 2d 204, 210, 652 N.E.2d 275 (1995) (supreme court rules have the force of law and should be followed). The

rules are binding on trial courts no less so then on counsel for the parties in litigation. *People v. Glasper*, 234 Ill. 2d 173, 189, 917 N.E.2d 401 (2009) (trial court erred in failing to abide by supreme court rule). The October 15, 2008, order was improper when it is beyond dispute that the grant of the withdrawal motion could only "delay the trial of the case" set for October 16, 2008. Ill. S. Ct. R. 13(c)(3) (eff. July 1, 1982). The October 15, 2008, order allowed the trial date of October 16, 2008, to stand without providing the respondent 21 days to obtain substitute counsel after he objected to his counsel's withdrawal. The October 23, 2008, order was improperly granted when it failed to comply with Supreme Court Rule 13, as it was entered eight days of the order granting counsel leave to withdraw, which, in the absence of a *pro se* appearance or that of substitute counsel, made an intractable trial date "inequitable." Ill. S. Ct. R. 13(c)(3) (eff. July 1, 1982) (motion seeking leave to withdraw may be denied if granting it "would otherwise be inequitable"); *People v. Howard*, 376 Ill. App. 3d 322, 343, 876 N.E.2d 36 (2007) ("although the potential for delay is of considerable concern, the court must balance that against the fundamental concerns of equity, fairness and justice" in applying Supreme Court Rule 13).

Nor did the trial court properly exercise its discretion in denying the respondent's request for a continuance on November 24, 2008. In the order of November 24, 2008, the trial judge found the respondent in indirect civil contempt and entered a judgment against him for more than $140,000 based on numerous petitions filed by the petitioner absent before us. The respondent was substantially prejudiced when the trial court allowed the trial on the petitioner's petitions to go forward with no counsel of record on behalf of the respondent, especially in light of its failure to comply with Rule 13 in its orders leading up to trial. See *Williamsburg Village Owners' Ass'n, Inc. v. Lauder Associates*, 181 Ill. App. 3d 931, 936, 537 N.E.2d 857 (1989) (trial court abused its discretion in denying defendant's request for a continuance of scheduled trial date); *Demos v. Haber*, 101 Ill. App. 3d 901, 903, 428 N.E.2d 972 (1981) (circuit court improperly denied the

plaintiff's request for a continuance to have an attorney represent him following the filing of a counterclaim seeking $10,000, which forced the transfer of the case from small claims court).

Based on the particular facts of this case, the underlying order of October 15, 2008, allowing trial counsel to withdraw over respondent's objection, and the subsequent order of October 23, 2008, contravened Supreme Court Rule 13. The trial court abused its discretion in denying the respondent's request for a continuance on November 24, 2008, when the record fails to reveal an appearance of substitute counsel or his own supplementary appearance, leaving the respondent unrepresented in the proceedings, which resulted in a judgment in excess of $140,000.

I agree that the judgment of November 24, 2008, must be vacated.