No. 1-10-3559

SIXTH DIVISION
March 29, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE MARRIAGE OF:	)	Appeal from the
	)	Circuit Court of
ANN McAULEY-GALASSINI	)	Cook County.
Petitioner-Appellant,	)	
	)	No. 07 D 8315
and	)	
	)	The Honorable
TIMOTHY GALASSINI,	)	Laquietta Hardy-Campbell,
Respondent-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justice McBride concurred in the judgment.
Justice R.E. Gordon specially concurred.

O R D E R

Held: In a dissolution of marriage action, the trial court's decision to deny the petitioner's motion for voluntary dismissal is rendered moot by the filing of a counter-petition for dissolution. The trial court did not err in finding the mother and father could cooperate in co-parenting their two minor children so as to award joint custody though the petitioner absented herself from trial. The trial court did not abuse its discretion in denying the petitioner's motion to vacate the dissolution judgment where the judgment rendered substantial justice to the parties.

Following 22 years of marriage, the petitioner, Ann McAuley-Galassini, and the respondent, Timothy Galassini, spent a good portion of the assets they gathered from successful careers in this dissolution action. Each party acknowledges the litigation was extensive and contentious. On June 22, 2009, the first scheduled date for trial, the petitioner filed a motion to voluntarily dismiss her petition for dissolution of marriage pursuant to section 2-1009 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1009(a) (West 2008)). The trial court denied her request and rescheduled the trial for March 15-17, 2010. On June 23, 2009, the respondent filed a counter-petition for dissolution of marriage. On the scheduled trial date of March 15, 2010, the petitioner and her counsel failed to appear. The trial went forward in her absence and the circuit court entered a judgment distributing the parties' assets and awarding the parties joint custody of their two minor children. Following the entry of judgment, the petitioner obtained new counsel and filed a motion to vacate. The trial court denied the motion. The petitioner claims the trial court erred in denying her request to voluntarily dismiss her petition, in awarding joint custody, and in denying her motion to vacate the judgment.

We affirm. The trial court's denial of the petitioner's motion for voluntary dismissal was rendered moot by the respondent's counter-petition; it was within the trial court's discretion to find joint custody appropriate; and the judgment of dissolution of marriage did substantial justice between the parties.

BACKGROUND

The petitioner filed her petition for dissolution of marriage in 2007. Two children were born of the parties' marriage, Bridget, born October 4, 1993, and Michael, born May 10, 1998.

When the trial commenced in 2010, the respondent was the Vice-President and minority owner of a family business, Data Media Products (DMP), earning between $52,000 and $60,000, and the petitioner was the Director of Alliance Management for Astellas Pharmaceuticals, where she earned approximately $180,000 per year and an annual bonus. During their marriage, the parties' assets included a minority interest in DMP, various checking accounts, a Merrill Lynch brokerage account worth approximately $330,000, retirement accounts worth approximately $500,000, and their marital home.

The parties extensively litigated the issues, including the custody and visitation with their two children. The petitioner filed multiple petitions requesting the appointment of a custody evaluator under section 604(b) of the Illinois Marriage and Dissolution of Marriage Act (Act)(750 ILCS 5/604(b)(West 2006)). In her petitions, the petitioner requested sole custody of the parties' children, alleging the parties were unable to make joint decisions affecting their children, the respondent attempted to alienate the children's affections, and he physically and mentally abused the petitioner during their marriage. The respondent objected to the appointment of a section 604(b) evaluator, arguing such an appointment would be stressful and emotionally disruptive because the parties were attempting to resolve the custody issues in mediation. The trial court denied the petitioner's request for a section 604(b) evaluator, but ordered an evaluation concerning the best interests of the minor children under section 604.5 of the Act (750 ILCS 5/604.5 (West 2006)). The court appointed a child representative and a section 604.5 custody evaluation expert. The parties' attempts at mediation were unsuccessful.

On June 22, 2009, the first day of the scheduled trial, the petitioner sought to voluntarily

dismiss her petition for dissolution of marriage. At the hearing addressing her request, the respondent argued the motion failed to provide two days' notice required by Cook County Circuit Court Rule 2.1(c). The petitioner responded that two days' notice is not required when a case appears on the "daily trial call." The petitioner presented a printout of the court's website showing that the parties' case appeared on what she characterized as the "daily trial call." The court denied the petitioner's motion because she failed to provide two days' notice required by Rule 2.1(c).

On June 23, 2009, the respondent filed a counter-petition for dissolution of marriage.

On September 2, 2009, with counsel for both parties present, the court rescheduled the matter for trial to March 15-17, 2010. While the petitioner admits she was informed by her counsel that trial was set for March 2010, she contends she was not informed of a specific trial date. The petitioner claims that in the months leading up to the March trial, her relationship with her counsel began to deteriorate. According to the petitioner, her counsel said he was going to file a motion to withdraw. No motion to withdraw was ever filed before trial commenced on March 15, 2010.

On the first day of trial, neither the petitioner nor her counsel appeared. The trial proceeded on the respondent's counter-petition for dissolution of marriage and judgment was entered. In proceeding to trial, the circuit court noted that the petitioner and her counsel had a history of not appearing in court.

In entering the joint custody order, the circuit court expressly found that each party had the ability to cooperate effectively with the other and that joint custody served the children's best

interests. The court valued DMP at $39,150, and awarded the respondent two-thirds of the value of the company and the petitioner one-third. The respondent was also awarded two-thirds of the value of the Merrill Lynch account and 55% of the parties' retirement assets. The court valued the marital home at $650,000 and awarded the respondent $360,000 of its equity. The court found the petitioner had dissipated $261,038.47 in marital assets and awarded the respondent two-thirds of that amount. The court required the petitioner to pay 80% of the children's medical, educational, and extra-curricular expenses. The court ordered the petitioner to contribute $100,000 towards the respondent's attorney fees. The court based these two rulings on its findings that the petitioner engaged in reckless litigation and had the greater income. The court delineated a parenting and visitation schedule.

According to the petitioner's testimony at the hearing on her amended motion to vacate, she called her counsel's office on March 18, 2010, and was informed the court had entered a judgment of dissolution of marriage in her case. The following day, the petitioner obtained a copy of the judgment. Within nine days of the entry of the judgment, the petitioner obtained new counsel and filed a motion to vacate. She later amended her motion.

In her amended motion to vacate, the petitioner asserted she was financially and physically unable to comply with the dissolution judgment. In his response, the respondent focused on the petitioner's lack of diligence, her knowledge of the court dates, and the need to bring the litigation to an end. He argued the judgment was proper despite the petitioner's absence because, as he wrote, " 'a litigant has the affirmative obligation to follow the progress of [his or her] own case.' *Sakun v. Taffer*, 268 Ill. App. 3d 343, 350, 643 N.E.2d 1271 (1994)."

The trial court conducted a hearing on the petitioner's amended motion to vacate over three days in September 2010. The petitioner was the only witness. She testified concerning her attempts to stay apprised of her case, her counsel's message that he was withdrawing as her attorney, her statements to counsel that she could not go to trial in March because of work commitments, and her efforts to learn the starting date of her trial. The petitioner acknowledged she was aware of the numerous references to a March trial date in earlier court orders and admitted she made no effort to learn the specific date for trial from anyone other than her counsel. The petitioner testified that joint custody was not in the best interests of the parties' children. As to the value of the marital home, the petitioner testified that when she sought to refinance the mortgage pursuant to the terms of the judgment, the house was valued at $455,000, nearly $200,000 less than the court's valuation of $650,000. Concerning her dissipation of marital assets, the petitioner testified she had a summary specifying where the monies had been spent. She further testified that in order to pay her own attorney fees, she had to take out a $100,000 loan, which meant she did not have the resources to contribute to the respondent's attorney fees.

The trial court denied the petitioner's amended motion to vacate. The court found the petitioner to be an "incredible witness," finding her testimony to be "replete with inconsistencies and unbelievable allegations." The court found the crux of the petitioner's claim that a new trial should be ordered because she did not know the specific start date of the March 2010 trial to be "highly dubious." The court concluded the petitioner "had no intention of appearing at her March 2010 trial because she had a project at work that she felt was more important." The court

found the petitioner "knew when her case was set for trial, but chose not to attend and participate." The court stated the petitioner "had a duty to take some affirmative action that would have caused her to obtain the specific trial dates" and that because she "did not satisfy this duty,[] she should not be [] allowed to present her case ***." The court observed that even if it were to accept as true the petitioner's claim that she was unaware of the specific March 2010 trial date, the petitioner "did not act diligently in following the course of her own litigation or in acting reasonably in order to obtain said trial dates." The court found unpersuasive the arguments that had the petitioner participated in the trial she would have presented a meritorious defense regarding the division of property, the allocation of assets, the claim that she dissipated marital funds, and the custody-related issues. The court ruled the reasons offered by the petitioner for her failure to appear did not justify vacating the judgment. The entry of the judgment in her absence did not deny her day in court as her motion to vacate suggested; rather, the petitioner was seeking "a second opportunity to testify because [she] took a pass on [her] first opportunity."

Ultimately, the trial court ruled that against the backdrop of the evidence presented by the respondent at trial, the petitioner's evidence presented during the hearing on her amended motion to vacate did not establish that the judgment was "unconscionable." The court rejected as self-serving the petitioner's contention that she could not comply with the dissolution judgment. In upholding its order that the petitioner pay $100,000 of the respondent's attorney fees, the court found the petitioner acted "irresponsibly and recklessly' during the course of the litigation. The court observed it was "intimately familiar with this litigation and believe[d] [the petitioner]

utilized the judicial system to disrupt and harass [the respondent]." The court concluded that "[e]nding the litigation between the [parties] will do substantial justice to each party." The trial court found the petitioner failed to provide a compelling reason for her absence at trial on March 15, 2010 and denied her motion to vacate.

The petitioner timely appeals.

ANALYSIS

We address the three issues raised by the petitioner in the order they appear in her brief.

Motion to Voluntarily Dismiss

The petitioner contends the circuit court erroneously denied her motion for voluntary dismissal of her petition for dissolution of marriage brought under section 2-1009(a) of the Code (735 ILCS 5/2-1009(a) (West 2008)). She contends proper notice to the respondent was provided because Circuit Court Rule 2.1(a) permits a voluntary dismissal motion to be presented on the day of trial without prior notice and, at the time her motion was presented, she agreed to pay the respondent's costs.

Illinois law makes clear that when the requirements set forth in section 2-1009 of the Code are met, the court has no discretion to deny a plaintiff's motion to dismiss. *Kendle v. Village of Downers Grove*, 156 Ill. App. 3d 545, 550, 509 N.E.2d 723 (1987). Section 1009(a) provides:

> "The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or

> any part thereof as to any defendant, without prejudice, by order filed in the cause. 735 ILCS 5/2-1009(a) (West 2008).

The plaintiff has an "absolute right" to dismiss the cause so long as three requirements of the section are met: (1) the motion is made before trial or the start of a hearing; (2) proper notice is given; and (3) costs are paid. *Kendle*, 156 Ill. App. 3d at 550. Inconvenience to the defendant by the entry of a voluntary dismissal is not a proper consideration given the plaintiff's "absolute right." *Id.* at 551. The petitioner asserts she satisfied the requirements of section 2-1009 of the Code and, therefore, the circuit court erred in frustrating her absolute right to dismiss her cause of action on June 22, 2009, the initial trial date in this matter.

The petitioner filed her motion to voluntarily dismiss Friday, June 19, 2009; trial was scheduled to begin Monday, June 22, 2009. When the petitioner presented her motion to voluntarily dismiss at the commencement of trial, respondent's counsel asserted proper notice was not provided because he received the motion at 4:30 p.m. Friday, June 19. The petitioner responded that presenting the voluntary dismissal motion on the scheduled trial date was proper under Circuit Court Rule 2.1(a). The trial court ruled the petitioner failed to "give proper notice and all costs were not paid."

The petitioner does not dispute she did not provide the respondent with notice of her intent to file the motion, along with a copy of the motion, by 4:00 p.m. on the second court day prior to the scheduled trial date in accordance with Circuit Court Rule 2.1(c)(i). The petitioner contends her motion fell within the exception of Circuit Court Rule 2.1(a) that provides no written notice is necessary "in actions appearing on the daily trial call ***." The petitioner

submitted pages from the Cook County court website confirming the parties' case was "SET ON TRIAL CALL" for June 22-25, 2009. (Emphasis in petitioner's brief.) The petitioner contends that because she presented her motion to voluntarily dismiss on the day of trial, she met the exception for prior notice of Rule 2.1(a). The petitioner cites *Koca v. Gavin*, 199 Ill. App. 3d 665, 557 N.E.2d 432 (1990) for support.

In *Koca*, a municipal division case, the plaintiff landlord brought an action against the defendant tenant. On the day of trial, the plaintiff filed answers to the defendant's request to admit. The defendant filed a motion to strike the plaintiff's answers as unsworn and untimely, which the trial court denied. *Id.,* at 669-70. On appeal, we held the trial court abused it discretion "to allow the filing of an untimely and unsworn response [to a request to admit.]" *Id.* at 673. In so ruling, we rejected the plaintiff's claim that the defendant's motion to strike was properly denied because prior written notice of the motion was not provided under the local rule. "Rule 2.1 of the circuit court of Cook County clearly provides that written notice of motions must be given except in actions appearing on the daily trial call or during the course of trial." *Id*. In other words, prior notice was not required because the defendant moved to strike after the case had been called for trial in accordance with Circuit Court Rule 2.1(a). *Id*. According to the petitioner, *Koca* stands for the proposition that the prior notice exception of Rule 2.1(a) applies to motions filed on the day of trial.[1]

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[1] *Koca* is readily distinguishable on a number of bases, the most glaring of which is it makes no sense that the plaintiff should be allowed to file his answers on the day of trial but the defendant must give two-court-days notice of his intention to challenge the legal sufficiency of

The circuit court also ruled the petitioner failed to meet the third requirement of section 2-1009 of the Code because she had not "alleged or tendered the payment of costs" as required in *Farrar v. Jacobazzi*, 245 Ill. App. 3d 26, 614 N.E.2d 259 (1993). The petitioner argues she met the payment of costs requirement, when, on the day she presented her motion to voluntarily dismiss, she tendered to respondent's counsel a check for costs. The petitioner argues that even if the respondent disagreed as to the amount of the costs due, her tender manifested a willingness and effort to pay costs. She argues Illinois courts have recognized that even in situations where a plaintiff does not tender all of the costs prior to filing a motion for voluntary dismissal, the trial court may properly grant the motion and order the moving party to pay any remaining balance. See *Mizell v. Passo*, 147 Ill. 2d 420, 428-29, 590 N.E.2d 449 (1992) ("since plaintiff agreed to pay the costs and the trial court's order included a provision for plaintiff to pay defendant's costs upon presentation of same, we find no prejudice to the defendant"); *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 328 Ill. App. 3d 255, 268, 764 N.E.2d 1264 (2002) (the defendants were not prejudiced where the court's order granting the plaintiff's motion required costs and expenses be paid to the defendants.) The petitioner complains the circuit court was overly technical in ruling that her motion alleged neither payment nor tender of costs.

In response, the respondent asserts the petitioner mistakenly relies on the prior notice exception of Circuit Court Rule 2.1(a) because, quoting the rule, that exception applies only to those "actions appearing on the daily trial call." The respondent directs our attention to Circuit Court Rule 5.1, "Notice of Trial Calls," that identifies cases on the "daily trial calls" as those

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the answers.

"published in the Daily Municipal Court Record" of the Chicago Daily Law Bulletin, which does not include domestic relations matters. The petitioner, herself, essentially acknowledges this fact by presenting pages from the Cook County court website, rather than the "Daily Municipal Court Record" to support her claim that she provided proper notice of her section 2-1009 motion. To bolster his contention, the respondent points us to the rules of the circuit court of Cook County in "Part 13 Domestic Relations Proceedings," which he contends leaves the scheduling of trials to the discretion of the individual calender judges. "Rule 13.5(a) states, 'Assignment for Trial-It shall be the responsibility of the *** individual calender judge to schedule matters for trial.' *** The phrase 'daily trial call' is *** not contained in this rule, either. The Honorable Judge Hardy-Campbell presides over her own individual calender ***."

In any event, the respondent reasons, the voluntary dismissal issue raised by the petitioner was rendered moot when Judge Hardy-Campbell granted the respondent leave to file a counter-petition for dissolution of marriage on the same day the court denied the petitioner's voluntary dismissal motion. The respondent filed his counter-petition the following day. In light of his counter-petition, he asserts little would have changed had the circuit court granted the petitioner's voluntary dismissal motion while granting his request for leave to file a counter-petition because his counter-petitioner would have been assigned to the same trial judge. Circuit Court Rule 13.3(c)(ii) provides: "Any domestic relations case between the same parties that is re-filed after a dismissal shall be assigned to the same judicial calendar to which the prior case was assigned before its dismissal." Though his counter-petition would not constitute a "re-filed" petition, the "same parties" reference in Circuit Court Rule 13.3(c)(ii) would have resulted in his counter-

petition being assigned to Judge Hardy-Campbell's calendar. After the petitioner's motion was denied for failure to give proper notice and the trial was rescheduled for a date nearly 9 months later, the filing of the counter-petition placed the parties in precisely the same position they held before the petitioner's section 2-1009 motion was filed so that even if the petitioner's motion had been granted, the trial would have gone forward as scheduled.

In her reply brief, the petitioner contends the respondent "misconstrues the timeline of events" in his claim that the petitioner's motion for voluntary dismissal of her petition for dissolution of marriage was rendered moot. She asserts had the case proceeded on the respondent's counter-petition alone, she would have been able to proceed on numerous pretrial matters, in other words begin litigation anew. She does not reply, however, to the petitioner's argument that the exception in Rule 2.1(a) has no application to domestic relations matters.

"An issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief." *Wheatley v. Board of Educ. of Tp. High School Dist. 205*, 99 Ill. 2d 481, 484-85, 459 N.E.2d 1364 (1984). We agree with the respondent that the filing of his counter-petition calls into question whether the voluntary dismissal issue presents an actual controversy for which effectual relief can be granted. As an aside, we note the petitioner never renewed her motion for voluntary dismissal after the circuit court denied it for lack of proper notice, which suggests the counter-petition eliminated the petitioner's reason for the motion. More to the point, she does not present us with any authority that any purported error by circuit court regarding her motion to voluntarily dismiss her petition rendered void the judgment that was entered many months later on the respondent's counter-petition for dissolution of

marriage. Nor are we aware of any such authority. Nor are we convinced that had the petitioner presented a legally sufficient section 2-1009 motion, the circuit court had no discretion to defer ruling on the petitioner's motion until the following day in order to give the respondent time to file his counter-petition. See *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 67, 651 N.E.2d 1071 (1995) (circuit courts have "inherent authority" to control their dockets). The circuit court may well have inherent authority, reflected in Circuit Court Rule 13.5(a)(iii), to grant the respondent leave to file his counter-petition as a means of controlling its own docket even in the face of a legally sufficient motion under section 2-1009.

We see no reason to address the "timeline" dispute she raises when she fails to address the respondent's argument that the "trial call" exception of Circuit Court Rule 2.1(a), upon which the petitioner relies to support that she provided due notice, is inapplicable to a domestic relations case. In the absence of a good counter argument by the petitioner, we see no reason to question the respondent's reading of Circuit Court Rule 2.1(a) that it is limited to cases published in the "Daily Municipal Court Record," which necessarily excludes domestic relation matters.

In the face of a strong argument that proper notice of the petitioner's motion for a voluntary dismissal was not provided, we nonetheless elect to ground our rejection of the petitioner's claim that the circuit court erred in denying her section 2-1009 on mootness. We rule that the circuit court had discretion to grant the respondent leave to file a counter-petition on the same day the court was presented with the petitioner's motion to voluntarily dismiss her petition. The filing of the respondent's counter-petition for dissolution of marriage filed on the succeeding day, rendered moot any purported error by the circuit court in denying the petitioner's section 2-

1009 motion. In other words, even if the circuit court erroneously denied the petitioner's motion for voluntary dismissal because proper notice was given, the error was rendered moot by the filing of the counter-petition when the eventual judgment in this cause was entered on the counter-petition nearly nine months later. The circuit court's ruling on the section 2-1009 motion had no practical effect on the instant controversy. The nature of action before us is unlike that in *Koca*, where we recognized that prior notice under Rule 2.1 of the circuit court of Cook County is not required "during the course of trial" for cases that clearly fall within the exception of Rule 2.1(a). *Koca*, 199 Ill. App. 3d at 673.

Reason and logic dictate that upon the filing of the counter-petition, any error by the circuit court in denying the petitioner's section 2-1009 motion was rendered moot. Upon the respondent's filing of the counter-petition for dissolution of marriage, the issue of the denial of the petitioner's motion for a voluntary dismissal under section 2-1009 " 'ceased to exist.' " *First National Bank of Waukegan v. Kusper*, 98 Ill. 2d 226, 233, 456 N.E.2d 7 (1983), quoting *People v. Redlich,* 402 Ill. 270, 278-79, 83 N.E.2d 736 (1949).

Joint Custody

Next, the petitioner contends the trial court erred in awarding joint custody in light of the evidence that she contends demonstrates the parties inability to cooperate in sharing custody of their two children. According to the petitioner, her lack of testimony at trial means the circuit court abused its discretion. She also contends that joint custody was not in the minor children's best interests and against the manifest weight of the evidence.

The petitioner contends there is a large chasm between the respondent's testimony at trial and the evidence she claims was contained in the documents and exhibits, which proves the circuit court erred. She contends the litigation history between the parties makes clear they cannot effectively parent jointly. The petitioner points out that she and the respondent contentiously sought sole custody of their two minor children, with examples replete in the record of the parties' inability or unwillingness to cooperate with each other in matters that directly affected their children. In light of this history and the petitioner's absence from trial, the court could not properly assess the ability of the parties to demonstrate the sort of cooperation required to comply with the joint custody order. She compares her situation to that addressed in *In re Marriage of Jackson*, 259 Ill. App. 3d 538, 542-43, 631 N.E.2d 848 (1994), where the Fourth District wrote, "In no instance should the court enter a joint-custody order when the respondent is in default."

A trial court's custody order will not be set aside on review unless it is against the manifest weight of the evidence, manifestly unjust, or the result of a clear abuse of discretion. *In re Marriage of Deem*, 328 Ill. App. 3d 453, 455, 766 N.E.2d 661 (2002). In custody cases, "a strong presumption favors the result reached by the trial court and the court is vested with great discretion due to its superior opportunity to observe and evaluate witnesses when determining the best interests of the child." *In re the Marriage of Seitzinger*, 333 Ill App. 3d 103, 107, 775 N.E.2d 282 (2002), citing *In re Marriage of Dobey*, 258 Ill. App. 3d 874, 876, 629 N.E.2d 812 (1994). The factors for determining custody in accordance with the best interests of the child are set forth in section 602 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS

5/602 (West 2008)) and include, the agreement of the parties and their mutual ability to cooperate, the geographic distance between the parents, the desires of the children, and the relationship previously established between the children and their parents. *In re Marriage of Drummond*, 156 Ill. App. 3d 672, 679, 509 N.E.2d 707 (1987). Joint custody is "a tool to maximize the involvement of both parents in the life of a child." *In re the Marriage of Seitzinger*, 333 Ill App. 3d at 109.

The petitioner contends the record makes clear the children would suffer under a joint custody arrangement because the parties have continued to litigate joint custody matters as recently as the summer of 2010.

We find the cases the petitioner relies on for her position factually distinguishable.

In *Drummond*, the circuit court entered a joint parenting order in the absence of a joint parenting agreement. The parents resided in different states, with the husband living in Texas. The circuit court awarded the husband "custody during the school year with visitation rights accorded the wife during the summer vacation." *Drummond*, 156 Ill. App. 3d at 681. The *Drummond* court noted that the parties' minor child had developed a sibling relationship with his step-brother and step-sister residing with the wife. *Drummond*, 156 Ill. App. 3d at 682. Ultimately, the court ruled the joint custody arrangement was against the manifest weight of the evidence because every expert but one recommended the child be placed with the wife. *Drummond*, 156 Ill. App. 3d at 683.

In *In re the Marriage of Bush*, 191 Ill. App. 3d 249, 547 N.E.2d 590 (1989), the parties

repeatedly showed hostility toward each other, including engaging in a physical confrontation. Counsel for each party agreed at oral argument that there was little chance the parties could ever overcome their mutual animosity. *Id.* The record also showed that since the child's birth, the parties had been unable to cooperate concerning matters that affected their son. *Id.*, at 263. At the time the joint custody order was entered, the child was four years old, a "tender" age. *Id*., at 260. The visitation schedule provided the petitioner "with absolutely no visitation rights." *Id.,* at 255. While the *Bush* court recognized that a "court can make the award [of joint custody] on its own motion" (*Id.,* at 262), it could do so only after it formulates "the terms of a joint custody arrangement," which the circuit court failed to do. *Id.,* at 263. In *Bush*, each party appealed the award of joint custody. *Id.,* at 262. Given these circumstances we cannot question the conclusion reached by the *Bush* court that the "award of joint custody *** manifest[ed] an abuse of discretion." *Id.*

In *Jackson*, the Fourth District, even in the face of the categorical language quoted above, allowed the joint custody order to stand when the defaulted parent failed to diligently pursue a hearing on her motion to vacate. *Jackson*, 259 Ill. App. 3d at 543. Thus, the rule is not as absolute as the above quoted language might suggest. Custody cases tend to be *sui generis*.

That each custody case turns on its own facts is precisely the respondent's argument. He asserts the trial court was intimately familiar with the facts of this case. At trial, the respondent provided recent instances where the parties had worked together to co-parent, including relying on each other for childcare and jointly making a hospital visit and follow-up appointments for their son. At trial, the child representative cross-examined the respondent on matters relating to

her appointment, making clear in her examination that in the six to eight months preceding the trial, she had not been contacted by the parties' to mediate child custody issues. In response to her questioning, the respondent made clear he believed that both he and the petitioner were able to cooperate in jointly parenting their children. Before us, the respondent urges the record amply supports the court's entry of the joint custody order. We agree.

Each parent has had a great deal of involvement in the lives of the children since the birth of the oldest 5 years into their 22-year marriage and the youngest 10 years into their marriage. Each showed a willingness to continue his or her involvement based on their respective efforts to obtain sole custody. At points during the marriage, both parties' worked outside the home, which required that they work together to coordinate their children's schedules and various needs, often aided by extended family members. At the time of trial, the parties lived in close proximity, both children were successful in their academics, and the parties had relied on each other for child care, though perhaps not as often as they will likely have to in the future. Based on the record before us, we find the trial court did not abuse its discretion in awarding joint custody; nor was its decision against the manifest weight of the evidence.

Of course, should facts develop that necessitate a change in the custody arrangement, a modification of the joint custody judgment under section 610 of the Dissolution Act is permitted upon a showing by clear and convincing evidence that a modification is necessary to serve the best interests of the children. 750 ILCS 5/610(b) (West 2008). We find no basis to disagree with the circuit court that the joint custody order serves the best interests of the children at this juncture.

Motion to Vacate Judgment

Lastly, the petitioner contends the trial court erred in denying her amended motion to vacate the judgment of dissolution. In her motion, the petitioner asserts that through no fault of her own, she was unaware of the trial date. She argues the court's denial of her motion deprived her of the only opportunity she had to contest the custody and property issues resolved by the circuit court at trial. She asks for the opportunity to be heard on these issues by the grant of a new trial.

A motion to vacate filed within 30 days of the entry of a judgment is governed by section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1203(a) (West 2008)). Under section 2-1301(e), the motion need not allege a meritorious defense or even a reasonable excuse for failing to assert such a defense in a timely manner; rather, these are merely factors the circuit court should consider in denying or granting the petitioner's motion to vacate. *Plantaric v. Michaels*, 98 Ill. App. 3d 154, 157, 424 N.E.2d 64 (1981). "The purpose of a motion to vacate under section 2-1203 is to alert the trial court to errors it has made and to afford an opportunity for their correction." *In re Marriage of King*, 336 Ill. App. 3d 83, 87, 783 N.E.2d 115 (2002), citing *In re Marriage of Sanborn*, 78 Ill. App. 3d 146, 396 N.E.2d 1192 (1979).

We review the trial court's decision to deny the petitioner's motion to vacate for an abuse of discretion, and in doing so, must determine "whether the court's refusal to vacate ' "violates the moving party's right to fundamental justice and manifests an improper application of discretion." ' " *Id.*, quoting *Harris v. Harris*, 45 Ill. App. 3d 820, 821, 360 N.E.2d 113 (1977), quoting *Anderson v. Anderson*, 28 Ill. App. 3d 1029, 1034, 329 N.E.2d 523 (1975).

The petitioner contends *Campbell v. White*, 187 Ill. App. 3d 492, 543 N.E.2d 607 (1989), is instructive on this issue. In *Campbell*, this court reversed the trial court's denial of the defendant's motion to vacate following a default judgment. The circuit court reasoned that while the defense counsel's negligence was readily apparent, the defendant failed to monitor his case, which demonstrated his lack of diligence. We reversed. We found it not unreasonable for the defendant to place reliance on his attorney. Though the defendant should have remained cognizant of the status of his case, he took immediate action following the receipt of the order of judgment. This we found demonstrated diligence under the facts of the case. *Id*. at 504.

The petitioner argues that like the defendant in *Campbell*, it was reasonable for her to assume that her attorney would keep her informed of court dates. She claims, too, that she took immediate action after receiving the judgment of dissolution, demonstrating she acted diligently. The petitioner argues that because she had meritorious defenses to the issues resolved by the circuit court at trial, a good excuse for failing to appear, and acted with diligence to vacate the dissolution of marriage judgment, she was denied substantial justice under the circumstances of her case. It necessarily follows that the trial court erred in denying her motion to vacate. We are not persuaded.

Following a hearing on her motion to vacate, Judge Hardy-Campbell, who was intimately familiar with both parties and their litigation history, found the petitioner "knew when her case was set for trial but chose not to attend and participate." Based on her past conduct, the circuit court found she "was well aware of what she was doing when she did not appear for her own trial." In other words, she demonstrated a flagrant disregard for the trial court's schedule.

The petitioner's testimony at the hearing to vacate the judgment amply supports the trial court's findings. The petitioner acknowledged she was aware that the purpose of the hearing held on September 2, 2009, was to set a firm trial date. In fact, at the September 2 hearing, the trial start date of March 15, 2010, was set by agreement. Though the petitioner testified she never learned of the specific trial dates, the trial court found her claim "highly dubious." In fact, the trial court concluded the petitioner was not only aware of the March trial dates, but she made a conscious decision not to appear. In an email sent to her attorney on December 28, 2009, the petitioner stated, "I do not want to go to trial in March. I cannot take this time off of work." Based on this email, the trial court properly inferred that the petitioner "had no intention of appearing at her March 2010 trial because she had a project at work that she felt was more important."

The circuit court also found her claim of diligence to discover the trial date lacking. She "did not act diligently in following the course of her own litigation or in acting reasonably in order to obtain said trial dates." We note that in her efforts to force a dismissal of her dissolution claim, she relied on the "TRIAL CALL" information on the circuit court's website. With knowledge that her trial date had been set for March 2010, we agree with the trial court that had the petitioner really wanted to discover the precise dates for her trial, the information was readily available to her. The trial court expressly rejected the petitioner's claim that she was wrongly denied her one opportunity to be heard on contested issues. The petitioner "had the opportunity to come before this Honorable Court and testify at her trial; but she simply elected not to utilize her day." "A litigant should not be given a second opportunity to testify because they took a pass

on their first opportunity." Regarding the rights of the parties adjudicated in the judgment, the court expressly found substantial justice was done. "Ending this litigation once and for all will do both parties substantial justice; and that is exactly what this Honorable Court did by entering a Judgment for Dissolution of Marriage."

We have reviewed the record in its entirety and have considered the arguments of the parties. The circumstances of this case make clear the petitioner did not have a reasonable explanation for her failure to appear at trial. We agree with the trial court that even if the petitioner was unaware of the specific dates of the trial through no fault of her own, which we find "dubious" as well, she was not diligent in trying to find out that information.

The petitioner further claims the trial court's disposition of marital property was unjust under the facts before it and, therefore, the defenses she would have asserted at trial militate in favor of granting her motion to vacate. The trial court found the testimony the petitioner offered to support her claim of meritorious defenses insufficient to warrant the relief requested. Based on our review of the record, we agree. Much as her attack on the joint custody order, the other claims she raises can be adequately addressed by a post-decree motion for modification. They do not require vacation of the final dissolution order.

As the petitioner asserted in attacking the joint custody order, the record reveals the extensive litigation in this case, including her own conduct. We find ample support for the trial court's denial of her motion to vacate in light of the petitioner's failure to follow prior court orders. Based on this record, we cannot disagree with the trial court's finding that the petitioner chose to forego her opportunity to present evidence at trial; petitioner cannot now complain that

she was denied substantial justice by the entry of a judgment in her absence when she engaged in repeated efforts to delay the resolution of this case.

Based on our review of the judgment, we agree with the trial court that substantial justice was rendered to each party. The denial of the petitioner's motion to vacate cannot be said to be an abuse of discretion.

CONCLUSION

The petitioner's claim that the trial court erroneously denied her motion to voluntarily dismiss her dissolution action more than nine months before the trial proceeded was rendered moot by the next-day's filing of a counter-petition for dissolution. We cannot say the trial court abused its discretion in entering a joint custody order, consistent with the manifest weight of the evidence. The trial court did not abuse its discretion in denying the petitioner's motion to vacate the judgment of dissolution because, under the circumstances of the case, substantial justice was done between the parties. The judgment of the circuit court is affirmed.

Affirmed.

JUSTICE ROBERT E. GORDON, specially concurring:

I concur with the majority's decision, but not their complete analysis.

First, when Ann McAuley-Galassini (Ann) sought to vacate the judgment for dissolution of her marriage, she testified that, when she sought to refinance the mortgage on the marital home, the house was valued at $455,000, nearly $200,000 less than the court's valuation of $650,000. However, Ann presented no other evidence to show that the house was valued for less on the date of trial, and presented no credible evidence that the other terms of the dissolution judgment were in error or unconscionable.

Next, I disagree with the majority and I believe the trial court may have erred in denying Ann's request to voluntarily dismiss her petition for dissolution of marriage. The matter was set for trial on June 22, 2009, and Circuit Court of Cook County Rule 2.1 provides no written notice is necessary "in actions appearing on the daily trial call." See also *Koca v. Gavin*, 199 Ill. App. 3d 665, 673 (1990).[2] In addition, Ann claims she tendered the costs to her husband and satisfied all of the conditions required by section 5/2-1009 of the Code of Civil Procedure. 735 ILCS 5/2-

[2] *Koca* is a case from the Municipal District; however, Circuit Court of Cook County Rule 2.1 was interpreted in that case.

1009 (West 2008). The trial court denied the motion based on lack of notice and failure to pay costs. However, I find that, if the trial court erred, it was harmless error for the reasons set forth by the majority. Slip op. at 11. I disagree that the appeal is moot regarding the issue concerning the denial of the voluntary dismissal. A matter is considered moot when it "presents or involves no actual controversy, interests or rights of the parties, or where the issues have ceased to exist." *People v. Redlich*, 402 Ill. 270, 278-79 (1949).

In the case cited by the majority for mootness, *First National Bank of Waukegan v. Kusper*, 98 Ill. 2d 226 (1983), the property of the plaintiff was sold at a scavenger sale and was confirmed by the circuit court. *Kusper*, 98 Ill. 2d at 232. The plaintiff did not redeem, and the statutory time for redemption expired. *Kusper*, 98 Ill. 2d at 233. The purchaser at the sale did not petition the circuit court to order the issuance of a tax deed in the event the property was not redeemed. *Kusper*, 98 Ill. 2d at 233. Plaintiff claimed in his complaint that the Scavenger Act was unconstitutional and the circuit court agreed. *Kusper*, 98 Ill. 2d at 228. Our supreme court vacated and dismissed the case for mootness because plaintiff's title was secured and unimpaired. *Kusper*, 98 Ill. 2d at 233. The actions of the scavenger under the Scavenger Act did not affect his rights. That is why it was moot. The supreme court then vacated the judgment of the circuit court and dismissed the case under the mootness doctrine, which is the appropriate remedy when a reviewing court finds mootness. *Kusper*, 98 Ill. 2d at 236. Here, the majority did not dismiss, they affirmed. Therefore, the issue cannot be moot.

In the case at bar, Ann had issues with the judgment for dissolution, claiming that she did not receive her fair share of the marital assets, and that she received an unreasonable burden on

other marital distributions, and that on issues, including custody, she was not given her day in court. Her issues are not moot. They were decided by the trial court's action, and she is asking this court to decide if the trial court erred on these issues. The holding in this case cannot be swept away by the majority calling an issue moot. Once the husband filed his petition for dissolution, whether it be an original action or a counterclaim, he had a right to a trial and if his wife failed to appear on a designated trial date, the trial court had the right to proceed without the party who ignored its trial date. If the trial court wrongfully denied Ann's motion for a voluntary dismissal, that action did not prejudice her rights in this case. Her rights were affected by her actions in failing to appear for a designated trial date which she was well aware of.