

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA
CIVIL ACTION

K. P. L.,
Petitioner & husband,

vs.
L. M. L.,
Respondent & wife,

Case No. XX DR YYY N

ORDER GRANTING WIFE'S *ORE TENUS* MOTION

This matter having come before the court today on the Report and Recommended Order of the Magistrate dated 9/11/2012, it is ordered:

1. Findings

The husband failed to appear at the trial on 9/11/2012. He also failed to show up at the docket sounding. At the trial, when the husband did not appear, the wife made an oral, that is, *ore tenus*, motion to continue the trial and for leave to amend her answer to file a counter petition.

The magistrate recommended that the court deny the wife's *ore tenus* motion and dismiss the husband's petition because he failed to appear and present any evidence on his petition. The magistrate found that the husband did "not have ... any prior notice" of the *ore tenus* motion and the wife "has had more than adequate time to file" at counter petition.

The result of the recommended order is that the wife must file a new action in order to get divorced, with a new filing fee, \$408, rather than pay the filing fee for a counter petition, \$295. The wife did not file a counter petition because it would have cost her \$295. If the husband had shown up at the trial, she would not have to pay that filing fee. When he did not show up, she knew she would have to incur that expense in order to get divorced, which is what she is interested in.

There is no prejudice at all to the husband shown by granting the wife's motion. He has, as the magistrate found, "abandoned" his cause of action, but there is some prejudice to the wife by denying her motion, that is, \$113.

The court is neutral and has no interest in this case one way or the other. The court has no interest in collecting more filing fees by dismissing cases, and that is not what the magistrate recommends, even if that is an effect of the recommended order.

The parties have the interest in this case. This is a civil matter so punishing a party for not filing a counter petition or doing or not doing anything else is no part of this case. Punishment is allowed only in a criminal proceeding, although in a civil case, upon notice and hearing, the court can sanction parties and attorneys to compel compliance with court orders. The wife here is not violating any court order.

So, in general, a motion to continue or a motion to amend must be granted unless some actual prejudice to the other party can be shown that exceeds the prejudice of denying the motion. It is true that the wife has had plenty of time to file a counter petition, but delay alone is not actual prejudice to the husband. Here, there is no prejudice at all to the husband in granting the wife's motion and some prejudice to the wife in denying the motion.

2. Ruling

The magistrate should have recommended an order granting the wife's *ore tenus* motion to continue and her motion to amend. The magistrate's report dated 9/12/2012 is not approved.

The court hereby grants the wife's motion to continue and to amend and grants her 30 days leave to file an amended answer and counter petition for dissolution of marriage.

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:
_____, Esq., and K P L, *pro se*