

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000194-DG

THERESA GERSTLE

APPELLANT

ON DISCRETIONARY REVIEW  
FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 02-XX-000054 AND 02-XX-000055

F. KENNETH CONLIFFE, JUDGE, JEFFERSON  
CIRCUIT COURT; TAMMY ABBOTT IN THE  
INTEREST OF MALLIN CHILDREN,  
CABINET FOR FAMILIES AND CHILDREN;  
MARY JARVIS; ANDREW MALLIN; CATHERINE  
I. WALLACE, GUARDIAN AD LITEM AND  
CABINET FOR FAMILIES AND CHILDREN

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: In an order entered on April 11, 2003, a panel of this court granted Theresa Gerstle's petition for discretionary review of an opinion and order of the Jefferson Circuit Court affirming an order of the Jefferson Family Court, acting in its capacity as a district court, awarding permanent custody of Gerstle's two children to her mother, Mary Jarvis.

We conclude that the circuit court correctly affirmed the order of the family court and thus affirm.

At a hearing on December 5, 2001, the family court found that Gerstle had neglected her children. Gerstle's mother, Mary Jarvis, was awarded temporary custody of the children. Gerstle was allowed supervised visitation with the children; however, she allegedly violated one of the visitation restrictions placed on her. Consequently, a motion for contempt was filed against her in the family court.

A hearing on the contempt motion was held on February 27, 2002. Gerstle requested that a public defender attorney be appointed to represent her, and the court appointed an attorney to represent her on the contempt charge only. An attorney was not appointed to represent Gerstle on the matter involving the custody of her children because the court determined that she was not entitled to the appointment of an attorney due to the fact that she owned real property. See KRS<sup>1</sup> 620.100(1)(a) and KRS 31.120(2)(c).<sup>2</sup> The court also continued the contempt hearing until 10:00 a.m. on May 1, 2002.

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<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> KRS 31.120 was amended effective July 15, 2002. Prior to that date, ownership of real property was prima facie evidence that a person was not indigent or needy. See the former KRS 31.120(3)(a). Under the present version of the statute, property ownership is one of several factors to be considered by a court in determining whether a person is indigent or needy and entitled to the appointment of an attorney. See KRS 31.120(2)(c). At the time of Gerstle's hearing, the prior version of the statute was in effect.

On April 10, 2002, Jarvis filed a motion for the permanent custody of the children. The motion was noticed for hearing at 10:00 a.m. on May 1, 2002, the same date and time that the contempt motion was to be heard. On April 24, 2002, Gerstle filed a motion for a continuance, alleging that she had not been able to reach her attorney, that she had not received the documents she had subpoenaed earlier, and that Jarvis had refused to answer her request for admissions. The motion was noticed for hearing at 8:30 a.m. on May 1, 2002, the same day that the contempt motion against Gerstle and the motion for permanent custody by Jarvis were to be heard.

When the hearing was held on May 1, 2002, Gerstle failed to appear. The attorney representing her on the contempt charge stated that he had received a call from Gerstle on his cell phone at two minutes after 10:00 that morning and that she had informed him she was "sick over all this" and would not be present at the hearing because she was going to see a doctor. Even though Gerstle had filed a motion for a continuance, her attorney on the contempt charge also orally moved the court to continue the hearing. The court denied the continuance motion and held the hearing, awarding permanent custody of Gerstle's two children to Jarvis and holding Gerstle in contempt.

Gerstle appealed to the Jefferson Circuit Court and argued that the family court had abused its discretion in

denying her motion for a continuance. In an opinion and order entered on December 26, 2002, the circuit court affirmed the family court's denial of the continuance motion on the basis that the family court had not abused its discretion. Gerstle subsequently filed a petition for discretionary review with this court, again arguing that the family court had abused its discretion in denying her motion for a continuance. In an order entered on April 11, 2003, a panel of this court granted discretionary review and specifically stated that the issues on appeal "shall include whether the trial court's failure to appoint counsel for appellant before adjudicating the matter of permanent custody was contrary to KRS 620.100(1)(b) and or violated appellants constitutional right to due process of law."

Gerstle continues to argue that the family court abused its discretion in denying her motion for a continuance. As we have noted previously herein, her motion stated that she had not been able to reach her attorney for several weeks, that she had not reviewed the documents that she had subpoenaed several months earlier, and that Jarvis had refused to answer her request for admissions. She also asserts that the continuance should have been granted pursuant to the oral motion of her attorney on the contempt charge because she was ill on the morning of the hearing and was unable to attend. None of the arguments have merit.

"The trial court has broad discretion in granting or denying a continuance." Grant v. Dortch, Ky. App., 993 S.W.2d 506, 508 (1999), citing Pelfrey v. Commonwealth, Ky., 842 S.W.2d 524, 525 (1993). Furthermore, "[t]his Court will not reverse for failure to grant a continuance absent a showing that the trial court abused its discretion." Id., citing Abbott v. Commonwealth, Ky., 822 S.W.2d 417, 418 (1992).

The trial court did not abuse its discretion in denying Gerstle's written and oral motions for a continuance. Gerstle's attorney for the contempt motion acknowledged that he had talked with Gerstle on the day before the hearing and that Gerstle had asked how she could get a continuance. Furthermore, that attorney did not represent Gerstle on the custody issue. Rather, she represented herself.

Second, although Gerstle stated in her motion that she had not reviewed the documents she had subpoenaed several months earlier, the record reflects that her motion to subpoena records had been denied. Third, although Gerstle claims that Jarvis refused to answer her request for admissions, the record indicates that a protective order was issued and that Jarvis was not required to respond to the request. Finally, in regard to the oral motion for a continuance, there is no indication in the record that Gerstle was actually ill on the morning of the

hearing, other than the statements made by the attorney representing her on the contempt motion.

The court was faced with this motion and with a record indicating Gerstle had failed to appear at prior hearings on her own motions and had also been late for hearings. In addition, the attorney representing Gerstle on the contempt motion stated that he had advised her on the previous day that she had no grounds for a continuance. In light of these facts, the family court did not abuse its discretion in denying the written and oral motions for a continuance.

Finally, we note that in the order granting discretionary review in this case, we raised questions concerning the fact that Gerstle had not been appointed counsel to represent her in the custody matter. Because Gerstle did not address this issue in her brief, we decline to address it herein. We do, however, note that the record indicates that Gerstle was denied court-appointed counsel on the custody matter due to a finding by the trial court that she did not qualify for such representation.

The opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

George R. Carter  
Louisville, Kentucky

BRIEF FOR APPELLEE, MARY  
JARVIS:

Dana R. Kolter  
Louisville, Kentucky

BRIEF FOR APPELLEE, GUARDIAN  
AD LITEM FOR MINOR CHILDREN:

Catherine I. Wallace  
Louisville, Kentucky

BRIEF FOR APPELLEE,  
COMMONWEALTH OF KENTUCKY,  
JEFFERSON COUNTY ATTORNEY:

Kathleen Snyder  
Chris Melton  
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