

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MERCEDES L. HIGGINS,

Appellant,

v.

WILLIAM J. HIGGINS,

Appellee.

No. 2D21-3213

December 2, 2022

Appeal from the Circuit Court for Lee County; Amy R. Hawthorne,
Judge.

David W. Holley of Burandt, Adamski, Feichthaler & Sanchez,
PLLC, Cape Coral, for Appellant.

Scott A. Beatty of Henderson, Franklin, Starnes & Holt, P.A.,
Naples, for Appellee.

SMITH, Judge.

Mercedes L. Higgins (the Former Wife) appeals the trial court's
Final Judgment of Dissolution of Marriage with Minor Children

rendered after an evidentiary hearing. Because the trial court should have granted the Former Wife's motion for continuance, we reverse the final judgment, in part, and remand for a new final hearing on the issues of child support, alimony, and attorney's fees. In all other respects the final judgment remains intact.¹

I.

The Former Wife and William J. Higgins (the Former Husband) were married on November 25, 2002. The Former Wife filed her petition for dissolution of marriage with minor children on January 6, 2020. On May 12, 2021, the trial court, sua sponte, set the trial for July 29, 2021, via Zoom.² On July 6, 2021, the Former Wife

¹ The Former Wife argues in the alternative that the trial court abused its discretion in disregarding her financial affidavits when determining alimony, child support, and retroactive child support. Because we are reversing on the basis that the trial court should have granted the Former Wife's motion for continuance, which requires the trial court to hold a new final hearing, we do not comment on the Former Wife's arguments related to the trial court's consideration of the documents presented at the final hearing.

² While this case was pending before the trial court, and in response to the COVID-19 global pandemic, the Florida Supreme Court issued an administrative order providing that courts that "can effectively conduct court and judicial branch business from a remote location shall do so." *See In re: Comprehensive COVID-19 Emergency measures for the Florida State Courts*, Fla. Admin. Order No. AOSC20-23 (2020),

filed a motion to continue trial, stating that she was in Colombia visiting her mother and grandmother and that due to a poor internet connection, she may not be able to attend the Zoom hearing. The motion provided that she would be back in the United States on August 3, 2021. Counsel for the Former Wife was unable to get a hearing on the motion for continuance prior to the final hearing on July 29, 2021.

In the meantime, the parties worked together to resolve most of the issues, including the equitable distribution of marital assets, a parenting plan, and timesharing. The only issues that could not be agreed upon were the calculations of child support, alimony, and attorney's fees. The parties signed and filed the pretrial settlement agreement on July 28, 2021, one day prior to trial.

On the day of trial, the Former Wife was unable to attend the Zoom hearing due to the poor internet connection. Counsel argued her motion for continuance, which the trial court denied.

<https://www.floridasupremecourt.org/content/download/636183/file/AOSC20-23-original.pdf>. Zoom is a widespread video-conferencing platform used by courts to facilitate hearings.

The final judgment adopted the parties' settlement agreement with regard to equitable distribution, the parenting plan, and timesharing. With regard to the Former Wife's request for alimony the trial court found:

The Wife's [sic] was not present at trial and presented no testimony with regards to her need. Her Financial Affidavit filed on February 6, 2020, 17 months prior to the trial in this matter, indicates a yearly gross income of \$56,436.00 and a yearly net income of \$45,836.64. Her Financial Affidavit includes expenses of \$6,962.00 per month. However, because the Wife voluntarily failed to appear at the trial in this case, the Husband was unable to cross examine the Wife with regards to her reported expenses. Therefore, although the Wife's Financial Affidavit has been entered into evidence as Husband's Exhibit #12, the Court declines to give the Financial Affidavit any weight in considering whether the Wife has a need for alimony. Since there was no additional evidence presented as to her need, the Court finds that the Wife does not have a need for alimony. In addition, the Wife is requesting reimbursement for expenses she has already paid. There was no evidence of any current liability owed by the Wife based on these expenses. Therefore, the Wife clearly has no need for bridge-the-gap alimony to pay these expenses.

The Husband is currently unemployed although he is actively seeking employment in his field. The Wife presented no evidence, nor did she argue, that the Husband is voluntarily unemployed and the Court does not make a finding that the Husband is voluntarily unemployed. During the marriage, the Husband received an inheritance which he maintained in a separate non-marital account. He has been using the funds in this

account to pay his living expenses since February 2020. He testified that the account had a balance of \$220,000.00 at the time of the filing of the Petition for Dissolution and currently has a balance of \$127,830.14. Based on the Husband's unemployment, the Court finds that the Husband does not have the ability to pay alimony to the Wife.

The trial court made the following findings, as part of the section 61.08, Florida Statutes (2020), analysis:

The Wife is 53 years of age. She works as a dental professional in an office environment. The Husband testified that she suffers from migraines and complains about foot and back problems. He also testified that the wife has anger management issues with the children but that those issues do not create an inability to work.

The Husband testified that the Wife has not contributed to the children's expenses since the parties' separation.

The Husband testified that the Wife was minimally involved in homemaking or childcare. He further testified that the parties equally contributed to the expenses of the household.

Lastly, the trial court ordered the Former Wife to pay the Former Husband child support and retroactive child support.

The Former Wife filed a motion for rehearing arguing that the motion for continuance should have been granted. The trial court denied the motion, and this timely appeal followed.

II.

We review the trial court's decision to deny a motion for a continuance for an abuse of discretion. *Taylor v. Inst. for Med. Weight Loss*, 863 So. 2d 398, 400 (Fla. 4th DCA 2003). "A denial of a continuance should not be reversed unless there has been an abuse of discretion clearly appearing in the record." *Cargile-Schrage v. Schrage*, 908 So. 2d 528, 529 (Fla. 4th DCA 2005). "However, in certain circumstances, the denial may create an injustice which outweighs the policy of not disturbing the trial court's ruling." *Fasig v. Fasig*, 830 So. 2d 839, 841 (Fla. 2d DCA 2002) (citing *Silverman v. Millner*, 514 So. 2d 77, 78 (Fla. 3d DCA 1987)).

In determining whether the trial [court] has abused [its] discretion, a reviewing court should consider "whether the denial of the continuance creates an injustice for the movant; whether the cause of the request of the continuance was unforeseeable by the movant and not the result of dilatory practices; and whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance."

Ramadon v. Ramadon, 216 So. 3d 26, 29 (Fla. 2d DCA 2017) (quoting *Cargile-Schrage*, 908 So. 2d at 529).

The Former Wife argues that her request for a short continuance until she returned from Colombia the following week

should have been granted as the denial created an injustice to her. We agree. The trial court's denial prohibited the Former Wife from presenting any evidence whatsoever. Here, the only issues to be determined at the final hearing were related to child support, alimony, and attorney's fees because the parties had resolved all other issues. There is no dispute that the Former Wife was unable to testify because she could not access the Zoom hearing due to a poor internet connection. And as a result, she did not present any evidence supporting her request for bridge-the-gap alimony. Nor was she able to offer any evidence related to the Former Husband's then-unemployment, the parties' standard of living, or their contributions to childcare expenses. The denial of the continuance, in effect, deprived the Former Wife her due process right to be heard. *See Pettry v. Pettry*, 706 So. 2d 107, 108 (Fla. 5th DCA 1998) (holding the husband's due process rights were violated when the trial court denied the husband the opportunity to present witnesses and closing argument).

While the Former Husband argues the Former Wife chose to leave the county and fly to Colombia, it cannot be said that the Former Wife knew she would have little or no internet connection

before she chose to leave the country to visit family. The trial was set to be heard via Zoom, which would not preclude her from traveling and still participating in the final hearing. However, when she realized that she may not be able to participate in the hearing, she filed her motion for continuance and attempted to resolve the issues with the Former Husband. Based upon the record before us, we cannot say that the Former Wife's need for a continuance was foreseeable or the result of dilatory practices.

Moreover, in this case, the continuance would not have caused any undue prejudice to the Former Husband where most of the issues in the dissolution had been previously resolved and there "was no emergency requiring the immediate resolution of the matter." *Fasig*, 830 So. 2d at 842; *see also Nicholson v. Nicholson*, 717 So. 2d 123, 124 (Fla. 4th DCA 1998) ("[W]e believe the court abused its discretion in not continuing trial, especially since the Guardian informed the court she was unprepared to testify, there was no emergency which required proceeding with the hearing, and the requested postponement would not have prejudiced [the] husband."). Nor is this a case where multiple witnesses were at the courthouse ready to testify that day. *Cf. G.S. v. Dep't of Child. &*

Fam., 828 So. 2d 392, 392 (Fla. 5th DCA 2002) ("The motion for continuance was not made until the final hearing when all of the witnesses for the opposing side were present including one from out of state."). Accordingly, the Former Wife's motion for continuance should have been granted.

Because the Former Wife was denied her right to be heard at the final hearing and because granting a continuance would not have caused any undue prejudice to the Former Husband, we reverse those portions of the final judgment not addressed in the parties' settlement agreement and remand for a new final hearing limited to the issues of child support, alimony, and attorney's fees.

Affirmed in part, reversed in part, and remanded.

MORRIS, C.J., and ATKINSON, J., Concur.

Opinion subject to revision prior to official publication.