

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-002450-ME

REBECCA LYE

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE WALTER F. MAGUIRE, JUDGE  
ACTION NO. 07-CI-00338

KENNETH LYE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,<sup>1</sup> SENIOR JUDGE.

COMBS, CHIEF JUDGE: This case involves a dissolution of marriage resulting in a grant of custody of the couple's daughter to the father. On November 13, 2007, the Pulaski Circuit Court issued a decree of dissolution of marriage awarding Kenneth Lye (Kenneth) custody of his minor daughter. The mother, Rebecca Lye

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

(Rebecca), appeals and contends that the trial court erred by not granting a continuance of the final hearing. We affirm the order of the Pulaski Circuit Court.

The divorce proceedings between Kenneth and Rebecca commenced on March 9, 2007. On August 23, 2007, a final hearing was scheduled for October 24, 2007. Kenneth and his counsel appeared at the final hearing, but Rebecca was absent. Rebecca's counsel advised the court that Rebecca was at a doctor's appointment and requested a continuance, which the trial court denied. On October 1, 2007, Rebecca filed a motion to alter, vacate, or amend the separation agreement, which the trial court also denied. The court issued its findings of fact and decree of dissolution on November 13, 2007.

In its findings, the trial court granted joint custody to both Kenneth and Rebecca, designating Kenneth as the primary residential parent. Rebecca filed a notice of appeal on November 26, 2007. This court denied Rebecca's request for an emergency stay, but we expedited the appeal on December 14, 2007.<sup>2</sup>

Rebecca argues that the trial court erred when it refused to continue the hearing until another date. Whether to grant a continuance is solely within the discretion of the trial court, and it will only be overturned if the court abused that discretion. *Lewis v. Liming*, 573 S.W.2d 365, 368 (Ky. 1978). Abuse of discretion is defined as, "an adjudicator's failure to exercise sound, reasonable, and legal decision-making." *Black's Law Dictionary* 10 (7th ed. 1999).

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<sup>2</sup> We note that in spite of the expedited status of the case, Rebecca later requested an extension for submitting the brief. The argument in the brief consists of one paragraph.

We cannot determine that the trial court abused its discretion.

Rebecca relies solely on *McCutcheon's Adm'r. v. Dean*, 54 S.W.2d 926 (Ky. 1932), which holds that a litigant has a right to be present at trial. However, *McCutcheon's* is distinguishable from the situation here. In that case, the plaintiff missed a court date in order to care for his sick wife. McCutcheon's physicians had advised him not to leave her alone because her illness was quite serious. In contrast, Rebecca's absence was for a pre-surgery consultation. She did not have an emergency or incapacitating ailment. Since Rebecca knew in August about the hearing scheduled for October, she had ample opportunity to re-schedule the medical appointment at a time that could not conflict with the hearing.<sup>3</sup>

Additionally, when the trial court denied Rebecca's motion to continue the hearing, it considered the entire course of the proceedings – not just the events of that day. The judge remarked that the “record is replete with circumstance after circumstance” where Rebecca disregarded the orders of the court. For instance, the record reveals that she delayed for six months in submitting a court-ordered hair follicle drug test. On the day of the hearing, Rebecca still owed court-ordered fees as a consequence of contempt charges. The trial court noted that Kenneth, who lives in Tennessee and took off work for a week, was present and that he was entitled to a resolution of the matter. The judge observed that Rebecca had repeatedly caused Kenneth to appear before the court.

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<sup>3</sup> We also note that the record does not contain an affidavit as required for continuance by CR 43.03 (see KRS 403.150).

In *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991), our Supreme Court stressed that the issue of granting a continuance should be evaluated based on the “unique facts and circumstances” of a case. In the case before us, the trial court carefully considered the previous history of the proceedings as well as the events of the day of the final hearing. It was aware that a child’s well-being was at stake and that matters involving custody are to be expedited as soon as possible. The court duly weighed Rebecca’s history of disregard for the court. Therefore, we cannot agree that the trial court abused its discretion.

We affirm the order of the Pulaski Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey C. Hoehler  
Monticello, Kentucky

BRIEF FOR APPELLEE:

Heidi Schultz Powers  
Somerset, Kentucky