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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000927-MR

MARY M. BOUVETTE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH BARTHOLOMEW, JUDGE
ACTION NO. 11-CI-503638

MICHAEL J. BOUVETTE

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Mary Bouvette appeals from two orders of the Jefferson Family Court which decided all the financial issues in a marriage dissolution action. Specifically, Appellant argues that the trial court abused its discretion when it denied her two motions for a continuance and when it awarded Michael Bouvette \$15,000 in attorney fees. We find that the denial of Appellant's motions to continue were an abuse of discretion; therefore, we reverse and remand for a

new hearing on the financial issues. Also, the award of attorney fees is reversed because the financial matters could change on remand.

The parties were married in 1996 and have two minor children. Appellant filed a petition for dissolution on October 20, 2011, and a status quo order was entered eleven days later prohibiting either party from selling or dissipating marital property without leave of the court. After numerous hearings and scheduled mediations, a decree of legal separation was entered on August 28, 2012.

A three-day trial was originally scheduled for October 17, 2012, but was continued. The reasons for the continuation were twofold. First, Appellant began suffering from physical and mental illness due to semiannual infusions of a chemotherapy drug and steroids. Second, Appellant's counsel withdrew from the case citing a breakdown in communication with their client. Appellant was instructed to obtain new counsel. Two new trial dates were then scheduled. A four-hour trial on the financial matters was scheduled for February 27, 2013, and a full-day trial was scheduled for May 30, 2013, for custody matters.

On December 12, 2012, Appellant, with the help of her financial adviser and power of attorney, Kathie Holloway, motioned the court to withdraw \$60,000 from her retirement account in order to retain new counsel. This order was granted on December 20. On January 23, 2013, Appellant was advised by the retirement plan administrator that she could not get the amount of funds requested from her account due to restrictions on the retirement plan. The administrator

advised her she would need to move her retirement account into a new IRA in order to remove the funds she requested. On January 28, Ms. Holloway, on Appellant's behalf, moved to put the retirement funds into a new IRA account. That motion also informed the court that Appellant had met with two new counsels, but that each required a retainer before beginning their representation. That motion was granted.

On February 6, 2013, Appellant, *pro se*, filed a motion to continue the February 27 trial based on the fact that she had still not received the money from the IRA account and was still unrepresented by counsel. That motion was summarily denied. On February 20, Appellant, through Ms. Holloway, filed another motion to continue the February 27 trial date due to the fact that on February 12 Appellant was hospitalized for treatment of severe depression under the care of her psychiatrist. A letter from Appellant's psychiatrist was provided to the court which stated that she would be hospitalized for the next ten to fourteen days and would then require around four weeks of outpatient services. This motion was also denied.

The February 27 trial on the financial matters went forward as scheduled. Appellee testified and presented hundreds of pages of financial documents. The trial court entered an order on March 14, 2013, which resolved the financial matters. On March 25, Appellant, through Ms. Holloway, filed a motion to alter, amend, or vacate the order. That motion argued that the trial court should have granted her a continuance due to her inability to retain counsel and her

inability to be present at the trial. On April 23, 2013, the trial court denied the motion. This appeal followed.

This appeal concerns two issues: Appellant's inability to present evidence due to the trial court's denial of her motions to continue and the improper award of attorney fees.

Appellant's chief issue on appeal is that the trial court abused its discretion when it denied her two motions for a continuance and deprived her of the ability to present evidence concerning the parties' financial issues.

With respect to the denial of a continuance, our standard of review is whether the court abused its discretion. The court's discretion has been described as "a liberty or privilege allowed to a judge, within the confines of right and justice, to decide and act in accordance with what is fair, equitable, and wholesome as determined by the peculiar circumstances of the case[.]"

Guffey v. Guffey, 323 S.W.3d 369, 371 (Ky. App. 2010) (citations omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Our Supreme Court has set forth various factors for us to consider when reviewing the denial of a continuance. *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky.1991) (overruled on other grounds by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky.2001)). At the threshold, the Court first admonishes that "[w]hether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case." *Id.* (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964)). The factors are:

- 1) length of delay;
 - 2) previous continuances;
 - 3) inconveniences to litigants, witnesses, counsel, and the court;
 - 4) whether the delay is purposeful or is caused by the accused;
 - 5) availability of other competent counsel;
 - 6) complexity of the case; and
 - 7) whether denying the continuance will lead to identifiable prejudice
- Id.*

Guffey at 371. These *Snodgrass* factors are to be considered “while taking into account all the relevant facts and circumstances.” *Id.* at 372.

LENGTH OF DELAY

Appellant argues that the length of the delay would have been minimal. She claims the trial court could have allowed her to present her financial evidence on the already scheduled May 30 trial date; however, that might not have been the case. The May date was scheduled for a full day of testimony and evidence regarding the custody of the children. There is no guarantee that the court would have also had time to hear the financial evidence. Appellee alone took around three hours to present his financial evidence to the trial court.

PREVIOUS CONTINUANCES

Appellant argues that only one previous continuance had been granted and that was due to her illness and the withdrawal of counsel. We agree that this would go in favor of granting a second continuance.

INCONVENIENCE TO LITIGANTS, WITNESSES, COUNSEL, AND THE

COURT

Appellant argues that the inconvenience to the court would have been minimal because it already had another trial date set and Appellant's financial evidence could have been presented then. As to the inconvenience to Appellee, Appellant claims this, too, would have been minimal because an order had been entered protecting his income after the separation and protecting him from any debts Appellant incurred. In addition, Appellee possessed the marital home and was able to earn around \$32,000 per month. Finally, Appellant claims no third-party witnesses were going to testify on financial matters.

It is unknown what the inconvenience to the court may have been. The record before us does not contain information regarding the custody hearing; therefore, we do not know if the trial court would have had time to hear Appellant's financial evidence that day. We do agree with Appellant that the inconvenience to Appellee would have been minimal. Appellee's portion of the marital assets was protected by order of the court and he was earning a substantial monthly income. At most, Appellee would have incurred more attorney fees, but this could have been remedied, and in fact was, by the trial court awarding him attorney fees.

WHETHER THE DELAY WAS PURPOSEFUL OR CAUSED BY APPELLANT

The first delay in this case was caused by Appellant's illness and the withdrawal of her two attorneys. It is unknown why her attorneys withdrew from the case other than their claim of a breakdown in communications. The second delay in this case was also caused by illness. In fact, Appellant was hospitalized

due to severe depression and unable to participate in the proceedings. This was confirmed by a letter from her psychiatrist presented to the court. These delays were not planned or purposeful. This factor would also go in favor of granting another continuance.

AVAILABILITY OF OTHER COMPETENT COUNSEL

Appellant claims that other counsel was not available because she was without sufficient funds to pay a retainer fee. Appellant motioned the court to allow her to withdraw funds from her retirement account two months before the financial hearing. As discussed *supra*, Appellant had difficulty withdrawing these funds from her retirement account in time to hire new counsel. No other counsel would take her case without a retainer. This, too, goes in favor of granting the continuance.

COMPLEXITY OF THE CASE

Appellant argues that this was a very complex case because it included issues of tracing nonmarital assets and the division of many assets, including real property, retirement accounts, stocks, personal property, life insurance, debt, vehicles, seven timeshares, and bank accounts. We agree with Appellant that this was a complex case. Appellee filed over 500 pages of financial documents with the court detailing his financial claims.

This case also included two fact-intensive issues: dissipation of marital assets and tracing of nonmarital funds. “The court may find dissipation when marital property is expended (1) during a period when there is a separation or

dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of her proportionate share of the marital property.” *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky. App. 1998) (citation omitted). The party alleging dissipation “should be required to present evidence establishing that the dissipation occurred. Once the dissipation is shown, placing the burden of going forward with the evidence on the spouse charged with the dissipation is reasonable because that spouse is in a better position to account for these assets.” *Id.* at 502.

As to the nonmarital property issue,

The presumption in Kentucky is that all property acquired during the course of the marriage is marital property, unless the property can be shown to have originated in one of the excepted ways outlined in KRS 403.190(2). A party claiming that property acquired during the marriage is other than marital property, bears the burden of proof. While the word does not appear in the statute, judicial construction of KRS 403.190 has given rise to the concept of “tracing.” . . . [T]his Court recognized that tracing to a mathematical certainty is not always possible, noting that: “While such precise requirements for nonmarital asset-tracing may be appropriate for skilled business persons who maintain comprehensive records of their financial affairs, such may not be appropriate for persons of lesser business skill or persons who are imprecise in their record-keeping abilities.”

Terwilliger v. Terwilliger, 64 S.W.3d 816, 820 (Ky. 2002) (citations omitted).

WHETHER DENYING THE CONTINUANCE WOULD LEAD TO
IDENTIFIABLE PREJUDICE

Appellant argues that there was identifiable prejudice to her in this case because she was not able to be present at the trial and did not have counsel. She claims that she was unable to present evidence regarding her nonmarital interest in the marital home, that some debts she incurred after leaving the marital home were marital debts, and could not rebut Appellee's dissipation argument.

We agree with Appellant that she was prejudiced by the court's denial of her motions to continue. Appellant was unable to present any evidence on her own behalf. As an example, when ruling in favor of Appellee's dissipation argument, the trial court stated that Appellant did not "provide the Court with any evidence proving that the majority of these assets were used for a marital purpose." The court then awarded Appellee \$109,277 as his share of the dissipated assets. Appellant could not have rebutted Appellee's dissipation claim because she was not present at the trial and did not have counsel.

Furthermore, Appellant did not sit idly by as the February trial date approached. She attempted to hire new counsel and filed two motions with the court in order to gain the funds necessary to do so. Circumstances beyond her control made the acquisition of these funds problematic. She was also unable to personally attend the financial trial due to her hospitalization for severe depression. In Appellee's brief, he characterizes the February hospitalization as a delaying tactic. He claims that she only admitted herself into the mental health facility once her motions to continue were denied. This is an unlikely scenario considering the

court and opposing counsel were presented with a letter from Appellant's psychiatrist. That letter stated:

Mary Bouvette is currently hospitalized under my care for treatment of severe incapacitating depression. She will likely be hospitalized for ten to fourteen more days followed by another four weeks in a psychiatric partial hospital program from 9:00 a.m. to 2:30 p.m. Her symptoms of depression include hopelessness, insomnia, poor concentration, poor focus, lack of energy, lack of motivation and inability to cope with even minimal stress. In my opinion, she is not able to participate in the planning process for her upcoming trial and likely will still be in the hospital on February 27, 2013. Her decision making is currently impaired as well. I would estimate that it would be eight to ten weeks before she is capable of participating in this legal matter.

Nothing could be more prejudicial than not being able to participate in the financial trial in any meaningful way. Appellant's previous counsel withdrew from the case, Appellant was unable to retain new counsel due to the lack of funds, and Appellant was hospitalized and unable to be present at the trial due to debilitating depression. Had Appellant either been able to personally attend the trial or been able to retain new counsel in time, prejudice might not have resulted.

After considering the *Snodgrass* factors in relation to the facts of this case, we believe the trial court abused its discretion in not granting Appellant a continuance. We therefore reverse and remand for a new trial on the financial matters. Due to the fact that we are remanding for a new trial, the award of attorney fees is also reversed as the issue will need to be reexamined after the financial matters are fully resolved.

ALL CONCUR.

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