RENDERED: AUGUST 30, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001531-ME

MARIAH MARTINEZ (NOW ROMINES) APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GINA KAY CALVERT, JUDGE
ACTION NO. 15-CI-503204

PABLO "JAVIER" MARTINEZ APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

COMBS, JUDGE: The matter before us arises out of a motion for joint custody and parenting time filed by the Appellee, Pablo "Javier" Martinez (hereinafter Javier) less than two years after issuance of the original decree granting sole custody of the parties' minor child to Appellant, Mariah Martinez (now Romines) (hereinafter Mariah), and granting Javier only supervised visitation. Mariah appeals and contends that the trial court abused its discretion by denying her motion for a continuance and that its order relating to parenting time infringed

upon her sole custody rights when that issue was not properly before the court. After our review, we vacate and remand.

This is the second appeal in this case. Our Opinion in *Martinez v. Martinez*, No. 2017-CA-000273-MR, 2018 WL 671306 (Ky. App. 2018), provides a summary of the underlying facts as follows in relevant part:

> Javier and Mariah were married October 16, 2002. One child was born of the marriage, V.M., their daughter, who was born on October 21, 2011. In December 2014, the parties separated . . . .
>
> [O]n November 10, 2016, the court held a trial on the parties' custody and visitation rights. Both parties testified at the hearing, in addition to three other witnesses. Two of the witnesses testified as "expert" witnesses, each seeing V.M. in therapy, Ms. Marybeth Orton ("Orton"), a licensed professional art therapist, and Dr. Ginger Crumbo ("Dr. Crumbo"), a licensed clinical psychologist.
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> Based upon the testimony at the hearing and evidence submitted to the court on November 18, 2016, the court entered Findings of Fact and Conclusions of Law and Decree of Dissolution, in which the court granted the divorce, granted sole custody of V.M. to Mariah, and granted Javier supervised visitation.

Javier appealed. By opinion rendered on February 2, 2018,[1] this Court affirmed, determining that the trial court's decision was based upon substantial evidence and that it was not clearly erroneous.

[1] Appendix 3 to Appellant's Brief.

On February 20, 2018, Javier filed a motion for joint custody, parenting time, holiday schedule, and immediate relief, accompanied by a single affidavit, his own. Javier based the motion upon the recommendations of a custodial evaluation by Kelli Marvin, Ph.D.

In March 2018, the trial entered an order of mediation regarding all issues. The court also granted motions filed by Mariah's counsel and by her appellate counsel to withdraw.

On May 10, 2018, the mediator filed an outcome report, which reflects that mediation was terminated with no agreement. On May 21, 2018, Javier filed another motion for joint custody, parenting time, holiday schedule, and temporary overnight parenting time, which states that the parties attended mediation on May 9, 2018, and that they were unable to reach an agreement. That motion is not accompanied by an affidavit.

On May 23, 2018, the circuit court entered an order scheduling a two-hour hearing for July 12, 2018.

On June 29, 2018, Javier, by counsel, filed a pre-trial compliance. On July 5, 2018, Mariah, *pro se*, filed a pre-trial compliance as well as a motion requesting "a continuance for the hearing . . . to sufficiently self-represent as the complexity of the case is greater than previously known. Additional time for research, preparation, and composition are [sic] necessary."

On July 6, 2018, Mariah filed a motion to strike and a motion to dismiss in which she argued, *inter alia*, that Javier's motion for modification of custody filed less than two years after issuance of the decree was deficient because KRS[2] 403.340 requires a minimum of two affidavits.

On July 12, 2018, the parties appeared for the hearing. The court addressed Mariah's motion for a continuance. The court observed that the case had been going on for a "very, very, very, very, very" long time. Despite the fact that this would be the first continuance, the court commented that "it would take several months to get back in here" and would inconvenience the two expert witnesses. It also noted that if even the continuance were granted, Mariah would not be able to learn "procedure" by the time of the next court date. And so the court denied the motion.

The hearing proceeded. Javier called two witnesses, Kelli Martin, Ph.D., a custodial evaluator; and Ginger Crumbo, PsyD., a licensed clinical psychologist, who attended telephonically. Javier also testified. The hearing ran over the allotted time before the court could hear Mariah's testimony, and the court scheduled a one-hour hearing for July 19, 2018.

[2] Kentucky Revised Statutes.

On July 25, 2018, Louis P. Winner filed a notice of entry of appearance as counsel of record for Mariah. On July 26, 2018, Mr. Winner filed an amended notice of entry of appearance.

On August 10, 2018,[3] the trial court entered the order from which Mariah now appeals. That order provided as follows:

> [Mariah] filed a motion for a continuance of the hearing on the grounds she was pro se and needed time to educate herself on the legal process. Rescheduling the hearing would cause major inconveniences to scheduled expert witnesses. [Mariah] was present when this hearing was scheduled. [Mariah's] motion was overruled.
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> . . . .
>
> [Mariah] filed a motion to dismiss [Javier's] motion for failure to comply with KRS § 403.340. KRS § 403.340 states "No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that: (a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or (b) The custodian appointed under the decree has placed the child with a de factor custodian. Robinson v. Robinson, [sic] the Court of Appeals ruled that, because the father's pursuit of custody modification occurred within two years of the award of custody in the Decree he was required to file a motion pursuant to KRS 403.340 and attach . . . **a minimum of two affidavits** with the proper showing. He failed to do so and the trial court had no authority to modify custody. Robinson v. Robinson [sic], 211 S.W.3d 63, 70-71 (Ky. Ct. App. 2006). Here,

[3] Appendix 1 to Appellant's Brief.

> [Javier] filed only one affidavit. Therefore, the motion is not compliant with KRS § 403.340. [Mariah's] motion to dismiss is granted. With that said, the Court will certainly consider a modification of custody once a compliant motion is before it.

(Emphasis added).

The court found that it was in the child's best interest to have increased parenting time with Javier as set forth at page 6 of the order. Furthermore, at page 7, the court provided as follows:

> [Javier] shall have the opportunity to offer his input in all educational and medical decisions in V.M.'s life prior to the decision being made. As [Javier's] joint custody motion was defective, [Mariah] shall remain the sole custodian. Therefore, she has the ultimate decision making authority, pending further order by this Court. As indicated earlier, the Court will reevaluate the custodial issue if a proper motion is filed. To be clear, [Mariah] may not make unilateral decisions regarding [the minor child] without first consulting [Javier].

On August 20, 2018, Mariah, by counsel, filed a motion to alter, amend or vacate and/or to make additional findings of fact. Mariah argued that the court should have granted her a continuance, citing *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991), and *Deleo v. Deleo*, 533 S.W.3d 211 (Ky. App. 2017).

By an order entered on September 21, 2018,[4] the court denied Mariah's motion, reciting as follows:

[4] Appendix 2 to Appellant's Brief.

> The Court considered the factors outlined in Snodgrass [sic]. [Mariah] requested the continuance on the grounds she needed time to educate herself on the legal process so she could adequately represent herself. [Mariah] was present at the time the hearing date was set. She had the same amount of time to prepare for her case as [Javier]. The hearing would have been delayed several months. Delaying the hearing would have inconvenienced [Javier] and the expert witnesses. Therefore, the Court overruled her request for a continuance.

On October 18, 2018, Mariah filed a Notice of Appeal to this Court. On November 15, 2018, Javier's counsel filed a motion to withdraw, which was granted by order of this Court entered on December 19, 2018. On January 4, 2019, Javier filed a motion for an enlargement of time to file his Appellee's Brief. On April 18, 2019, this Court granted Javier's motion and ordered that "Appellee's brief shall be filed on or before 30 days from this date." However, to date, Javier has not filed an Appellee's brief.

CR[5] 76.12(8)(c) addresses our options with respect to the failure of an appellee to file a brief:

> If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering

[5] Kentucky Rules of Civil Procedure.

the merits of the case.

With respect to the rule, we note: "While a party's failure to file a brief may be taken as a confession of error, CR 76.12(8)(c), such a sanction is inappropriate in appeals involving child custody or support." *Ellis v. Ellis*, 420 S.W.3d 528, 529 (Ky. App. 2014).

The first issue that Mariah raises is that the trial court committed reversible error in denying her request for a continuance. She relies upon *Deleo v. Deleo*, 533 S.W.3d 211, 217 (Ky. App. 2017), in which this Court addressed the denial of a continuance in a custody proceeding:

> Although an abuse of discretion is the standard of review, the decision to grant or deny a continuance must be made within a legal framework so that there can be some meaningful appellate review. [*Guffey v. Guffey*, 323 S.W.3d 369, 372 (Ky. App. 2010)]. In *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), our Supreme Court provided that framework setting forth the factors to be considered:
>
> 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.

In *Deleo*, this Court held that although *Snodgrass* was a criminal case, the same factors were applicable to a civil motion.

> While a family court is not required to make written findings that it considered the *Snodgrass* factors, in this case [*i.e.*, *Deleo*], the family court orally stated its reason for denials of [the mother's] motions was because of the delay in the trial. . . . [M]ere delay in a trial alone is not a sufficient reason to deny a continuance.

Id.

The first factor that we must consider is delay. The trial court orally stated the case had been going on for a "very, very, very, very, very" long time. We do not agree. The matter before the court – as far as Mariah's request for a continuance was concerned – was Javier's motion for joint custody and parenting time, which was filed on February 20, 2018 – ***fewer than five months before the hearing***. Although the court stated that it could take "several months to get back in here," that factor – in and of itself – clearly does not favor denying a continuance pursuant to *Deleo*.

The second factor is whether there were previous continuances. There were not. As in *Deleo*, this factor supports the grant of a continuance.

The third factor – inconvenience – also favors granting a continuance in the case before us. The trial court observed orally that the witnesses would be inconvenienced. In its order of September 21, 2018, the court stated that "[d]elaying the hearing would have inconvenienced [Javier] and the expert

witnesses." However, as was explained in *Deleo*, our "Supreme Court has held that **any change** in trial date is going to cause **some** inconvenience. 'Thus, in order to become a factor for consideration **there must be some significant or substantial inconvenience**, which should be demons4trated on the record.'" *Deleo*, at 217 (emphasis added) (quoting *Eldred v. Commonwealth*, 906 S.W.2d 694, 700 (Ky. 1994), *abrogated on other grounds by Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003)). Thus, delay alone is insufficient. *Id.*

In its order of September 21, 2018, the trial court stated that it had considered the factors outlined in *Snodgrass*. However, it does not appear to have specifically addressed the remaining four factors – *i.e.*, whether the delay was purposeful or was caused by the accused; the availability of other competent counsel; the complexity of the case; and whether denying the continuance would lead to identifiable prejudice.

Although Mariah requested the continuance, there was no showing or contention that any delay was purposeful or that Mariah endeavored or intended to cause delay. We are persuaded that the case is sufficiently complex to favor granting a continuance. Mariah also argues that there was identifiable prejudice. After she was compelled to proceed without counsel, she notes correctly that the court effectively took away her sole custody of V.M. "under the rubric of simply modifying her parental rights." We agree. As we explained in *Deleo*,

> [t]here is inevitably an imbalance at trial when one party is represented by counsel and the other party is without counsel. That is particularly true where, as here, the represented party intends to heavily rely on expert testimony to support that party's position.

Id. at 218.

Having considered the applicable *Snodgrass* factors and the totality of the circumstances, we conclude that the trial court abused its discretion in denying Mariah's motion for a continuance. Therefore, we vacate and remand this matter for further proceedings.

In light of our decision, we need not decide the final issue Mariah raises; *i.e.*, that the trial court's order of August 10, 2018, improperly impeded her right of sole custody by prohibiting Mariah's ability to make unilateral decisions regarding V.M.[6] Nevertheless, we fully agree with Mariah that the order clearly infringes upon her rights as sole custodian and that the trial court exceeds its authority by effectively eroding her prerogatives as sole custodian. *Robinson v. Robinson*, 211 S.W.3d 63 (Ky. App. 2006) (Where father's pursuit of custody modification occurred within two years of custody award in decree, he was required to file motion pursuant to KRS 403.340(2) and a minimum of two

[6] At page 7 of the order (Exhibit 1), the trial court directed that Javier "shall have the opportunity to offer input in all educational and medical decisions in V.M.'s life prior to the decision being made." Further, "[t]o be clear [Mariah] may not make unilateral decisions regarding V.M. without first consulting [Javier]."

affidavits with the proper showing. He failed to do so and the trial court had no authority to modify custody.).

We VACATE the August 10, 2018, order of the Jefferson Circuit Court and REMAND this case with direction that the court conduct a new hearing in accordance with our decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

Louis P. Winner
Clay Daniel Winner
Louisville, Kentucky

NO BRIEF FOR APPELLEE