

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 13, 2007

PAT BURKS, ET AL. v. EVELYN BERRYHILL SPURLIN

Appeal from the Chancery Court for Lawrence County
No. 11975-04 Jim T. Hamilton, Judge

No. M2006-00122-COA-R3-CV - Filed on May 7, 2007

The sole issue on appeal is whether the trial court abused its discretion by denying the appellants' motion for a continuance of the trial date. Although the appellants had substantial notice of the trial date, they waited until the day of the trial to file their motion for a continuance. Whether to grant a motion for a continuance is subject to the discretion of the trial court, and a discretionary decision to grant or deny a motion for a continuance will not be disturbed by an appellate court unless the record clearly shows an abuse of discretion by the trial court and prejudice to the party seeking the continuance. There being no proof of either, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Robert D. Massey, Pulaski, Tennessee, for the appellants, Pat Burks and Richard Burks.

John A. Day and James A. Streett, Brentwood, Tennessee; and Wayne Hairrell, Lawrenceburg, Tennessee, for the appellee, Evelyn Berryhill Spurlin.

OPINION

The matter at issue arises from the conservatorship of Evelyn Berryhill Spurlin. In August of 2004, appellant Pat Burks was appointed conservator of Evelyn Berryhill Spurlin based upon the trial court's determination that Ms. Spurlin was suffering from the early stages of Alzheimers. Seven months later, in February of 2005, Ms. Spurlin, through her attorney, Wayne Hairrell, sought permission of the trial court to have Ms. Spurlin's mental health re-evaluated by a psychiatrist. The trial court granted the request and appointed a guardian ad litem to participate in the proceedings. Thereafter, the guardian ad litem, counsel for the conservator, and counsel for Ms. Spurlin entered into an Agreed Order specifying that Ms. Spurlin would be evaluated by Dr. Kirby Pate, a board certified psychiatrist practicing in Nashville.

On April 14, 2005, Dr. Pate evaluated Ms. Spurlin at his office in Nashville. Thereafter, Dr. Pate submitted a written report to the court. Copies of Dr. Pate's report were forwarded to the parties on or about June 20, 2005. Dr. Pate stated in his report that it was his opinion that Ms. Spurlin's cognitive impairment had resolved and she was competent to manage her own affairs.

After reviewing the report, the Burks decided to take the deposition of Dr. Pate. His deposition was taken on August 24, 2005. Three weeks later, on September 16, 2005, Ms. Spurlin petitioned the court to terminate her conservatorship and restore her rights. The trial court set the motion to terminate the conservatorship for hearing for October 4, 2005.

Other than the request to depose Dr. Pate in August, no requests for a continuance or for another medical examination were presented to the court by the Burks until the date of the hearing. It was not until the case came on for hearing on October 4, 2005 that the Burks presented to the trial court a request for a continuance. It was presented in a written motion. In the motion, the Burks contended that they wished to have an additional examination conducted by "either one of the prior doctors that had already examined Ms. Spurlin, specifically Dr. Gregory . . . or, as Dr. Pate states would be better a neuropsychologist. . . ."

Although the motion was handed to the court at the hearing, the record suggests the trial court did not address the motion and that no party made a request that it do so. Moreover, instead of requesting that the court rule on the motion for a continuance, the record suggests the Burks allowed the case to proceed, and the parties presented their respective cases. In addition to the witnesses who testified in court, the depositions of Dr. Pate and Dr. Gregory were filed and introduced into evidence for the court to review. After the parties presented their respective witnesses in court, the trial judge recessed the proceedings so that the court and counsel could travel to the residence of Ms. Spurlin where the parties questioned Ms. Spurlin in the presence of the court.

Following the questioning of Ms. Spurlin at her residence, the court took the matter under advisement. Ten days later, on October 14, 2005, the trial court entered an order terminating the conservatorship of Ms. Spurlin based upon the finding that she had sufficiently recovered and was capable of managing her own affairs. This appeal followed.

BURKS' LATE FILED MOTION FOR A CONTINUANCE

The sole issue on appeal is whether the trial court abused its discretion by denying the motion for a continuance filed by appellants Pat and Richard Burks on the day of the hearing. Having reviewed the record before us, we find no basis in law or in fact upon which to conclude that the trial court abused its discretion.

Among the factors trial courts should consider when determining whether to grant or deny motions to continue are: (1) the amount of time the proceedings have been pending, (2) the reasons for the continuance, (3) the diligence of the parties seeking the continuance, and (4) the prejudice to the requesting party if the continuance is not granted. *Nagarajan v. Terry*, 151 S.W.3d 166, 172

(Tenn. Ct. App. 2003). As noted above, the Burks had three and one-half months from receipt of the report by Dr. Pate, and forty days from taking the deposition of Dr. Pate to seek a continuance.

The Burks had more than three months from the time they received the report of Dr. Pate to request the court's permission to have Ms. Spurlin examined by another physician. They also had forty days following the deposition of Dr. Pate to make such a request. For reasons wholly unexplained by the record, the Burks, however, neglected to seek yet another medical evaluation or a continuance, at least not until the day of the hearing.

The only reason given by the Burks for a continuance was to have Ms. Spurlin examined by another physician, a third physician. As the Burks explained it, they wanted Ms. Spurlin examined by another physician because Dr. Pate spoke with the lady who drove Ms. Spurlin to his office on the day he examined her. They complained of this conversation because the order appointing Dr. Pate stated that none of the interested parties could communicate with Dr. Pate. Although the conversation was in violation of the order, the Burks failed to introduce any fact upon which the trial court or this court could conclude that the brief conversation with Ms. Spurlin's driver influenced Dr. Pate or his opinion that Ms. Spurlin was competent to manage her affairs. Moreover, the Burks had over three months from the receipt of Dr. Pate's report and forty days from his deposition to address this concern to the trial court. For reasons not shared with this Court, the Burks waited until the day of trial to do so.

The record fails to suggest that Dr. Pate's opinion as to Ms. Spurlin's competency was substantially influenced by his brief discussion with the lady who drove her to his office. Moreover, the trial court's decision to terminate the conservatorship was not singularly based upon the opinions of Dr. Pate as set forth in his report or deposition. To the contrary, the trial court considered the testimony of Dr. Gregory along with that of several lay witnesses. In addition thereto, the trial court went to the residence of Ms. Spurlin and observed her demeanor and her responses to questions of counsel.

A trial court's discretionary decision to grant or deny a motion for a continuance should not be disturbed by an appellate court unless the record clearly shows an abuse of discretion by the trial court and prejudice to the party seeking the continuance. *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413, 415 (Tenn. 1997). Finding no abuse of discretion, we affirm.

EXPENSES OF APPEAL

The appellee contends the Burks' appeal is devoid of merit and, as a consequence, she requests that we assess costs and expenses against them pursuant to Tenn. Code Ann. § 27-1-122. We have concluded that the Burks' appeal is indeed devoid of merit and, therefore, the appellee is entitled to recover the costs and expenses she incurred on appeal.

The sole issue before us was whether the trial court abused its discretion by denying a motion for a continuance that was not presented until the day of trial and which was not pursued after it was

presented. For the Burks to prevail, we must find that the trial court applied an incorrect legal standard or reached a decision that is against logic or reasoning that caused an injustice to the party complaining. *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The record before us is devoid of any factual or legal basis upon which this Court could reach such a conclusion and, therefore, the Burks had “no reasonable chance of success” in this appeal. *Jackson v. Aldridge*, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999). For these reasons, we have concluded the Appellee is entitled to recover the costs and expenses she incurred on appeal, pursuant to Tenn. Code Ann. § 27-1-122.

IN CONCLUSION

We affirm the trial court in all respects. Costs of appeal are assessed against Appellants, Pat Burks and Richard Burks, and we remand this matter to the trial court for a determination of the reasonable and necessary costs and expenses the Appellee incurred on appeal that she is entitled to recover.

FRANK G. CLEMENT, JR., JUDGE