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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000460-ME

BERNADETTE MILLER SYMPSON

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 01-CI-00109

JAMES GILBERT SYMPSON

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

KNOPF, JUDGE: The 1983 marriage of Bernadette and James Sympson was dissolved by decree of the Nelson Circuit Court entered October 4, 2001. Bernadette appeals from that court's judgment of December 8, 2003, awarding sole custody of the couple's oldest child to James. Bernadette contends that the custody proceedings were rendered unfair when the trial court denied her motion for a continuance following her counsel's withdrawal. She also contends that the award of sole rather than joint

custody constitutes an abuse of the trial court's discretion.

We affirm.

The Sympons' marriage produced three children, ages thirteen, seven, and two when the couple separated in February 2001. In May 2001, the trial court entered a temporary award of joint custody for all of the children under which they were to spend alternating weeks with either parent. From then until the final hearing in June 2003, the parties engaged in acrimonious conduct against one another that spilled over into bitter disputes concerning the children's schooling, the middle child's participation in soccer, and the eldest child's testifying in these proceedings. It appears that the final hearing was originally scheduled for June 2002, but was postponed at least three times, once to permit the filing of psycho-social and psychological custody evaluations and twice to permit Bernadette to change counsel.

In May 2003, with the final hearing scheduled for June 12, Bernadette's third attorney, citing serious differences with her client, moved to withdraw. Following a hearing, which was not made a part of the record on appeal, the trial court granted counsel's motion to withdraw and denied Bernadette's motion for yet another continuance, although it indicated that it would reconsider that issue if raised by new counsel.

Rather than enlist new counsel, however, Bernadette proceeded pro se. During the two day trial, she managed to introduce numerous pieces of evidence, called and examined several witnesses, cross-examined James's witnesses, and even raised objections to some of James's evidence. Generally, as the trial court observed, she coped well with the procedural demands of trial and succeeded in presenting a meaningful case. She contends, nevertheless, that the court abused its discretion when it permitted counsel to withdraw three weeks before trial and did not grant a continuance. We disagree.

Bernadette correctly notes that a motion for a continuance is addressed to the trial court's discretion, so that absent an abuse of that discretion the court's decision will not be disturbed on appeal. Among the factors bearing on the court's decision are length of the delay being sought; previous continuances; inconvenience to litigants, witnesses, counsel, and the court; whether the delay is purposeful or is caused by the movant; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.¹ Weighing heavily against further delay in this case were the facts that the case was already more than two years old, that it had twice been delayed to permit Bernadette to substitute counsel, and that James and

¹ Snodgrass v. Commonwealth, 814 S.W.2d 579 (Ky. 1991).

the children would suffer significant inconvenience if the limbo in which they had been living were prolonged. Against this was to be weighed the prejudice to Bernadette of having to obtain new counsel or proceed on her own.

The two paragraphs Bernadette's brief devotes to this issue fail to identify a sufficiently countervailing prejudice. Had Bernadette desired new counsel, three weeks was enough time to find one, and the court indicated that it would likely give counsel a reasonable opportunity to prepare. Bernadette does not claim to have sought new counsel. She decided, rather, to try her own hand. With hindsight, she now contends that counsel would have raised and preserved property issues, but this contention is belied by the fact that during the nearly two years counsel was involved with the case property issues did not surface. There was simply not enough marital property to make Bernadette's waiver of property issues unduly prejudicial.

She also contends that counsel would have coped better with the rules governing the introduction of evidence, but she fails to identify what evidence was excluded or not developed due to her unfamiliarity with those rules. She was not allowed to introduce the custody evaluation of psychologist Johnson because, pursuant to her own counsel's motion, the court had earlier ruled that that report could only be introduced by way of the psychologist's deposition, which neither party elected to

take. Bernadette was not unduly prejudiced by having to abide by a ruling she herself obtained.

In sum, although like most pro se litigants Bernadette suffered disadvantages, the trial court did not abuse its discretion by denying her third request to postpone a long-delayed trial in order to obtain new counsel.

Bernadette also contends that the trial court abused its discretion by awarding sole custody of her eldest daughter to James. Bernadette testified, presented other evidence, and argued to the effect that during the marriage she rather than James provided most of the care for the children and that since the separation she had demonstrated a more insightful concern for the children's long-term interests than James had. She more than James wanted to expose them to educational and cultural opportunities available in Louisville, and she more than James sought to address their need for counseling as a result of the divorce. She also presented evidence of certain acts and incidents alleged to reflect badly on James's ability to care for the children.

On the other side was evidence of Bernadette's own lapses from ideal parenthood; a psycho-social custody evaluation characterizing both parents as fit and loving caretakers but recommending that the children not be uprooted from Nelson

County; and testimony by the eldest daughter, who was fifteen at the time of trial, requesting that James be awarded her custody.

KRS 403.270 provides that the trial court "shall determine custody in accordance with the best interests of the child." In making that determination the court enjoys broad discretion.² Among the factors guiding the court's discretion are the wishes of the child, particularly a mature child, and the relationships between the child and her parents.³ There was ample evidence here for the trial court's finding that both parents are fit custodians, but that Bernadette's relationship with her eldest daughter had become extremely strained. That finding together with the daughter's wish justified the court's determination that her best interests would be served by awarding sole custody to James. There is nothing in the court's ruling to indicate that it sought to punish Bernadette for the divorce or for forming new relationships.

Because the Nelson Circuit Court did not abuse its discretion either by refusing to postpone the trial of this matter or by awarding sole custody of the eldest daughter to James, we affirm its December 8, 2003, judgment.

ALL CONCUR.

² Squires v. Squires, 854 S.W.2d 765 (Ky. 1993).

³ KRS 403.270(2)(b) and (c).

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