

RENDERED: NOVEMBER 10, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001600-ME

RACHEL LOUISA JONES (NOW WALLACE)

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 02-CI-504335

DAVID HOWARD FENLEY

APPELLEE

OPINION
REVERSING IN PART, VACATING IN PART,
AND REMANDING

** ** *

BEFORE: BARBER AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

TACKETT, JUDGE: Rachel Jones appeals from a decision of the Jefferson Circuit Court denying her a continuance in order to obtain counsel to represent her in a custody action. After two previous continuances, the trial court stated that no further continuance would be granted, thus, when Jones' counsel was forced to withdraw shortly before the trial date, the trial

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court refused to allow her a reasonable continuance to obtain new counsel. Jones was forced to trial without counsel and, as a result, lost custody of her son. In addition, the trial court failed to address her request to be awarded attorney's fees. We hold that the trial court abused its discretion in failing to grant a continuance, and this case is reversed in part, vacated in part, and remanded for a new trial. The trial court is directed to allow Jones a reasonable time to secure representation by counsel and to further consider an award of attorney's fees.

Jones was involved in an intimate relationship with David Fenley, although the two never married. Fenley is President and CEO of Fenley Real Estate, a business he co-owns with his sister and two brothers. Jones is a high school graduate. They dated for several months during 1995. The relationship ended after Jones allegedly began using drugs; however, she would still contact Fenley from time to time when she was depressed or needed money. After Jones' sister was removed from the home of their mentally ill mother, Fenley paid for her tuition at Presentation Academy in 1997. Fenley and Jones attended a Christmas recital at Presentation after which they engaged in intimate relations resulting in the conception of their son.

The parties' child was born September 2, 1998. Fenley filed a petition for paternity, custody, and visitation in October 1998. He was found to be the father of Jones' child and ordered to pay child support. Jones and Fenley entered into an agreement sharing custody in 1999. Fenley was very involved in his child's life, making decisions such as where the boy attended school and what religious upbringing he would have. When the child stayed with Fenley, he rarely used a babysitter. In addition to paying his court-ordered child support, Fenley frequently assisted his son's mother financially, even when the parties were involved in litigation.

In October 2002, Fenley filed a petition for custody which the trial court elected to treat as a request for modification of its custody order in the 1998 paternity case. The trial court appointed a clinical psychologist to conduct a full custody evaluation, which was filed in July 2003. In August, the trial court entered an order scheduling the case for trial on October 21-23, 2003. Jones filed a motion the following month requesting a continuance. Her attached affidavit stated that counsel could not find an expert in Jefferson County to act as consultant in her case and also that Jones was to be married on September 27, 2003, and would be unable to assist her counsel in preparing for trial. A second trial date was continued after Jones' counsel was hospitalized

for a heart procedure two days before the trial date. At that time, the trial court indicated that no further continuances would be granted.

Jones retained another attorney who began preparing her case for trial, but withdrew three weeks later after receiving a judicial appointment. She secured the services of a third attorney who entered a limited appearance in order to request a continuance. When the trial court declined to continue the case, the attorney did not enter a formal appearance. Subsequently, Jones filed a *pro se* motion asking for a continuance, and attached a list of attorneys she had contacted who declined to accept the case due to the proximity of the trial date. Her motion was denied and Jones was forced to represent herself at trial after even her standby counsel was disallowed. The trial court concluded that it was in the child's best interest to award sole custody to his father with Jones having visitation rights. Jones obtained counsel and filed this appeal.

Jones argues that the trial court abused its discretion by failing to grant her a continuance in order to retain trial counsel. This failure led to her being forced to represent herself, and she suffered prejudice when Fenley was awarded sole custody of their son. The decision to grant or deny a request for a continuance is within the sound discretion

of the trial court and shall not be disturbed absent an abuse of discretion. Hunter v. Commonwealth, 869 S.W.2d 719 (Ky. 1994).

The facts of the case determine whether the refusal to grant a continuance was an abuse of the trial court's discretion.

Greeley v. Commonwealth, 825 S.W.2d 617 (Ky. 1992). The Kentucky Supreme Court previously set forth the following list of factors for the trial court to consider in determining whether or not to grant a continuance:

. . . length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991). Of these factors, it would appear that the trial court considered only one: previous continuances.

After granting two previous continuances, the trial court entered the following order in response to Jones' third request to continue the trial date:

This matter came before the Court on the motion of Hon. Louis I. Waterman to withdraw. The motion was sustained in a separate order.

Also, Hon. Stephen J. Kriegshaber filed a motion to continue the case, and if the continuance was granted, that he be permitted to enter his appearance as attorney for [Jones]. This matter was previously scheduled for trial on two separate occasions, and on each occasion,

the case was continued on [Jones'] motion. When the case was again set for trial, it was done with the admonition from the Court that no additional continuances would be granted. Therefore, the motion to continue the case is overruled. With that ruling, Mr. Kriegshaber withdrew his motion for entry of his appearance as attorney for [Jones].

In its order denying the request for a continuance, the trial court gives as its sole reason the fact that Jones had already obtained two continuances. However, a brief examination of all of the factors in Snodgrass demonstrates that a continuance was required.

Length of delay – Waterman entered his appearance as Jones' attorney on January 26, 2004, and two days later the trial court scheduled the case for trial on March 16th and 23rd 2004. After he withdrew as Jones' counsel on February 18th, she lost no time obtaining new counsel, and Kriegshaber entered a limited appearance February 20th for the purpose of requesting a continuance. Given that Waterman was prepared to try the case seven weeks after he entered his appearance and that Kriegshaber was willing to enter an appearance four weeks before the case was set for trial, the trial court needed only to grant a continuance of a few weeks to enable Jones to be represented by counsel.

Inconvenience to litigants, witnesses, counsel and the court – Fenley points out that his son has a compelling interest

in having a timely resolution to the custody dispute between Fenley and Jones. While this is certainly true, Fenley does not demonstrate how a short continuance would have such a negative impact on the child as to outweigh the mother's right to a fair proceeding when faced with the loss of her custodial rights.

Whether the delay is purposeful or caused by Jones –

It is undisputed that the two previous continuances were also sought by Jones. In the first instance, she sought a continuance to enable her attorney to find an expert witness and also because she was to be married shortly before the trial date. The trial court continued the case from October 2003 to January 6th and 8th 2004. On the morning of trial, Jones' counsel, Hon. Britt Stevenson, did not appear in court. Instead, his partner, Hon. John Olash, appeared and stated that Stevenson had been hospitalized on Sunday, January 4, 2004, and would be undergoing heart catheterization. Olash advised the trial court that Stevenson would likely be withdrawing from the case. It was at this time that the trial court issued its admonition that no further continuances would be granted. Stevenson was replaced by Waterman who was forced to withdraw after he was appointed to the bench. While Jones was arguably responsible for the first continuance, neither the second nor third can be attributed to any conduct on her part.

Availability of other competent counsel – After Kriegshaber refused to enter his appearance, Jones made another request for a continuance on March 2, 2004. She attached to her motion a list of attorneys who had declined to represent her citing lack of time to prepare for trial.

Complexity of the case – Jones made arrangements for Olash to assist her in presenting her case and cross-examining Fenley. When Olash appeared in court on March 23, 2004, Fenley successfully objected because Olash was on a list of potential witnesses submitted by Fenley's counsel. Olash was required to leave the courtroom, and Jones received no assistance. Fenley's counsel made numerous evidentiary and technical objections to Jones' testimony and her attempts to cross-examine Fenley. Jones, meanwhile, had no legal training and failed to object to unfavorable evidence which may not have been admissible.

Whether denying the continuance would lead to identifiable prejudice – Prior to this trial, Jones had joint custody of her son with Fenley. After the trial, in which no one represented Jones' interests or protected her right to a fair proceeding, the trial court granted Fenley sole custody of the child with visitation rights for Jones. While we do not attempt to determine what decision the trial court would have made in a truly adversary proceeding, Jones suffered a diminution of her fundamental right as a parent as a result of a

proceeding where only the prevailing party was represented by counsel. It is clear to us that the trial court abused its discretion in this matter by failing to weigh all of the factors affecting Jones' right to a continuance; therefore, this case is reversed and remanded for a new trial at which Jones will be given sufficient time to obtain counsel.

On appeal, Jones further claims that the trial court allowed inadmissible evidence to be entered by Fenley's attorney. Our decision reversing the case renders any consideration of this argument moot. Finally, she contends that the trial court abused its discretion by failing to award her attorney's fees and costs as she still owes Stevenson a substantial amount for his representation. Since the court's order fails to address this issue, we vacate it with regard to whether Jones was entitled to attorney's fees and direct the court to make a determination on the matter.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Allen K. Gailor
Louisville, Kentucky

BRIEF FOR APPELLEE:

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