

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000779-MR

E. BRYAN CISSELL

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY PHILPOT, JUDGE
ACTION NO. 06-CI-02257

ALICE M. CISSELL

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; KNOPF,¹ SENIOR JUDGE.

DIXON, JUDGE: E. Bryan Cissell (“Bryan”) appeals from a decree of dissolution of marriage entered by the Fayette Circuit Court on March 27, 2007. After thoroughly reviewing the record, we affirm.

Following ten years of marriage, Alice Cissell (“Alice”) filed a divorce petition against Bryan in Fayette Circuit Court on May 25, 2006.

For most of the marriage, Bryan owned his own real estate brokerage firm, Triple Crown Realty. Alice worked in the healthcare field before joining Bryan’s firm as

¹ Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

a realtor in 2005. By the time Alice filed for divorce, Bryan's business was in financial ruin. Bryan and Alice had excessive debt, and the marital residence was fully encumbered by two mortgages. The most significant marital asset was Alice's 401k valued at \$72,000.00.

In January 2007, Bryan's attorney withdrew, and the trial court allowed Bryan several weeks to retain counsel. The court set a trial date for the end of February 2007. Prior to trial, Brian, *pro se*, moved for a continuance so he could retain counsel. The court denied Bryan's motion and held a trial on February 26, 2007, relating to division of the marital estate. Thereafter, in April 2007, the court held a hearing on issues relating to the parties' three minor children.

On March 14, 2007, the trial court rendered findings of fact and conclusions of law resolving the disputed property issues. This appeal followed.

Bryan raises three issues on appeal. First, he contends the court abused its discretion by denying his pre-trial request for a continuance. Next, he argues the court unfairly allocated the 401k and marital residence to Alice. Finally, he claims the court erroneously concluded maintenance had not been requested.

I. Motion to Continue

We review the trial court's denial of a motion to continue for an abuse of discretion. *Simpson v. Sexton*, 311 S.W.2d 803, 805 (Ky. 1958). Accordingly, we will not disturb the court's ruling unless "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004), *citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Bryan's attorney moved to withdraw on January 2, 2007. Bryan had several weeks to retain counsel prior to the February 26 trial date. The record shows that, at a January pre-trial hearing, Bryan stated that he planned to proceed *pro se* and represent himself at trial.

In early February, Bryan asked the court to continue the trial date until he had money to retain counsel. The court denied the motion. One week before trial, Bryan requested a two-week continuance and argued that he found an attorney to represent him. The court denied this motion as well, and Bryan represented himself at trial.

Bryan contends the court abused its discretion by denying his motion for a two-week continuance. We disagree.

Bryan relies on *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991) (overruled on other grounds by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001)), which delineates seven factors for the court to consider when a criminal defendant requests a continuance. *Id.* at 581. Pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c), Bryan also cites an unpublished opinion of this Court, wherein the panel applied the *Snodgrass* factors in a child custody case. *Jones v. Fenley*, 2004-CA-001600-MR (Nov. 10, 2005). In the case at bar, we are not persuaded that the family court was required to consider the *Snodgrass* factors in denying the continuance.

Our Supreme Court, in *Snodgrass*, stated:

Factors the trial court is to consider in exercising its discretion [on a motion to continue] are: 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, 814 S.W.2d at 581, *quoting Wilson v. Mintzes*, 761 F.2d 275, 281 (6th Cir. 1985).

In *Wilson v. Mintzes*, *supra*, the Sixth Circuit Court of Appeals, focused on the constitutional implications of a criminal defendant's request for a continuance.

Wilson, 761 F.2d at 280. "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." *Id.*, n.9, *quoting Powell v. State of Alabama*, 287 U.S. 45, 59, 53 S.Ct. 55, 60, 77 L.Ed. 158 (1932).

In civil cases, however, a constitutional right to counsel exists only if imprisonment is a potential punishment. *May v. Coleman*, 945 S.W.2d 426, 427 (Ky. 1997). Thus, in the case at bar, the constitutional concerns of *Snodgrass* are not at issue. Consequently, we review the trial court's denial of Bryan's motion to continue solely for an abuse of discretion.

Bryan argues he suffered from bipolar disorder and was unable to represent his best interests. However, the record reflects that Bryan was prepared to proceed *pro se*. Prior to trial, the judge addressed Bryan's personal problems and mental health issues. Bryan assured the court his mental health problems were under control and he was focused on pulling his life together.

After reviewing the record, we must also question the veracity of Bryan's second request for a continuance. The attorney Bryan allegedly retained did not file any

documentation with the court, nor did the attorney represent Bryan at the custody hearing on April 2, 2007.

Despite Bryan's argument to the contrary, we cannot conclude that the judge "forced" Bryan to represent himself at trial. It is apparent that the judge was well acquainted with the facts of this bitter divorce action, and in his discretion, chose to go forward with the trial. We find no error.

II. Division of Property

We also review the court's findings of fact regarding the division of marital property and debt for an abuse of discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001).

Kentucky Revised Statutes 403.190(1) states:

In a proceeding for dissolution of the marriage[,] . . . the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

Bryan argues the family court did not consider each of the statutory factors when it allocated the 401k and marital residence to Alice. Bryan concedes that the

statute does not require an equal division of property, only that the division is “in just proportions.” *Russell v. Russell*, 878 S.W.2d 24, 25 (Ky. App. 1994).

Bryan failed to preserve this argument for our review, as he did not request that the family court make additional findings of fact regarding the statutory factors. CR 52.04. Regardless, our review shows that the family court’s findings are sufficiently detailed. We conclude the court did not abuse its discretion in dividing the marital property.

Briefly, we note it is undisputed that Alice contributed to the 401k with earnings from her employment prior to becoming a realtor at Triple Crown Realty. Likewise, the marital residence was fully encumbered, and the evidence showed it would likely be sold at a loss. The court’s findings clearly show that it thoroughly considered the arguments of both parties. Furthermore, Bryan was awarded a house owned by the parties as rental property. Although that property was encumbered, Bryan acknowledged that it was an “asset” he could keep until it appreciated.

“The [marital] property may very well have been divided or valued differently; however, how it actually was divided and valued was within the sound discretion of the trial court.” *Cochran v. Cochran*, 746 S.W.2d 568, 570 (Ky. App. 1988). After thoroughly reviewing the record, we find no error.

III. Maintenance

Finally, Bryan claims the court failed to determine whether he was entitled to maintenance pursuant to the factors set forth in KRS 403.200.

The record shows that Bryan’s claim for maintenance was not raised at trial. In its findings of fact, the trial court determined, “There was no claim by either

party for maintenance, and therefore, the Court finds that it will not award any maintenance.” Although Bryan contends maintenance was at issue, he failed to file a motion for the court to make additional findings of fact in light of the factors set out in KRS 403.200. CR 52.02.

“The failure, if there was a failure, on the part of the trial judge to make adequate findings of fact was not brought to his attention as required by CR 52.02 or CR 52.04; consequently, it is waived.” *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982).

For the reasons stated herein, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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