

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001041-ME

DANNY WAYNE BROWN

APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 06-CI-00132

PENNY ALICE BROWN

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

VANMETER, JUDGE: Danny Wayne Brown appeals from an order entered by the Barren Circuit Court, Family Division, in a marital dissolution proceeding. For the reasons stated, we affirm.

Danny and appellee Penny Alice Brown married in 1994 and separated in 2006. They entered into a partial separation agreement which provided for joint custody of their three children, but they reserved for the court the determination of the primary residential custodian, visitation, and child support. After a February 2007 trial, the court

designated Penny as the primary residential custodian and established terms of visitation and child support. This appeal followed.

First, Danny contends that the trial court abused its discretion by denying his pretrial request for counseling and a custodial evaluation, and by denying his request for a continuance to allow such counseling or evaluation. We disagree.

As noted by Penny, the record shows that the children were seen by several counselors, and that they were receiving ongoing counseling at the time of the trial.

Although the parties had agreed that they could not afford private counseling for the children, some three weeks before the scheduled trial Danny filed a motion requesting the court to order the parties and children to immediately schedule counseling with a specific named private counselor, with the costs to be paid by a family member. Danny also asked the court to reschedule the February hearing pending the receipt of such counseling. Penny objected, noting that the children already were receiving services from a licensed counselor, that the counseling was beneficial to them, and that requiring

them to change counseling efforts at this late date and meet with some other counselor, no matter how qualified and which, by statements of [Danny] through counsel, would be designed primarily to provide testimony for the benefit of [Danny], does not serve the best interest of the three infant children. The best interest of these children can only be served by getting this matter finally considered by the Court and concluded.

When addressing the issue of custody, a trial court must consider all relevant factors including “[t]he mental and physical health of all individuals involved.”

KRS¹ 403.270(2)(e). Determining whether the evidence is sufficient to address such factors falls well within a trial court's discretion. Here, given the other evidence concerning the mental health of the parents and children, as well as the court's obvious concerns about the impact of further delays on the welfare of the children, that the court did not abuse its discretion by denying Danny's motion seeking additional court-ordered counseling or an evaluation, or by denying his request for a continuance.

Next, Danny contends that the trial court abused its discretion by denying his motion for additional time in which to present his case-in-chief. We disagree.

The party who bears the burden of proof at trial “must ordinarily exhaust his evidence before the other begins.” CR² 43.02(c). However, a trial court is vested with great discretion in how it conducts a trial, including in the way that it imposes reasonable time limits. *See Hicks v. Commonwealth*, 805 S.W.2d 144, 151 (Ky.App. 1990). *See also* KRE³ 611(a), directing courts to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence[.]” This court will not attempt to control a trial court's exercise of discretion in directing the conduct of a trial “unless there has been an abuse or a most unwise exercise thereof.” *Transit Auth. of River City v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992); *Welsh v. Galen of Va., Inc.*, 128 S.W.3d 41, 59-60 (Ky.App. 2001).

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

³ Kentucky Rules of Evidence.

Here, the record shows that on November 7, 2006, the court set the matter to be tried on February 14, 2007, between the hours of 8:30 and 12:00 noon. According to Danny, the court declared his case closed after the passage of one-half of the allotted trial time even though he had not yet testified. Danny's requests for additional time were denied.

The record shows that Danny made no pretrial requests for additional time in which to present his case at trial. Further, he admits that he ran out of time because he first called Penny as a hostile witness, and then called a representative of the Cabinet for Health and Family Services. Even if, as Danny asserts, Penny's recalcitrance caused him to waste much of his allotted trial time, he was not entitled to a court order providing him with additional time to present his witnesses, either during the trial or on a later date. Obviously, Danny controlled the order in which he called his witnesses, and his decision to first call witnesses other than himself must be considered a trial strategy even if he later regretted the results. Under these circumstances, there is no merit to Danny's contention that the trial court abused its discretion by failing to allow him time in which to present additional evidence, either at trial or on a later date.

Next, Danny contends that the trial court abused its discretion by denying his motion to present rebuttal witnesses and rebuttal evidence. Essentially, this argument consists of the rephrasing of his prior argument concerning his inability to testify or to present additional witnesses. Again, the court specifically advised the parties well in advance of trial of the time limitations. Further, the record does not show and Danny

does not claim that he attempted to reserve any time for rebuttal at the close of Penny's case. Thus, the trial court did not abuse its discretion by denying his motion.

Finally, although Danny raises an issue on appeal relating to an alleged marital debt, his attorney confirmed below that all financial issues had been resolved by agreement. Hence, this issue is not properly before us on appeal.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Keen
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Robert M. Alexander
Glasgow, Kentucky