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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 22, 2023 Session

HEATHER R. WILDER v. JOSEPH C. WILDER

**Appeal from the Circuit Court for Knox County
No. 108931 Gregory S. McMillan, Judge**

No. E2022-00990-COA-R3-CV

This appeal concerns a long-running domestic matter. Heather R. Wilder (“Mother”) and Joseph C. Wilder (“Father”) were issued a final judgment of divorce by the Circuit Court for Knox County (“the Trial Court”) in 2010. Issues concerning child support have persisted since then. In the most recent chapter, the Trial Court allowed Mother’s attorney to withdraw five days before trial but denied her request for a continuance. The Trial Court subsequently entered its final order. Mother appeals. We find that the Trial Court abused its discretion in denying Mother a reasonable continuance. We vacate the Trial Court’s judgment and remand for a new trial to be conducted after Mother has had a reasonable continuance in which to try to retain counsel or otherwise prepare for trial pro se.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated;
Case Remanded**

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which JOHN W. MCCLARTY and THOMAS R. FRIERSON, II, JJ., joined.

Heather Russell Wilder, Pro Se.

C. Scott Taylor, Jon C. Fromke, and Karen G. Crutchfield, Knoxville, Tennessee, for the appellee, Joseph Chamblee Wilder.

OPINION

Background

Mother and Father were issued a final judgment of divorce by the Trial Court in October 2010. At the time of the divorce, Mother and Father had three children within the marriage: Russell Chamblee Wilder (born March 1998), Marcel Eugene Wilder (born January 2001), and Joseph Ansel Wilder (born April 2002). Various filings were made by the parties, with those pertinent to this appeal beginning in 2016. In February 2016, Father filed a petition to modify his child support claiming his income had decreased significantly since the August 2014 entry of a child support order. Mother answered this petition in March 2016 and filed a counter-petition asserting, among other things, that Father's child support obligation for the oldest child should continue post-majority; that child support payments were not timely made; that Father's health insurance lapsed; that Father had not paid his portion of uninsured medical expenses incurred for the children; and that her income and earning ability should be recalculated. Trial dates were set for August 2016 and February 2017, but were continued by the parties. A trial date in September 2017 was ordered. The case was continued twice more at Mother's request, finally being heard in February 2019. The Trial Court entered an order in March 2019, which Mother timely appealed.

In *Wilder v. Wilder*, No. E2019-00635-COA-R3-CV, 2020 WL 1069522 (Tenn. Ct App Mar. 6, 2020), we dismissed Mother's appeal for lack of subject matter jurisdiction, stating in relevant part:

In summary, there is an absence of a final judgment due to the unresolved issues identified herein. *See In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003) (noting that a final judgment resolves all issues in the case and leaves nothing else for the court to do). On remand, the trial court must first, independent of the post-majority support issue, address the respective requests for a modification of the ordinary support owed and, if a significant variance exists, determine what the guideline child support amount should be. It should then also complete its consideration of the post-majority support issue, and, if it intends to award some post-majority amount as previously indicated, specify what that amount is. Finally, for the sake of finality, the trial court should also adjudicate requests for attorney's fees that we observe were made by both parties in their respective pleadings but that were also not addressed in the trial court's judgment.

Wilder, 2020 WL 1069522, at *3.

In May 2020, Mother filed a petition seeking post-majority support for the parties' youngest child. In July 2020, Father filed a response and counter-petition to modify his child support obligation. In September 2020, Father filed a motion to compel and/or to prohibit introduction of evidence and/or for continuance. Father asserted that, in July 2020, he sent Mother interrogatories and requests to produce to which Mother's responses were incomplete and failed to identify her expert trial witnesses. The case was continued and trial was set for January 2021. In September 2020, Mother filed a motion to renew judgment to enforce the October 2010 judgment of divorce. In September 2021, Mother filed a motion to compel discovery from Father.

The January 2021 trial date was continued by agreement owing to the illness of Mother's counsel. A January 2022 trial date was set and continued again at the request of Mother. The trial date was then set for May 2022. At an April 2022 hearing, Mother's counsel said that Mother wanted him to file a motion for the trial judge to recuse, which he believed would be improper. The following exchange occurred:

MR. CHILD [Mother's counsel]: Your Honor, I am in a situation where I'm not sure what to do. I have been very candid with counsel. We have met and talked. I have shared with him a copy of the communication that I received this morning or a couple of days ago from my client. It's something that she wants me to do in this case that I am not willing to do, and I'm not proposing to do it, and I'm not going to do it. If it was filed, Your Honor would have to rule on it, and I don't want to bring it up. I don't want to deal with it.

THE COURT: Okay. Well, it's either a pleading concerning the relief she wants or it's a motion to recuse me.

MR. CHILD: It's a motion to recuse.

THE COURT: And whether she files it or not, you know, if it's ethical and within the rules, I think you're obligated to do it. If it's not, then you're obligated not to, and she's free to fire you and file it on her own as a pro se litigant. She may not file it pro se while she's represented by counsel, according to the rule.

In May 2022, Mother's counsel filed a motion seeking to withdraw from representing Mother pursuant to Tennessee Rule of Professional Conduct 1.16 and requesting a continuance. At a May 18, 2022 hearing, the Trial Court granted Mother's counsel's motion to withdraw but denied the request for a continuance. Mother continued her litigation from this point on pro se. At the May 18, 2022 hearing, the following exchanges occurred regarding the withdrawal of Mother's counsel and the denial of a continuance:

MR. CHILD: Your Honor, my situation in that, and that's regrettable, I'm sorry I'm not there but I'm -- my wife tested positive for COVID on Saturday due to an emergency visit by her to the UT Hospital. And I'm currently under quarantine and will be at least through tomorrow. I believe that there is discovery that is needing to be supplemented that hasn't been done. And of course there are some issues that Ms. Wilder may want to choose to pursue that I have -- my professional opinion is they ought not to be done. And I think that those financial matters would be better resolved should there be updated and exchange of that information rather than trying to sort that out at a hearing.

THE COURT: Well, okay. But as I understand it, you're withdrawing irrespective of what I do on the motion to continue. I just don't think I'm allowed to handle your withdrawal before I handle something that you did as attorney of record, which is ask this Court for a continuance. So I'm not worried about your potentially having been exposed and becoming positive for COVID delaying this trial. I'm just here on the motion to withdraw -- I mean on the motion to continue.

MR. CHILD: Well --

THE COURT: The basis for it, you say that your client may owe Mr. Taylor [Father's counsel] discovery, he may owe you some. He says he has it here today. Candidly, given that this case was remanded to this Court conservatively two years ago, the Court is unconcerned that there may be discovery related to that issue which -- and I'm ready to try it and go forward on it. As to the child's disability, I think that needs to be first and Ms. Wilder will either put her case on or not, and Mr. Taylor will make whatever objections he may make or not make based on her discovery responses at trial. He's allowed to do that. He's not asking me to continue this case for discovery today. So as to the discovery that you say is due concerning updating of information and so forth, Mr. Taylor has that, and Mr. Taylor tells me that he has the information that needed to be supplemented. So he'll turn that over to Ms. Wilder today. Okay?

MR. CHILD: Okay.

THE COURT: So the continuance at this point is denied.

MS. WILDER: Your Honor, may I speak, please?

THE COURT: No, ma'am, you have an attorney right now.

MS. WILDER: No, he's not representing me right now.

THE COURT: Ma'am, he has not been allowed to withdraw because as your attorney he filed a motion to continue, which must be addressed before I can turn to the motion to withdraw.

THE COURT: All right. Ms. Wilder, I don't understand that you were objecting based on your last remark which said that Mr. Child is no longer your attorney. So Mr. Child, you are allowed to withdraw. Prepare an appropriate order requiring your client to secure security for the cost of this cause, and I will sign it and allow you to withdraw. Okay?

MR. CHILD: Thank you.

At trial on May 23, 2022, the following exchange occurred concerning Mother's request for a continuance:

MR. TAYLOR: Respectfully, Your Honor, when we were here last Wednesday, I don't recall her --

THE COURT: There was no request for another attorney.

MR. TAYLOR: -- requesting a continuance.

THE COURT: There wasn't.

MS. WILDER: I'm sorry, yes, I did request a continuance and I was told I was not allowed to request a continuance because my attorney had requested a continuance and that was put off. And I was told that I was not allowed to and that was recorded in the courtroom.

THE COURT: Okay. And if I don't -- if I recall correctly, we had a motion to compel where I said you'll either answer the discovery as it's written fully and completely, or I will exclude anything that is not. I do not find the -- and the other objections to have any merit and if after that hearing, which I do believe we had in open court, discovery was not provided then I will rule on each issue as it is brought up and put on and if --

MS. WILDER: Your Honor, I am not an attorney. I don't understand what that means.

THE COURT: Well, ma'am --

MS. WILDER: And that's a disadvantage to me.

THE COURT: Yes, ma'am, and I understand that. But as I understand it, okay, I was aware of the potential of Mr. Childs withdrawing some period of time ago and the conflicts allegedly that led to that which meant that there was time to continue this case and obtain new Counsel. You're telling me that you were asking him to do things some period of time ago related to this and he didn't, and you didn't take action until the eve of trial.

I do not find that a eve of trial firing of Counsel can put this case off when it has been pending from a remand from the Court of Appeals since 2019.

MS. WILDER: Your Honor, I --

THE COURT: It is time to try this case.

In its final order entered in June 2022, the Trial Court found as pertinent to this appeal:

6. The January 2021 trial date was continued by agreement due to the illness of Mother's attorney. The case was set for trial on January 10 and 11, 2022 and continued again at Mother's request. *See* Motion to Continue filed December 3, 2021. The case was then set for trial on May 23, and 24, 2022. On or about May 6, 202[2], Mother's counsel asked the Court for permission to withdraw, stating that he was required to do so by Rule 1.16 of the Tennessee Rules of Professional Conduct. At a hearing on May 18, 2022, the Court granted Mother's counsel's motion to withdraw. The Court denied Mother's request for a continuance due to the multiple delays in trial at Mother's request and the prejudice to Father, who was paying post-majority child support for three children, two of them who were over twenty-one.

Mother timely appealed to this Court.

Discussion

Mother raises seven issues on appeal. However, we discern one dispositive issue: whether the Trial Court abused its discretion in denying Mother's request for a continuance. Father raises a separate issue of whether this appeal is frivolous.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). Regarding the factors that courts consider in ruling on a motion to continue, we have stated:

“Decisions regarding continuances are fact-specific” and “motions for a continuance should be viewed in the context of all the circumstances existing when the motion is filed.” *Nagarajan v. Terry*, 151 S.W.3d 166, 172 (Tenn. Ct. App. 2003). This Court has held that the party seeking a continuance

carries the burden to prove the circumstances that justify the continuance. *Osagie v. Peakload Temporary Services*, 91 S.W.3d 326, 329 (Tenn. Ct. App. 2002). In order to meet this burden, the moving party must supply some “strong excuse” for postponing the trial date. *Barber & McMurry, Inc. v. Top-Flite Development Corp. Inc.*, 720 S.W.2d 469, 471 (Tenn. Ct. App. 1986) (citing *Levitt & Co. v. Kriger*, 6 Tenn. App. 323 (Tenn. Ct. App. 1927)). Factors relevant to the trial court’s decision include: “(1) the length of time the proceeding has been pending, (2) the reason for the continuance, (3) the diligence of the party seeking the continuance, and (4) the prejudice to the requesting party if the continuance is not granted.” *Nagarajan*, 151 S.W.3d at 172.

Howell v. Ryerkerk, 372 S.W.3d 576, 580-81 (Tenn. Ct. App. 2012) (footnote omitted). A trial court’s decision on a motion to continue is reviewed under the abuse of discretion standard. *Id.* at 579 (citations omitted). Likewise, a trial court’s decision to permit or deny the withdrawal of counsel is discretionary. *Banks v. Univ. of Tenn.*, No. M2017-01358-COA-R3-CV, 2018 WL 3621082, at *7 (Tenn. Ct. App. July 30, 2018), *perm. app. denied Jan. 17, 2019*.

In *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515 (Tenn. 2010), the Tennessee Supreme Court discussed the abuse of discretion standard at length, stating:

The abuse of discretion standard of review envisions a less rigorous review of the lower court’s decision and a decreased likelihood that the decision will be reversed on appeal. *Beard v. Bd. of Prof’l Responsibility*, 288 S.W.3d 838, 860 (Tenn. 2009); *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000). It reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives. *Overstreet v. Shoney’s, Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999). Thus, it does not permit reviewing courts to second-guess the court below, *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999), or to substitute their discretion for the lower court’s, *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998). The abuse of discretion standard of review does not, however, immunize a lower court’s decision from any meaningful appellate scrutiny. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002).

Discretionary decisions must take the applicable law and the relevant facts into account. *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). An abuse of discretion occurs when a court strays

beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007). A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence. *State v. Ostein*, 293 S.W.3d 519, 526 (Tenn. 2009); *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d at 358; *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d at 42.

To avoid result-oriented decisions or seemingly irreconcilable precedents, reviewing courts should review a lower court's discretionary decision to determine (1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the lower court's decision was within the range of acceptable alternative dispositions. *Flautt & Mann v. Council of Memphis*, 285 S.W.3d 856, 872-73 (Tenn. Ct. App. 2008) (quoting *BIF, a Div. of Gen. Signal Controls, Inc. v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *3 (Tenn. Ct. App. July 13, 1988) (No Tenn. R. App. P. 11 application filed)). When called upon to review a lower court's discretionary decision, the reviewing court should review the underlying factual findings using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d) and should review the lower court's legal determinations de novo without any presumption of correctness. *Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d at 212.

Beecher, 312 S.W.3d at 524-25.

Mother argues that the Trial Court erred in allowing her attorney to withdraw from the case only a few days before trial and refusing to grant her a continuance in order to either retain new counsel or prepare to try the case pro se. Father asserts in response that there was no abuse of discretion on the Trial Court's part. He points out that the case had been reset several times, mainly at Mother's request. Father also points to the long-running nature of this matter. Essentially, Father argues that Mother created the problem of which she complains.

In support of his argument, Father cites *In re Estate of Davis*, No. M2012-00559-COA-R3-CV, 2013 WL 5827640 (Tenn. Ct. App. Oct. 28, 2013), *perm. app. denied March*

4, 2014, a probate case in which a party fired his lawyers five days before trial and asked for a continuance. *Id.* at *2. The party wrote to his lawyers stating that “the time has come for our business relationship to end.” *Id.* The trial court denied a continuance. *Id.* We affirmed on appeal, concluding that the trial court did not abuse its discretion either in allowing counsel to withdraw or in denying the party’s request for a continuance. *Id.* at *5-6. We stated, in part:

Mr. Davis fails to show he was prejudiced as a result of the court’s denial of his motion. Unlike a criminal trial, a party in a civil suit has no right to the assistance of counsel. *See Knight v. Knight*, 11 S.W.3d 898, 900 (Tenn. Ct. App. 1999) (party to civil suit has no absolute right to counsel). Mr. Davis created the problem he complains of by terminating his attorneys so close to the start of his trial. He was not a victim of anyone else’s actions over which he had no control.

Id. at *5.

With respect to Mother’s argument that the Trial Court erred in allowing her attorney to withdraw, we disagree. Mother states in her brief that her lawyer gave no reason for his desire to withdraw. That is not correct. Mother’s counsel said that he was required to withdraw because of Rule 1.16 of the Tennessee Rules of Professional Conduct. He did not need to elaborate further. The Trial Court had no basis to force Mother’s counsel to stay on the case when he said that he believed that he had to withdraw for ethical reasons under the facts as presented to the Trial Court. The Trial Court did not abuse its discretion in allowing Mother’s counsel to withdraw.

That leaves the issue of whether the Trial Court abused its discretion in denying Mother’s request for a continuance. To determine that, we apply the factors quoted above as set out in *Nagarajan v. Terry*, 151 S.W.3d 166, 172 (Tenn. Ct. App. 2003). First, the length of time that the proceeding has been pending does not favor Mother’s request for a continuance. These parties have been engaged in litigation for one reason or another for sixteen years. It is in the interest of judicial economy and common sense that this matter finally be resolved. Nevertheless, that is only one factor for consideration. We also consider why Mother asked for a continuance. Under the circumstances, Mother had good reason to ask for a continuance—her attorney withdrew five days before trial. While Father contends that this case is analogous to *In re Estate of Davis*, we find that it is distinct. Mother did not fire her attorney. Rather, Mother’s attorney determined that the rules of professional conduct required him to withdraw. While that is a proper basis to withdraw, it left Mother unrepresented with five days to go before trial including a Saturday and Sunday. As Mother states in her brief, she was “not a willing pro se litigant.” Thus, this factor weighs heavily in favor of granting Mother a reasonable continuance. With respect

to Mother's diligence in seeking a continuance, the record shows that Mother timely asked for a continuance without success, including her attorney's motion for a continuance which was denied in the same hearing before the Trial Court granted counsel's motion to withdraw. This factor favors a continuance. Finally, as to the factor concerning prejudice to the party requesting the continuance, this factor also favors Mother's request for a continuance. While Father argues that Mother is an experienced litigator after all these years of litigation, the fact remains that she is not an attorney. Furthermore, pro se litigants require adequate time to prepare for trial no less than licensed attorneys do. We therefore conclude that the factors governing whether a continuance should be granted weigh largely in Mother's favor.

We do not lightly overturn a trial court's decision when it is reviewed under the deferential abuse of discretion standard. However, the abuse of discretion standard does not fully insulate a trial court's decision from review. Here, we have no concern as to whether the Trial Court properly identified and applied the most appropriate legal principles applicable to its decision on whether to grant or deny Mother's request for a continuance. Nevertheless, the factual basis for the Trial Court's decision is not properly supported by the facts in the record but rather is a clearly erroneous assessment of the evidence. Mother did not willingly proceed pro se. She did not fire her lawyer on the eve of trial. Rather, he chose to withdraw. He did so on an appropriate basis, but he withdrew all the same. What is more, the Trial Court denied Mother's request for a continuance knowing that her lawyer was withdrawing from the case. This left Mother in a position wherein she was still technically represented by counsel but it was understood that she was on the verge of being unrepresented by counsel five days before trial. Mother attempted to seek a continuance on her own initiative, but she was denied. Mother had only five days to prepare for trial as an unwilling pro se litigant who just lost her attorney. Under these circumstances, the Trial Court's decision to deny Mother a reasonable continuance was not within the range of acceptable alternative dispositions. Mother needed an opportunity to either try to retain new counsel or at least have more time to prepare to try the case pro se.

We find that the Trial Court abused its discretion in denying Mother's request for a continuance. We vacate the Trial Court's judgment and remand for a new hearing to be conducted after Mother has had a reasonable continuance in which to try to retain counsel or otherwise prepare for trial pro se. We emphasize that this is to be a reasonable continuance, not an open-ended opportunity to prolong this already long-running case indefinitely. When Mother has had a reasonable amount of time in which to retain new counsel or prepare for trial pro se if she is unable to retain new counsel, this matter is to proceed to trial.

In her brief's conclusion, Mother requests that this matter be assigned to a new trial judge on remand. Mother states that the Trial Court showed bias against her in its rulings.

From our review of the record, Mother is wrong on this point. On the contrary, based on the transcripts, the Trial Court was professional and courteous toward Mother. It simply ruled against her, which is not a sign of bias in itself. In addition, error by a judge does not automatically mean that the judge is biased; it just means that the judge erred. *See Watson v. City of Jackson*, 448 S.W.3d 919, 933 (Tenn. Ct. App. 2014) (“Rulings of a trial judge, even if erroneous, numerous and continuous, do not, without more, justify disqualification.”) (Citations omitted). We detect no hint in this record of bias by the Trial Court against Mother. We deny Mother’s request for a new trial judge on remand.

Finally, we address Father’s issue of whether this appeal is frivolous. As Mother has prevailed on the one dispositive issue on appeal, her appeal is not frivolous. We decline to award Father any attorney’s fees or expenses.

Conclusion

We vacate the judgment of the Trial Court, and this cause is remanded to the Trial Court for collection of the costs below and further proceedings consistent with this Opinion. The costs on appeal are assessed against the Appellee, Joseph Chamblee Wilder.

D. MICHAEL SWINEY, CHIEF JUDGE