

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

ANNETTE S. WALDORF,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2013-T-0094
JOHN ROBERT WALDORF, JR.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 11 DR 265.

Judgment: Reversed and remanded.

Elise M. Burkey, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483 (For Plaintiff-Appellee).

Sarah Thomas Kovoov and *Ned C. Gold, Jr.*, Ford, Gold & Falgiani Law Group, Ltd., 8872 East Market Street, Warren, OH 44484 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, John Robert Waldorf, Jr. ("Husband"), appeals from the August 12, 2013 judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, denying his motion to continue the trial in a divorce matter. For the reasons that follow, we reverse and remand.

{¶2} Husband and appellee, Annette S. Waldorf ("Wife"), were married on October 22, 1983. One child was born as issue of the marriage. The child was a minor

at the time of the divorce but became emancipated during the pendency of the proceedings. On July 25, 2011, Wife filed a complaint for divorce.

{¶3} After two years of litigation, a final hearing was set for July 24, 2013. On May 8, 2013, Husband's attorney sought leave to withdraw citing that Husband "raised ethical and commitment issues." On May 22, 2013, the trial court granted Husband's attorney's request to withdraw. The court indicated the following in its judgment entry: "A status conference was held with all parties present regarding this matter. All parties advised and understand there will be no continuances of this matter which is set for final trial in July."

{¶4} On July 5, 2013, Husband filed a motion to continue. In his motion, Husband noted that he had been unable to obtain new counsel. Additionally, Husband stated that despite his requests, he was also unable to obtain information relating to Wife's 401(k) plans from her attorney. On July 16, 2013, the trial court denied Husband's motion to continue. In its judgment, the court reiterated that all parties were present at a status hearing and were advised that no further continuances would be granted.

{¶5} The final hearing was held on July 24, 2013. Wife was represented by counsel. Husband appeared pro se. At the beginning of the hearing, Husband objected to the trial court's denial of his motion to continue. He maintained that, despite his efforts, he was unable to obtain counsel. The trial court again informed Husband that he had been made aware that no continuance would be granted. The final hearing went forward. The court issued the divorce decree on August 12, 2013.

{¶6} Husband filed a timely appeal and asserts the following assignment of error:

{¶7} “The trial court erred and abused its discretion by denying Appellant’s Motion for a Continuance where the Trial Court had knowledge that the Appellant was, suddenly and through no fault of his own, unrepresented and that he was seeking counsel.”

{¶8} Husband maintains the trial court abused its discretion denying his motion for a continuance as he had only two months to find new counsel, despite the litigation spanning almost two years. Husband argues that he was not seeking a continuance for the purpose of delay, and instead of requiring Husband to represent himself at trial, the trial court should have granted a continuance and provided him with a reasonable opportunity to obtain counsel. Because we find that a continuance should have been granted and that Husband was improperly denied the ability to be represented by counsel at trial, we reverse and remand.

{¶9} The Supreme Court of Ohio has held that “[t]he grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.” *State v. Unger*, 67 Ohio St.2d 65, 67 (1981).

{¶10} The term “abuse of discretion” is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court “applies the wrong legal standard, misapplies the correct legal standard, or relies on

clearly erroneous findings of fact.” *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.).

{¶11} When an appellate court reviews a trial court’s ruling on a motion to continue, the court ““appl[ies] a balancing test, thereby weighing the trial court’s interest in controlling its own docket, including the efficient dispensation of justice, versus the potential prejudice to the moving party.”” *In re K.M.D.*, 4th Dist. Ross No. 11CA3289, 2012-Ohio-755, ¶50, quoting *Foley v. Foley*, 10th Dist. Franklin Nos. 05AP-242 & 05AP-463, 2006-Ohio-946, ¶16, quoting *Fiocca v. Fiocca*, 10th Dist. Franklin No. 04AP-962, 2005-Ohio-2199, ¶7. In dealing with a motion to continue, a trial court should consider the following factors: (1) the length of the delay requested; (2) whether other continuances have been requested and received; (3) the inconvenience to litigants, witnesses, opposing counsel and the court; (4) whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; (5) whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and (6) other relevant factors, depending on the unique facts of each case. *K.M.D.* at ¶51, quoting *State v. Unger*, 67 Ohio St.2d 65, 67-68 (1981).

{¶12} In this case, Husband was clearly put in a difficult position when the trial court permitted his counsel to withdraw. The record is not clear what the circumstances of that request for withdrawal were, other than the vague reference to the fact that Husband’s attorney had questioned certain “ethical and commitment issues.” There may be legitimate reasons for granting the withdrawal after such a lengthy representation and within only two months of trial. However, those reasons are not contained in the record before us. In fact, not only was counsel permitted to withdraw,

but the trial court indicated there would be no continuance of the upcoming trial date. Based on the facts presented, such was clearly error.

{¶13} Husband was put in an arduous position of having to find an attorney who would be willing to undertake a case with nearly two years of litigation and then immediately have to prepare for an upcoming trial date, which clearly is an unreasonable expectation for any successor counsel. Thus, even if Husband had obtained new counsel, he or she would not have been able to competently represent Husband without additional time to prepare for trial. Under these circumstances, the trial court should have given more consideration to and granted Husband's request for a continuance.

{¶14} There is no indication Husband was dilatory in seeking counsel, as his request was made at least three weeks prior to the hearing date. There is also no indication there would have been any prejudice to Wife had a brief continuance been granted. In addition, there were no issues concerning children, as the parties' only child became emancipated. Also, each party was living in a separate residence.

{¶15} It is not clear from the record why the trial court would not grant a brief continuance. The record does, however, reflect that the parties were aware as of May 22, 2013, that no further continuances would be granted and the final hearing, scheduled in July 2013, would proceed.

{¶16} As Husband's request for a continuance was denied, the case proceeded to trial as scheduled. As stated, Husband represented himself pro se. Husband has no legal training or background, was ill-equipped to cross-examine Wife and her witness, and was unable to present his case competently. During trial, the court had to explain

to Husband how the proceedings worked. Husband presumably lacked any understanding of the evidentiary rules as he never objected at any time during the questioning by opposing counsel. Husband reiterated that he was not prepared to question Wife.

{¶17} During his own testimony, Husband experienced confusion over various issues. Husband could not answer certain questions regarding spousal support or the accuracy of Wife's earnings. Husband also experienced confusion over Wife's 401(k). The trial court was aware that Wife failed to provide Husband with documentation of her retirement interest and the reasons for her early withdrawal.

{¶18} Again, the preparations leading up to trial took two years. This fact lends support to the conclusion that this case was complex. The entire trial was impacted due to Husband's lack of counsel. Nevertheless, the trial court ultimately issued, albeit improperly, a final decree dividing the marital assets.

{¶19} In its final judgment, the trial court found that each party shall be "entitled to one-half of all marital portions of all retirement benefits of the other minus any loans taken prior to July 25, 2011, the date of filing." Further, the court found that Wife had spent some of the marital portion of her 401(k) and credited Husband one-half of the marital portion of the funds spent by Wife. Yet, the record does not reflect with specificity the amount, if any, the parties withdrew from their individual 401(k) and/or retirement accounts prior to the July 25, 2011 date of filing. Nor does the record reflect with specificity the values of the parties' retirement accounts acquired during the pendency of their marriage.

{¶20} Wife asserts that the rulings related to the divorce, aside from the 401(k) issue, were favorable to Husband. However, we note that a perceived positive result does not demonstrate a lack of prejudice. It is evident from the record before us that the lack of assistance of counsel and the denial of the continuance put Husband at a great disadvantage. As a result, Husband suffered prejudice by having to represent himself at trial, thereby requiring a reversal of the trial court's judgment and a remand for a new trial. See *Foley, supra*, at ¶27; *Swanson v. Swanson*, 8th Dist. Cuyahoga No. 90472, 2008-Ohio-4865, ¶21.

{¶21} For the foregoing reasons, appellant's sole assignment of error is well-taken. The judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is reversed and the matter is remanded for further proceedings consistent with this opinion.

DIANE V. GRENDALL, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in part and dissents in part with a Concurring and Dissenting Opinion.

TIMOTHY P. CANNON, P.J., concurring in part and dissenting in part.

{¶22} I respectfully concur in part and dissent in part from the majority opinion.

{¶23} Although the majority reverses and remands the entire matter for proceedings consistent with the opinion, I would reverse and remand only for the purpose of receiving evidence relating to the parties' 401(k) and/or retirement benefits,

and the withdrawals of each party prior to the filing date of July 25, 2011. The remaining aspects of the trial court's decree of divorce should remain intact.