

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

ELIJAH COUNCIL	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23514
v.	:	T.C. NO. 2008DR0467
CHARSTINE COUNCIL	:	(Civil appeal from Common Pleas Court, Domestic Relations)
Defendant-Appellant	:	

**OPINION**

Rendered on the 23<sup>rd</sup> day of July, 2010.

ELIJAH COUNCIL, 8545 Gateview Court, Huber Heights, Ohio 45424  
Plaintiff-Appellee

CHERYL R. WASHINGTON, Atty. Reg. No. 0038012, 130 West Second Street, Suite 1600, Dayton, Ohio 45402  
Attorney for Defendant-Appellant

FROELICH, J.

{¶ 1} Charstine Council appeals from a Final Judgment and Decree of Divorce entered by the Montgomery County Court of Common Pleas, Domestic Relations Division, after a non-contested divorce hearing.

{¶ 2} Mrs. Council asserts that the domestic relations court erred in failing to grant

her a continuance of the trial, in rescheduling the hearing for later the same day without sufficient notice, and in failing to reschedule the matter for a contested divorce hearing. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 3} Charstine and Elijah Council were married on March 28, 1983. No children were born of the marriage. The two separated in November 2005. On April 25, 2008, Mr. Council filed a complaint for divorce. Mrs. Council was served four days later. On May 5, 2008, the court scheduled the matter for a "non-contested divorce" on June 19, 2008.

{¶ 4} On June 13, 2008, Mrs. Council filed an Answer and Counterclaim for divorce. Five days later, the court issued a new scheduling order, setting a pretrial for September 10, 2008, and a trial date of October 28, 2008, for the contested divorce. On October 1, 2008, Mrs. Council moved for a continuance due to the fact that her counsel had "a hearing out of town that was inadvertently omitted from my calendar." The trial court granted the motion and rescheduled "the divorce hearing" for March 2, 2009. On March 2, 2009, something apparently happened in court (because the record contains a Reporter's Certificate), but the record does not reflect what occurred at that hearing. The same day, however, the court issued another scheduling order setting a "non-contested divorce hearing" for March 26, 2009. Again, a Reporter's Certificate indicates that some sort of hearing was held on March 26, 2009, but the record does not reflect what occurred. On March 30, 2009, the court rescheduled the matter for "trial" at 9:00 a.m. on May 20, 2009, and noted that "[a]t least three other contested cases have been set on this date." The "Order Scheduling Trial" further provided that "failure to appear, to be prepared, or to proceed with the \*\*\*

trial, may result in the dismissal of a party's action." The record does not indicate the reason for this continuance.

{¶ 5} The next thing the record reflects is that on May 20, 2009, at 1:42 p.m., the trial court held a "final hearing." Mr. Council appeared with his attorney, but Mrs. Council and her attorney were absent. At the beginning of the hearing and after an off-the-record sidebar conference with Mr. Council's attorney, the trial court stated:

{¶ 6} "THE COURT: I'd like the record to reflect this is the seventh time this case has been set for final hearing. Miss Council has not appeared, and we were notified this morning that her attorney asked for a continuance. And I denied the continuance. Her attorney was not feeling well.

{¶ 7} "However, I told her to inform her client that she should be here at 1:30 because we were going to proceed with the case. It's just gone on too long. And there does not appear to be any major issues in this case.

{¶ 8} "And the parties had – parties had negotiated – all right. What was done with 2004 tax return [sic]? Anything done with that? Do you remember some issue about that?

{¶ 9} "[HUSBAND'S ATTORNEY]: Elijah, you know anything about the 2004 tax return?

{¶ 10} "THE HUSBAND: What about it?

{¶ 11} "[HUSBAND'S ATTORNEY]: They've been separated since then, which is the other issue.

{¶ 12} "THE COURT: Let's start at the top. \*\*\*"

{¶ 13} The trial court heard testimony from Mr. Council and from Mr. Council's witness, Barbara Cade-Thompson. Mr. Council testified that no children were born of the marriage and regarding the parties' residency, the length of time they had lived apart, and their respective assets. Mr. Council confirmed the parties' incomes and indicated that the parties' personal property had already been divided, that all bank accounts are separate, that Mrs. Council owned an automobile, and that there were no marital debts. Cade-Thompson confirmed Mr. Council's testimony regarding his residency in Montgomery County and Ohio and the fact that the parties had lived separately for over a year prior to April 2008.

{¶ 14} At the conclusion of this hearing, the court found that Mr. Council was entitled to a final judgment and decree of divorce "on the grounds stated," and the court ordered that a proposed decree be filed forthwith. A Final Judgment and Decree of Divorce, prepared by Mr. Council's attorney, was filed on June 1, 2009.

{¶ 15} Mrs. Council appeals from the trial court's judgment, raising one assignment of error. Mr. Council has not filed a responsive appellate brief.

## II

{¶ 16} Mrs. Council's sole assignment of error states:

{¶ 17} "THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL BY FAILING TO GRANT A REQUESTED CONTINUANCE AND RESCHEDULING A HEARING WITHOUT NOTICE."

{¶ 18} Mrs. Council claims that the trial court abused its discretion in denying her request for a continuance and denied her due process when it ordered her to appear at 1:30

p.m. that afternoon without reasonable notice and an opportunity to subpoena witnesses. Mrs. Council further claims that the trial court denied her the benefit of counsel by requiring her to appear when her counsel was unavailable.

{¶ 19} The grant or denial of a continuance is a matter entrusted to the broad, sound discretion of the trial judge, which will not be reversed absent an abuse of discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, 67. An abuse of discretion requires a finding that the decision was unreasonable, arbitrary and unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶ 20} In evaluating a motion for a continuance, the trial court should consider such factors as: (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) any other relevant factors, depending on the unique facts of the case. *Unger*, 67 Ohio St.2d at 67-68.

{¶ 21} As an initial matter, Mrs. Council makes several statements in her appellate brief that are not reflected in the record. For example, Mrs. Council stated that, when her attorney asked the court for a continuance on May 20, 2009, she “further informed the Court that the parties unfortunately no longer had an agreement and requested the case be rescheduled for a contested hearing. Appellant’s Counsel also informed the Court that opposing Counsel had been informed earlier that week that the parties were no longer in agreement and that the case needed to be rescheduled on the Court’s contested docket.”

When Appellant's Counsel was told that the hearing would occur at 1:30 p.m. that day, counsel "informed the Court that [she] could not be present and also voiced my objection to the lack of notice to my client." In addition, Mrs. Council stated in her brief that she is confined to a wheelchair and receives free transportation from her house to certain appointments, but the transportation needs to be requested in advance, precluding her attendance at trial.

{¶ 22} The record reflects that, by the time of the May 20, 2009, hearing, the trial court had rescheduled the divorce trial on four occasions – June 18, 2008; October 1, 2008; March 2, 2009; and March 30, 2009 – and the action had been pending for nearly 13 months.

The March 30, 2009, scheduling order, which set the May 20, 2009, trial date, provided that continuances of the trial date must be requested by motion and, if the continuance were requested after the pretrial date, the motion must include "a proposed entry which complies with Mont. D.R. Rule 4.20 and is filed with the Clerk of Courts."<sup>1</sup> The order provided notice that failure to appear, to be prepared, or to proceed with the pretrial or trial might result in the dismissal of the party's action.

{¶ 23} Mrs. Council did not request a continuance of the May 20 hearing by motion, and there is no record of the telephone call between Mrs. Council's attorney and the trial court other than the trial judge's brief summary during the trial. As stated above, the trial

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<sup>1</sup>Mont. D.R. Rule 4.20 provides, in relevant part: "The attorney or party, if unrepresented, shall prepare a proposed entry granting the motion for continuance with a space for the new pre-trial, trial or hearing date and submit it to the assigned judge or magistrate along with the motion. This entry shall provide that any relief which ultimately may be granted, may be effective as of the original hearing date, due to the granting of the requested continuance." Mont. D.R. Rule 4.20(C).

court indicated that the case had been set for final hearing seven times, that Mrs. Council's attorney had requested a continuance because she was "not feeling well," that the trial court had denied the continuance, and that counsel was instructed to tell her client, Mrs. Council, to be "here at 1:30 because we were going to proceed with the case. It's just gone on too long. And there does not appear to be any major issues in this case."

{¶ 24} Although the record reflects four (not seven) continuances, and there is no indication of who made the requests or of any explanation for these continuances other than Mrs. Council's motion for a continuance in October 2008, we find no abuse of discretion of the trial court's decision to deny Mrs. Council a continuance on May 20, 2009. The case had been pending for more than a year, and Mrs. Council's attorney requested the continuance on the morning of the final hearing.

{¶ 25} We have held that a party's severe illness may require the granting of a continuance. See *Cook v. Cook* (June 3, 1994), Montgomery App. No. 13849. In *Cook*, the wife sought a continuance of the second day of a divorce trial. Her motion, filed four days before the trial date, indicated that she had contracted a viral infection and pneumonia. The wife attached an affidavit from her physician, who described her condition and the course of treatment and stated that the wife was "currently unable to appear and to testify, either at a deposition or at trial, and will be unable to appear for either a deposition or trial for at least fourteen (14) days, without endangering her own health and/or the health of others." The trial court proceeded without the wife present. We reversed, citing the principle that "[i]f the court determines that the defendant is physically unable to appear in court or to assist in her defense, or that such appearance would endanger his health or result

in substantial prejudice, a continuance should be granted.” *Id.* See, also, *Puckett v. Puckett*, Pickaway App. No. 00 CA 03, 2000-Ohio-1985 (trial court abused its discretion in denying continuance when evidence demonstrated that wife was hospitalized and physician would not release her for divorce trial).

{¶ 26} Similarly, the denial of a continuance may be an abuse of discretion if counsel unexpectedly becomes severely ill and that particular counsel is necessary for the proper presentation of the case. See *State v. Packer*, Lucas App. Nos. L-08-1145, L-08-1146, 2010-Ohio-2627, ¶24-25. Compare *Ham v. Ham*, Wyandot App. No. 16-09-24, 2010-Ohio-1262 (finding wife was not prejudiced by denial of continuance due to preferred counsel’s illness when co-counsel was available to proceed).

{¶ 27} In this case, there is no explanation in the record for Mrs. Council’s attorney’s inability to attend other than the judge’s statement that she was notified that morning that counsel was “not feeling well.” Although there is nothing to suggest that this report was inaccurate, Mrs. Council’s attorney did not file anything with the court – either contemporaneously with her telephone call or between the telephone call and the 1:30 p.m. hearing – to document that her health condition or any other reason warranted the requested continuance.

{¶ 28} Moreover, there is nothing in the record to demonstrate that the trial court or opposing counsel was aware that Mrs. Council would be prejudiced by the court’s denial of the continuance. Although Mrs. Council argues in her appellate brief that she wished to contest the divorce, the record lacks any indication that the parties had not reached an agreement. Nothing was filed with the trial court informing the court of the issues that had

yet to be resolved, and Mrs. Council did not file anything prior to the issuance of the June 1, 2009, final judgment or thereafter to raise those issues. On the limited record before us, the trial court's decision to deny Mrs. Council's last-minute motion for a continuance was not an abuse of discretion.

{¶ 29} In addition, Mrs. Council's due process rights were not violated by the "rescheduling" of the hearing. Mrs. Council was on notice that she was required to attend "trial" on May 20, 2009, beginning at 9:00 a.m.; in the absence of a ruling by the court that the motion for a continuance was granted and based on the record before us, Mrs. Council had no reasonable basis to believe that she was not required to be at the courthouse at the scheduled trial date and time. She cannot complain that she did not have notice when the trial court provided her additional time to appear, i.e., until 1:30 p.m. that day.

{¶ 30} Nor did the trial court deny Mrs. Council the benefit of counsel by denying the motion for a continuance. The trial court having reasonably denied the motion for a continuance and ordered Mrs. Council and her attorney to appear at 1:30 p.m., it was the attorney's obligation to appear at the hearing or to ensure that Mrs. Council had substitute representation at the final hearing.

{¶ 31} The assignment of error is overruled.

### III

{¶ 32} The judgment of the trial court will be affirmed.

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BROGAN, J., and GRADY, J., concur.

Copies mailed to:

Elijah Council  
Cheryl R. Washington  
Hon. Judith A. King