

[Cite as *Moore v. Lanning*, 2010-Ohio-1395.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SHELLY N. MOORE	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009-CA-46
SHAWN A. LANNING	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Fairfield County Court of Common Pleas, Domestic Relations Division, Case No. 2006PA00137

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: March 29, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Gwin, P.J.

{¶1} Plaintiff-appellant Shelly N. Moore appeals a judgment of the Court of Common Pleas, Domestic Relations Division, of Fairfield County, Ohio, designating defendant-appellee Shaw A. Lanning the residential parent and legal custodian of the parties' minor child Asher. Appellant assigns three errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF-APPELLANT'S REQUEST FOR A SHORT CONTINUANCE OF THE CUSTODY TRIAL TO ALLOW HER TO OBTAIN/RE-RETAIN COUNSEL AND FORCED PLAINTIFF-APPELLANT TO PROCEED WITH TRIAL PRO-SE AFTER HAVING ALLOWED PLAINTIFF-APPELLANT'S COUNSEL TO WITHDRAW PRIOR TO TRIAL.

{¶3} "II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING PLAINTIFF-APPELLANT'S REQUEST TO RECESS THE TRIAL UNTIL THE FOLLOWING DAY TO ALLOW HER TO HAVE COUNSEL PRESENT AND TO PRESENT ADDITIONAL WITNESSES THAT WERE NOT AVAILABLE ON THE FIRST SCHEDULED DAY OF TRIAL.

{¶4} "III. THE TRIAL COURT ERRED BY ADMITTING THE REPORT FROM THE COURT ORDERED PSYCHOLOGICAL EVALUATION INTO EVIDENCE AND BY RELYING ON SAID REPORT IN ITS DECISION."

{¶5} The magistrate to whom the matter was referred conducted a hearing and made extensive findings of fact and conclusions of law. Both parties filed objections to the magistrate's opinion, and the trial court modified the order in part as to matters not relevant here.

I.

{¶6} In her first assignment of error, appellant argues the trial court abused its discretion when it overruled her motion for a continuance of the trial to permit her to obtain new counsel after the court had allowed prior counsel to withdraw.

{¶7} The original complaint was filed on May 3, 2006. The magistrate found appellant had filed at least five requests for continuances, and the matter had been pending for over two and one-half years.

{¶8} In *State v. Unger* (1981), 67 Ohio St. 2d 65, 423 N.E. 2d 1078, the Ohio Supreme Court held “the grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of the trial judge.” Syllabus by the court. This court cannot reverse the denial of a continuance unless we find the trial court has abused its discretion, *Id.* at 67, citations deleted. The Supreme Court has frequently defined the term abuse of discretion as implying the court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E. 2d 1140. A reviewing court may not substitute its judgment for that of the trial court in applying the abuse of discretion standard. *Pons v. Ohio State Medical Board* (1993), 66 Ohio St. 3d 619, 621. There is no mechanical test for determining whether the denial of a continuance is arbitrary, and the matter must be analyzed on a case-by-case basis. *Unger*, at 67.

{¶9} The *Unger* court sent out the factors a trial court should apply in evaluating whether to grant a motion for continuance. The factors are: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel, and the court; whether the

delay is for a legitimate reason or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstances which give rise to the request for a continuance; and whatever other relevant factors are presented by the unique facts of each case. *Id.* at 67-68, citations deleted.

{¶10} Appellant argues although the case had been pending for a long time, there had been a significant amount of activity, and in particular, the psychological evaluations took some time to complete.

{¶11} The record indicates appellant's counsel withdrew on October 13, 2004, stating appellant was aware of the pending November 24th court date. Counsel's reasons for withdrawing included failure to pay her fee and client conduct. The magistrate had directed there would be no more continuances when he granted the previous continuance.

{¶12} Our review of the record leads us to conclude the trial court did not abuse its discretion in overruling appellant's motion for continuance. The first assignment of error is overruled.

II.

{¶13} In her second assignment of error, appellant argues the trial court abused its discretion in overruling her request to recess the trial early on the first day of trial and resume the following day so she could present additional witnesses.

{¶14} Appellant argues the matter had been set for a two-day hearing. The record does not support this, At some point the morning of the hearing the court announced it would recess until noon. When the court reconvened, appellant immediately asked for a recess until the next day. The magistrate informed her the matter had not been set

for a two-day hearing and he had another case scheduled for 9:00 am the following day. The magistrate stated his schedule was very full, and the matter would not run over to the second day unless the parties were unable to complete the trial on the first day.

{¶15} On the unique facts and circumstances of this case, this court cannot say the trial court abused its discretion in refusing to recess the matter early.

{¶16} The second assignment of error is overruled.

III

{¶17} In her third assignment of error, appellant argues the trial court erred in admitting the psychological evaluation report.

{¶18} A trial court has broad discretion in determining whether to admit evidence, *Rigby v. Lake County* (1991), 58 Ohio St. 3d 269, 569 N.E. 2d 1056.

{¶19} The trial court appointed a psychologist to perform a psychological and custody and companionship evaluation of the parties, and specifically stated the written evaluations shall be admissible as evidence, but all parties should be given the right to present testimony concerning the evaluations. R.C. 3109.04 permits a court to order an investigative report and such reports will be available to all parties and subject to cross examination.

{¶20} We find the trial court did not abuse in admitting the psychological report.

{¶21} The third assignment of error is overruled.

{¶22} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, of Fairfield County, Ohio, is affirmed.

By Gwin, P.J.,

Farmer, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY

WSG:clw 0309

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SHELLY N. MOORE	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
SHAWN A. LANNING	:	
	:	
	:	
Defendant-Appellee	:	CASE NO. 09-CA-46

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, of Fairfield County, Ohio, is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY