

In re the Marriage of

Charles E. Corry,

Appellant,

and

Theresa Rizzo f/k/a Corry,

Appellee.

Appeal from the District Court of Jefferson County
Honorable Christopher J. Munch, Judge
No. 97DR1971

Division II
Opinion by JUDGE DAILEY
Plank and Davidson, JJ., concur

JUDGMENT AFFIRMED

Frascona, Joiner and Goodman, P.C., Gregg A. Greenstein,
Boulder, Colorado, for Appellant

Law Office of Karin Bagn, Ph.D., Karin Bagn, Boulder, Colorado,
for Appellee

In this dissolution of marriage action between Charles E. Corry (husband) and Theresa Rizzo f/k/a Corry (wife), husband appeals from the trial court's permanent orders pertaining to division of property. We affirm.

I.

Husband first contends that the trial court abused its discretion in denying his motion to continue the permanent orders hearing. We disagree.

The decision whether to grant a continuance is left to the sound discretion of the trial court, and that decision will not be disturbed absent a clear showing of an abuse of discretion. Butler v. Farner, 704 P.2d 853 (Colo. 1985); In re Marriage of Dion, 970 P.2d 968 (Colo. App. 1997). In making this determination, the trial court should consider the circumstances of the particular case, weighing the right of the party requesting the continuance to a fair hearing against the prejudice that may result from delay. Cherry Creek School District No. 5 v. Voelker, 859 P.2d 805 (Colo. 1993).

Here, husband filed his motion for a continuance just two weeks before the scheduled hearing date. In his motion, husband asserted that wife's discovery responses had been incomplete and dilatory and that wife had failed to produce certain financial documents until some 28 days before the scheduled hearing.

Wife responded by arguing that husband's motion was untimely, and that husband had sufficient time to review and analyze the additional financial documents.

Upon review of husband's motion and wife's response to it, we find no clear abuse of discretion in the trial court's denial of the requested continuance. See In re Marriage of Dion, supra. Furthermore, even if we were to conclude that the trial court abused its discretion, husband has failed to demonstrate any prejudice resulting from the trial court's refusal to grant a continuance.

Husband argues that a continuance was necessary because he had alleged that wife was concealing assets. However, the trial court addressed husband's concern by specifically retaining jurisdiction to divide any assets the parties may have failed to disclose at the time of the hearing. The court also authorized the parties to conduct additional limited discovery concerning any alleged undisclosed assets. Finally, the trial court also indicated that if undisclosed assets were later discovered, they would "almost certainly . . . be awarded to the other party."

Because husband has failed to demonstrate any prejudice caused by the trial court's denial of his motion for a continuance, we conclude that any abuse of discretion that may

have occurred does not require reversal. See In re Marriage of Howard, 42 Colo. App. 457, 600 P.2d 93 (1979).

II.

Husband next contends that the trial court abused its discretion when it quashed two subpoenas he issued to Merrill Lynch without providing him with an opportunity to respond to the motion to quash. We perceive no reversible error.

C.R.C.P. 45(b) provides, in pertinent part, that a court, "upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may . . . [q]uash or modify [a] subpoena if it is unreasonable and oppressive" The decision whether to quash a subpoena is discretionary with the trial court and will not be disturbed absent an abuse of that discretion. See Dill v. City of Edmond, 155 F.3d 1193 (10th Cir. 1998); Williams v. District Court, 700 P.2d 549 (Colo. 1985).

Here, the subpoenas at issue targeted alleged undisclosed assets of wife. Husband's attorney served the subpoenas just eight days before the date of the scheduled permanent orders hearing. One day before the hearing, Merrill Lynch filed its motion to quash in which it argued that the subpoenas were duplicative and overly burdensome, and that it would be impossible to obtain the records sought within the requested time. Merrill Lynch further indicated its understanding that

wife had already produced a majority of the requested records. Finally, Merrill Lynch's attorney indicated that husband's counsel had failed to respond to six urgent phone messages regarding the subpoenas. The trial court granted the motion and quashed the subpoenas just prior to the commencement of trial.

Husband argues that he was denied due process because the trial court granted the motion to quash before husband had an opportunity to file a response. However, even if we assume that a due process violation occurred, husband has failed to demonstrate grounds for reversal. Once again, the trial court specifically authorized further discovery concerning alleged undisclosed assets and retained jurisdiction to distribute such assets if discovered. Because husband is free to pursue additional discovery concerning wife's Merrill Lynch accounts, he has failed to demonstrate substantial prejudice caused by the order quashing the subpoenas. See Ricci v. Davis, 627 P.2d 1111 (Colo. 1981) (party's due process rights are not infringed unless he has been prejudiced by the procedures to which he or she objects).

III.

We also disagree with husband's contention that the trial court erred or abused its discretion by retaining jurisdiction

over any undisclosed assets and allowing further discovery on that issue.

It is not unprecedented for a trial court in a dissolution proceeding to retain jurisdiction over undisclosed property. In In re Marriage of Hiner, 669 P.2d 135 (Colo. App. 1983), rev'd in part on other grounds, 710 P.2d 488 (Colo. 1985), the parties agreed that the trial court would retain jurisdiction concerning any undisclosed assets. A division of this court found nothing improper in that provision and noted that it assured fair dealing between the parties, and enhanced the truth-finding function of the trial court. See also In re Marriage of Eisenhuth, 976 P.2d 896 (Colo. App. 1999) (trial court reserved jurisdiction with respect to any undisclosed property in husband's possession or control).

Although husband has repeatedly asserted that wife concealed assets, the trial court made no findings below to support this assertion. In our view, the trial court's decision to proceed with the permanent orders hearing and retain jurisdiction to distribute any undisclosed assets struck a proper balance between husband's concern over such assets and wife's desire to proceed with the dissolution.

We have considered husband's remaining contentions and find them to be without merit.

Finally, we conclude that this appeal is not frivolous. Consequently, we deny wife's motion for attorney fees incurred on appeal. See Wood Brothers. Homes, Inc. v. Howard, 862 P.2d 925 (Colo. 1993); C.A.R. 38(d).

The judgment is affirmed.

JUDGE PLANK and JUDGE DAVIDSON concur.

NOTICE CONCERNING ISSUANCE OF MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-six days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. The timely filing of a petition for rehearing will stay the mandate until the Court has ruled on the petition.

BY THE COURT:

Claus J. Hume, Chief Judge

Ret. for Rehearing
2/24/00