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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF PATERNITY OF D.B.	)	
	)	
J.N.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 34A02-0910-JV-979
	)	
T.B.	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Rosemary Higgins-Burke, Senior Judge
Cause No. 34C01-0904-JP-58

March 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

J.N. (Mother) appeals the denial of her motion for continuance of a hearing in a paternity and custody action filed by T.B. (Father). She presents the following restated issues for review:

1. Did the trial court err in determining that Mother received adequate service of process?

2. Did the trial court err in denying Mother's motion for continuance?

We affirm.

The facts are that Mother and Father conceived a child, D.B., who was born on January 29, 2009. Mother and Father, who were not married, executed a paternity affidavit establishing D.B.'s paternity in Father. Not long after the child's birth, the relationship between Mother and Father deteriorated significantly. Soon, Mother began to frustrate Father's attempts to have contact with D.B. On April 21, 2009, Father filed a motion entitled "Petitioner's Petition to Establish Paternity". The petition alleged that paternity had been established by the filing of the paternity affidavit executed by the parties on January 31, 2009. In point of fact, Mother does not challenge Father's paternity upon appeal and did not do so at the hearing on Father's paternity petition. That matter, at least, is settled. The petition addressed another matter, however – child custody. In the petition, Father asked the court not only for an order confirming he is D.B.'s natural father, but also for an order awarding him custody of D.B. and establishing a child support obligation for Mother. The matter was set for hearing on June 3, 2009. On May 4, before Mother was served, Father moved for continuance and the motion was granted. The hearing was rescheduled for June 17, 2010. On May 12, 2009, William Lindblom, a Lafayette, Indiana police officer,

delivered the summons to Mother while she was in a school parking lot. Lindblom was off duty at the time.

Both parties appeared at the June 17 hearing. Father was represented by counsel, Mother was not. At the outset of the hearing, Mother denied that she was served with process. She claimed that two men (one of whom was Lindblom, as it turned out), approached her while she was sitting in a car in a school parking lot and "threw something in my car." *Transcript* at 46. Mother claimed she "got out and threw it back." *Id*. The trial court rejected Mother's claim that she did not receive notice of the hearing, noting among other things that Mother was present. Mother then asked for a continuance, claiming "I didn't know I had to have an attorney here present in Kokomo because I'm a resident of Illinois." *Id*. at 3. When asked whether she intended to hire an attorney, Mother answered in the affirmative. At that point, Father's counsel objected to a continuance, citing the following reasons:

> [Mother] was served by a private process service on the 12th day of May so she has had a significant amount of time to obtain counsel. At the time [Mother] was not a resident of Illinois. She was residing in Lafayette, Indiana, where she was attending I believe some OWI related or Battery related treatment as well as going to school as well as being employed at a local establishment there. My client has had no contact with the child in this case for 38 days. [Mother] has repeatedly advised him that she intends to take the child and flee to Florida or the State of Washington or any of a variety of other places. It is an intolerable condition for my client at this point in time and to show up here after being served on May 12th and suggest that she doesn't know anything about this and needs counsel and couldn't obtain counsel because she's a resident of Illinois is not only disingenuous, it's fraudulent as far as we're concerned. Something needs to be done to allow my client to have the contact he had with this child prior.

Id. at 4. The trial court denied the request for continuance and the hearing proceeded. At the

conclusion of the hearing, after both Mother and Father had testified about matters pertinent to custody, the court found that Father was D.B.'s natural father and awarded him custody of the child. Near the end of the hearing, after the court advised Mother of her right to appeal the adverse custody ruling, Mother informed the court that she "was in the process of hiring [a named attorney] this morning to come with me." *Id*. at 56.

1.

Mother first contends that the trial court erred in concluding that she had received adequate service of process, claiming that she never received a copy of the summons. Mother claims the trial court violated her due process rights by proceeding with the hearing when she had not received notice of it.

Pursuant to Indiana Trial Rule 4.1(A)(2), "[s]ervice may be made upon an individual … by … delivering a copy of the summons and complaint to him personally[.]" As mentioned previously, Father retained the services of Lindblom, a police officer, to effect service upon Mother. At the hearing, Father introduced an affidavit signed by Lindblom stating that he served the summons on Mother "by placing same in her hands at 5:12 p.m. on the campus of Harrison College [in] Lafayette, Indiana." *Id*. at 13. Mother acknowledged at the hearing that Lindblom placed a piece of paper – undoubtedly a copy of the summons – in her car. Father was not responsible for making sure that Mother read the summons, much less understood it. That she chose to throw it back in Lindblom's car rather than read it is of no moment.

Mindful that Mother essentially admitted that Lindblom was present with the

summons and placed it in her car, and considering Lindblom's sworn statement that he placed the summons in her hand, Mother's act of throwing the summons back in Lindblom's car was tantamount to a refusal to accept service. T.R. 4.16 imposes a duty upon persons being served to cooperate and accept service. It further provides that "[a] person who has refused to accept the offer or tender of the papers being served thereafter may not challenge the service of those papers." *Id*. The trial court did not err in determining that Mother received adequate notice and therefore that the requirements of due process were satisfied.

2.

Mother contends the trial court erred in denying her motion for continuance. Ind. Code Ann. § 35-36-7-1 (West, Westlaw through 2009 1st Special Sess.) governs continuances. Among other things, it sets forth rules pertaining to continuances sought for certain specified reasons. Mother does not argue that her motion for continuance was based on a reason identified in I.C. § 35-36-7-1. When a motion for a continuance is based on non-statutory grounds, the decision whether to grant or deny the motion is committed to the trial court's discretion. *Hamilton v. State,* 864 N.E.2d 1104 (Ind. Ct. App. 2007). We will not disturb such decisions absent "a clear demonstration that the trial court abused that discretion." *Id*. at 1109. An abuse of discretion consists of an "evaluation of facts in relation to legal formulae. In the final analysis, the reviewing court is concerned with the reasonableness of the action in light of the record." *Tapia v. State*, 753 N.E.2d 581, 585 (Ind. 2001). Therefore, the trial court's ruling should be set aside only if it is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable,

and actual deductions to be drawn therefrom. *Tapia v. State*, 753 N.E.2d 581. Although "the facts and reasonable inferences in certain instances might allow for a different conclusion, we will not substitute our judgment for that of the trial court." *J.M. v. Marion County Office of Family & Children*, 802 N.E.2d 40, 44 (Ind. Ct. App. 2004), *trans. denied*.

We reiterate that the trial court determined that Mother was served with the summons on May 12. The trial court rejected Mother's protestations to the contrary as a prevarication (i.e., "[the court does not] look well on people who mislead the court"). *Transcript* at 6. Therefore, she had more than a month to procure counsel but failed to do so. Moreover, Mother knew or should have known that Father sought custody of D.B. and that custody would be addressed at the hearing. Yet, Mother expended no effort in attempting to obtain counsel until the morning of the hearing. Mother's explanations for waiting until the last minute to begin her efforts did not ring true to the trial court and we cannot say that conclusion is without basis. Under these circumstances, we agree with the trial court that Mother lacked diligence in this matter and that her predicament at the June 17 hearing was of her own making. This does not present a compelling reason to grant the request for a continuance.

We are aware, of course, that custody is a serious matter and therefore that courts should perhaps err on the side of granting continuances in most such cases. In this case, however, Mother spent the five weeks that she could have used to retain an attorney instead engaging in considerably less productive behavior. During that time, Mother obtained a protective order against Father, telling him she did so because she "had no choice" in light of

the fact that he "was pulling some kind of an underhanded, sneaky thing," in retaining an attorney in order to establish visitation rights. *Transcript* at 17. The protective order was later removed at Mother's request. According to Father, Mother also threatened to move out of state for the express purpose of frustrating his ability to have contact with his child. In fact, Father expressed fear at the hearing that Mother would flee with the child if she retained custody.

Father testified that after Mother obtained the protective order against him, but before she had it lifted, she called or text-messaged him "hundreds of times over several weeks." *Id*. at 18. He further claimed that over a period of time and as recently as the day before the custody hearing, Mother sent him nude photos of herself and left messages indicating that she "wanted to be with [him] and that if [he is] with her or [has] contact with her or spend[s] time with her then [Father will be] able to see [his] son." *Id*. at 8. Considering these circumstances as a whole, the trial court did not abuse its discretion in denying Mother's request for a continuance.

We note as an aside that the parties were able to present evidence relevant to the matter of custody. Father testified that he was a victim of domestic battery at Mother's hands and that she was ordered to attend an anger management program as a result. The evidence revealed that Mother is employed as an exotic dancer and that she works four or five evenings a week at a club nearly an hour from her home, meaning that she is not at home in the evenings on those days. There was also testimony that Mother has a substance abuse problem. Finally, we observe that Mother is not without recourse should she wish to regain

custody of D.B., as she is free to petition for modification of the current custody arrangement.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.