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IN THE COURT OF APPEALS OF INDIANA

IN RE: THE PATERNITY OF B.R.,)
)
L.K.,)
)
Appellant-Petitioner,)
)
vs.) No. 70A01-0905-JV-261
)
E.R.,)
)
Appellee-Respondent.)

APPEAL FROM THE RUSH SUPERIOR COURT
The Honorable Brian D. Hill, Judge
Cause No. 70D01-0411-JP-55

April 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

L.K. ("Mother") appeals the trial court's order granting custody of B.R. to E.R. ("Father"). Mother raises two issues, which we revise and restate as whether the trial court abused its discretion in denying her motion to continue.[1] We reverse and remand.

The relevant facts follow. In March 2005, Mother and Father were found to be the biological parents of B.R., Mother was given custody of B.R., and Father was allowed parenting time. B.R., Mother, and Father are deaf, and an interpreter was required for all court proceedings.

On December 21, 2007, Mother filed an emergency petition to suspend parenting time, which alleged that B.R. had told Mother that he "had been tied to a bed, placed under a bed, and been abused in other fashions" while visiting Father. Amended Appellant's Appendix at 21. The Rush County Department of Child Services interviewed B.R. on December 20, 2007, and B.R. confirmed allegations of "being bound hand and foot, being blind folded and being tied down to a bed for not wanting to go to sleep." Id. at 24. The trial court originally scheduled a hearing on Mother's petition for January 9, 2008, but later, upon determining that an interpreter had not been appointed, rescheduled the hearing for February 1, 2008.

On January 8, 2008, Father filed a petition for contempt, for modification of decree, and for attorney fees. In his petition, Father alleged that it was in the best interest of B.R. to be placed in the custody of Father, and that Mother failed or refused to comply with court orders, failed or refused to allow Father parenting time, interfered with

[1] Mother also raises the issue of whether the trial court erred in ordering that Mother have no summer 2009 parenting time. Because we reverse on other grounds, we need not address this issue.

communications between Father and B.R.'s school and medical providers, and had made repeated false allegations to various people. An attorney conference was held on February 1, 2008. On June 19, 2008, the court issued an order on telephonic conference ordering the parties to deliver executed medical releases to Behavior Corp. and to cooperate with any investigation conducted by the Department of Child Services.

On August 12, 2008, the court issued a pre-trial order requiring Father and B.R. to participate in further counseling at Behavior Corp., beginning with the counseling session on August 12, 2008. Mother failed to make arrangements for B.R. to attend the August 12, 2008 counseling session because she had a previously-scheduled appointment with a neurologist on that day.[2] On August 15, 2008, Father filed a verified petition for contempt, expenses and for attorney fees, alleging that Mother intentionally failed and refused to appear with B.R. for counseling at Behavior Corp. on August 12, 2008 and requested the court to order Mother to pay his lost wages, his expenses in traveling to the counseling session, and his attorney fees. The court ordered that Mother have B.R. attend the next counseling session scheduled at Behavior Corp. on August 19, 2008, and Mother complied.[3]

On September 5, 2008, Father filed a motion for order requiring Mother to facilitate parenting time for Father, which alleged that Mother had "refused all parenting time since prior to Christmas 2007" and requested the court "to either keep the existing

[2] Also, Mother testified that she did not receive the court's order regarding the August 12, 2008 counseling session prior to the session.

[3] The court took Father's petition for contempt, expenses and attorney fees under advisement.

Order [requiring parenting time on alternating weekends], or require Mother to facilitate parenting time every weekend, to make up for prior time missed between Father and [B.R.]." Id. at 42. On September 11, 2008, Mother filed a response to Father's motion alleging that parenting time for Father "would only be supervised and would be supervised through counseling by Jill Lauer at BehaviorCorp." and that "[s]hould [Father] wish to continue to exercise supervised visitation through BehaviorCorp, [Mother] will cooperate with the scheduling of the same on alternate weekends as required by the current Court Order." Id. at 45-46. On October 16, 2008, the court held a hearing and conducted an *in camera* interview of B.R. off record. At the close of the hearing, the trial court ordered that Father shall have parenting time of B.R. on alternating weekends, and the court scheduled a hearing for January 8, 2009 to address all outstanding issues.

On January 8, 2009, the trial court held a hearing on all pending issues. On the first day of the hearing, Mother presented her case, which included testimony of five witnesses. Father also began the presentation of his case.[4] However, the hearing was not completed by the end of the day on January 8, 2009, and the trial court scheduled to complete the hearing on January 28, 2009. Due to a snow emergency, the trial court rescheduled the second day of the hearing for April 30, 2009. On February 20, 2009, Father filed a verified petition for contempt and for attorney fees alleging that Mother failed to comply with the court's order regarding Father's parenting time, and the trial

[4] Father called three witnesses on the first day of the hearing, one of which was also one of Mother's witnesses.

court ordered Mother to appear at the April 30, 2009 hearing to show cause why she should not be held in contempt.

On March 16, 2009, Mother's attorney filed a motion to withdraw requesting that his appearance be withdrawn in this matter on behalf of Mother because "[t]he attorney/client relationship has deteriorated to the point that it no longer exists and it is in the best interest of [Mother] that she seek other counsel." Id. at 63. That same day, the trial court granted the motion to withdraw filed by Mother's attorney. On March 27, 2009, Father filed a verified petition for contempt, attorney fees, and an order requiring Mother to transfer B.R. for Father's parenting time, and the trial court ordered Mother to appear at the April 30, 2009 hearing.

On April 23, 2009, Mother, *pro se*, filed a handwritten motion to continue the April 30, 2009 hearing. Mother's motion stated in part: "I am request [sic] for motion to continue April 30 Hearing to give me sufficient time to hire counsel and will need time to get money to pay lawyer." Id. at 74. Mother's motion also stated: "I may also try to ask for a court-appointed attorney." Id. On April 27, 2009, the trial court denied Mother's motion to continue.

On April 30, 2009, the court held the second and final day of the hearing on all pending issues. Mother appeared at the hearing without counsel. At the beginning of the hearing, the trial court gave a "brief recap" of the filings in the case, including Mother's emergency petition to suspend parenting time, Father's petition for contempt and modification decree, and the various petitions for contempt and responses. See Transcript at 214. The court also noted that "Mother had rested on her case" during the

first day of the hearing and that Father was "presenting his evidence." Id. at 215. During the second day of the hearing, Father presented the testimony of five witnesses, including his attorney who testified regarding Father's attorney fees. Mother attempted to cross-examine the witnesses, but the court ended her attempts at cross-examining three of them. In addition, Mother also presented rebuttal by calling two witnesses.

Following the presentation of the evidence, the trial court found that Mother consistently and substantially refused parenting time with Father, failed to follow other orders of the court, harassed Father by fax, continually made false allegations of abuse by Father to the Indiana Department of Child Services and various law enforcement agencies, and acted in a manner contrary to B.R. in trying to manipulate and inhibit the relationship between B.R. and Father. The court determined that the above findings "are a substantial and continuing change in circumstances which warrant a modification of the previous decree in this case," and that it is "in the best interests of the child that custody of [B.R.] shall be modified and awarded to Father." Id. at 404. The trial court ordered that Father shall have sole legal and physical custody of B.R. and that Mother shall be entitled to parenting time with B.R. every other weekend. The court also determined that Mother shall not exercise extended parenting time for the summer vacation in 2009. The trial court issued a written order setting forth its findings and conclusions as set forth above.

The issue is whether the trial court abused its discretion in denying Mother's motion to continue. The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court. Litherland v. McDonnell, 796 N.E.2d 1237, 1240

(Ind. Ct. App. 2003), trans. denied. We will reverse the trial court only for an abuse of that discretion. Id. "An abuse of discretion may be found on the denial of a motion for a continuance when the moving party has shown good cause for granting the motion." Rowlett v. Vanderburgh County Office of Family & Children, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), trans. denied; see Trial Rule 53.5. A trial court abuses its discretion when it reaches a conclusion which is clearly against the logic and effect of the facts or the reasonable and probable deductions which may be drawn therefrom. Hess v. Hess, 679 N.E.2d 153, 154 (Ind. Ct. App. 1997). If good cause is shown for granting the motion, denial of a continuance will be deemed to be an abuse of discretion. Id. No abuse of discretion will be found when the moving party has not shown that he was prejudiced by the denial. Litherland, 796 N.E.2d at 1240. The United States Supreme Court has addressed the issue of continuances by stating:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrawise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request was denied.

Ungar v. Sarafite, 376 U.S. 575, 589-590, 84 S. Ct. 841, 849-50 (1964) (citations omitted), reh'g denied.

Mother argues that the trial court erred in denying her motion to continue because she "showed good cause in her motion" and "was greatly prejudiced by the denial in that

she had to represent herself at a critical stage of the proceedings, the final day of a hearing lasting 17 months." Amended Appellant's Brief at 10, 12. Mother argues that "[s]he was without fault in that she had not previously asked for any delays in the case or engaged in dilatory tactics and there is no evidence that she was at fault in her attorney's withdrawal." Id. at 12. Mother further argues that "as the [trial] court knew, she is deaf." Id. at 15. In addition, Mother argues that she "had to proceed pro se in a complicated and protracted custody battle where knowledge of the Rules of Evidence and Trial Practice were essential" and that "[s]he needed time to obtain an attorney in a drawn-out, complicated custody matter involving her son." Id. at 17, 21. Mother argues that "[t]he record is replete with examples of the prejudice resulting from the denial" and that "[t]he Trial Judge ended [Mother's] cross-examination of three (3) of [Husband's] witnesses." Id. at 17. Mother also argues that "[t]here were numerous other failed objections [by Mother] in the record." Id. at 19.

Father argues "[t]he Trial Court did not abuse its discretion when it denied [Mother's] motion for continuance of the April hearing, since [Mother] had over two months actual notice of the pending withdrawal of her legal counsel and forty-five days actual notice after the withdrawal of her attorney to hire new counsel." Appellee's Brief at 6. Father argues that Mother "provided no evidence to the Trial Court of a diligent search for counsel." Id. at 7. Father further argues that Mother "had a month and a half (45 days) to find an attorney" and "did not request a continuance until a week before the hearing." Id. In addition, Father argues that "pro se litigants are held to the same standard as attorneys," and that "[i]f [Mother] wanted an attorney at the hearing, she had

ample time to secure counsel; instead, she waited until the last minute to file a motion to continue a case that had already been going for seventeen months." Id. at 9. Father also argues that "[Mother's] deafness did not prevent her from securing counsel for the April hearing." Id. at 10.

The unexpected and untimely withdrawal of counsel does not necessarily entitle a party to a continuance. Hess, 679 N.E.2d at 154 (citing Koors v. Great Southwest Fire Ins. Co., 530 N.E.2d 780, 783 (Ind. Ct. App. 1988), reh'g denied). "Under some circumstances, however, denial of a continuance based on the withdrawal of counsel may be error when the moving party is free from fault and [her] rights are likely to be prejudiced by the denial." Koors, 530 N.E.2d at 783 (citations omitted). "Further, among the things to be considered on appeal from the denial of a motion for continuance, we must consider whether the denial of a continuance resulted in the deprivation of counsel at a crucial stage in the proceedings." Hess, 679 N.E.2d at 154 (citing Homehealth, Inc. v. Heritage Mut. Ins. Co., 662 N.E.2d 195, 198 (Ind. Ct. App. 1996), trans. denied). We also consider whether the record demonstrates dilatory tactics on the part of the movant designed to delay coming to trial. See Hess, 679 N.E.2d at 155. We must also consider whether a delay would have prejudiced the opposing party to an extent sufficient to justify denial of the continuance. Id. at 154.

In this case, we conclude that Mother demonstrated good cause for a continuance of the April 30, 2009 hearing on all pending issues in that her motion asserted that she needed time to get the money to hire counsel and she was facing findings of contempt, for which she may have qualified for court-appointed counsel, in addition to a

modification of custody. While Mother's motion does not indicate the efforts she had made to hire new counsel prior to filing the motion, we note that her deafness would no doubt have complicated any effort to get new counsel hired and up to speed during the forty-five days that elapsed between the date that Mother's original counsel withdrew on March 16, 2009 and the date of the hearing on April 30, 2009. We also conclude that a delay would not have prejudiced Father to an extent to justify denial of the continuance. Further, we observe that "a parent's interest in the care, custody, and control of his or her children is 'perhaps the oldest of the fundamental liberty interests.'" Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005) (quoting Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054 (2000)). The parent-child relationship is "one of the most valued relationships in our culture." Id. (quoting Neal v. DeKalb County Div. of Family & Children, 796 N.E.2d 280, 285 (Ind. 2003)).

Here, the record reveals that Mother's motion was her first seeking to continue the hearing. Additionally, Mother's counsel represented Mother from the time of the filing of her emergency petition to suspend parenting time on December 21, 2007 to the time of the filing of his motion to withdraw on March 16, 2009, including representing Mother at the October 16, 2008 hearing and on the first day of the hearing on all pending issues on January 8, 2009. We also observe that a hearing in this case was initially scheduled for October 16, 2008, but that due to some miscommunication between the trial court and the interpreter's office a second interpreter[5] was not available and the hearing on all pending

[5] The court required two interpreters, and only one interpreter was available.

issues was scheduled for January 8, 2009. Given that Mother's counsel filed his motion to withdraw on March 16, 2009, Mother's attorney would presumably have represented Mother at the second day of the hearing on all pending issues on the originally-scheduled date of January 28, 2009 had a snow day not compelled the trial court to postpone the hearing until April of 2009.

Further, although Mother presented her witnesses on the first day of the hearing on January 8, 2009, the second day of the hearing was also critical considering that Husband planned to present five of his eight witnesses during that day in support of his petitions for contempt, modification of custody, and attorney fees. We also note that after Mother's attorney had withdrawn, Father filed a verified petition on March 27, 2009 for contempt, attorney fees, and an order requiring Mother to transfer B.R. for Father's parenting time. The case required comprehension of the law with respect to the modification of custody and the rules of evidence and trial procedure.

Under the circumstances of this case, we are of the view that the withdrawal of Mother's attorney deprived Mother of counsel at a "critical stage in the proceedings" in a case involving at least some complexity and that Mother was prejudiced by the denial. See Hess, 679 N.E.2d at 155. Also, in light of the various extensions prior to Mother's motion to continue and our review of the record and the petitions filed by the parties, we cannot say that the record shows that prejudice to Father as the nonmoving party would have resulted from a reasonable postponement or delay of the second day of the hearing

on all pending issues.[6] Therefore, we conclude that the trial court abused its discretion in denying Mother's motion to continue. See Hess, 679 N.E.2d at 154-155 (holding that the trial court erred in denying an appellant's *pro se* motion for a continuance in a dissolution case where the appellant's attorney had withdrawn from the case only four days prior to trial and the appellant had been unable to obtain another attorney); Koors, 530 N.E.2d at 783 (noting that a summary judgment hearing had already been continued six times, but nevertheless finding that "[w]hile the trial court understandably may have been vexed by the numerous continuances of the hearing, the result of the denial of [the] motion for a continuance [three days prior to the hearing] was to deprive [appellant] of representation at a crucial stage of the proceedings"); Homehealth, Inc., 662 N.E.2d at 199 (holding that trial court abused its discretion in denying appellant's motion for continuance and noting that the record contained no evidence that significant prejudice to the appellees would have resulted had the appellant's continuance been granted and that the appellants did not conclusively have knowledge that substitute counsel was necessary "until only a few weeks before trial"); Cf. Riggin v. Rea Riggin & Sons, Inc., 738 N.E.2d 292, 311 (Ind. Ct. App. 2000) (affirming the denial of a motion for continuance where over five months elapsed from the time the movant's attorney withdrew to time of the trial).

[6] Father argues that he was prejudiced because "[d]elaying the hearing would have allowed [Mother] more time to file false allegations, and [Husband] would have struggled to obtain parenting time with [B.R.]." Appellee's Brief at 10. We are confident that the trial court would have been able to take into account any additional allegations made by Mother or Mother's failure to comply with its order regarding Father's parenting time at the hearing on all pending issues even if the second day of the hearing were delayed, and that any such delay would not have prejudiced Father to an extent sufficient to justify denial of a continuance. See Hess, 679 N.E.2d at 154 (citation omitted).

For the foregoing reasons, we reverse the trial court's denial of Mother's motion to continue and remand for a new hearing.

Reversed and remanded.

MATHIAS, J., concurs.

BARNES, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE PATERNITY OF B.R.,	)	
	)	
L.K.,	)	
	)	
Appellant-Petitioner,	)	
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vs.	)	No. 70A01-0905-JV-261
	)	
E.R.,	)	
	)	
Appellee-Respondent.	)	

BARNES, Judge, dissenting.

I respectfully dissent from the majority's conclusion that the trial court abused its discretion by denying Mother's request for a continuance of the April 30, 2009 hearing.

Our supreme court's recent case of Gunashekar v. Grose, 915 N.E.2d 953 (Ind. 2009), is instructive. In Gunashekar, the defendants' attorney filed a motion to withdraw his appearance eight weeks before the trial. The trial court granted the request six weeks before the trial. Eleven days before trial, the defendants filed a pro se request for a continuance to hire new counsel. The trial court denied the motion. On appeal, our

supreme court held that the trial court did not abuse its discretion. In particular, the court held:

> [T]he trial court was entitled to consider how long the trial had been scheduled, the lack of explanation for eight weeks of apparent inaction, the relative simplicity of a three-witness bench trial, and the potential that the request was a conscious gaming of the system.

Gunashekar, 915 N.E.2d at 956. The defendants also argued that the continuance should have been granted because their English was limited. The court rejected that argument, holding:

> The trial judge who heard that motion and heard the Gunashekars during trial was in a much better position to judge their relative ability to communicate, which the transcript suggests was reasonably good. While Rudrappa sometimes indicated a lack of legal knowledge, communication in English did not appear to be a real problem.

Id. at 955 n.2.

Similarly, here, Mother argues that the trial court abused its discretion by denying her motion for a continuance. Hearings were held on this matter on October 16, 2008 and January 8, 2009, at which time Mother presented her evidence and Father presented some of his evidence. The final portion of the hearing was ultimately scheduled for April 30, 2009. Mother's attorney filed a motion to withdraw on March 16, 2009, and the trial court granted the motion on the same day. Mother filed a motion for a continuance on April 23, 2009, seven days before the final portion of the hearing. Mother suggests that communication in getting a new attorney would be difficult because she is deaf, but she

never alleged that she attempted to get a new attorney, much less that she had difficulty in doing so.

Further, the "potential that the request was a conscious gaming of the system" is high here. Gunashekar, 915 N.E.2d at 956. The trial court found that Mother "consistently and substantially refused to follow" the court's orders, harassed Father by fax, "continually made false allegations of abuse by the Father to the Indiana Department of Child Services and various law enforcement agencies," and "consistently [tried] to manipulate and inhibit the relationship between the child and his father." Tr. p. 404.

The trial court was in the best position to determine Mother's ability to communicate and her motivations for requesting the continuance. As in Gunashekar, I conclude that the trial court did not abuse its discretion by denying Mother's motion for a continuance. Further, I would affirm the trial court's denial of extended summer parenting time to Mother during the summer of 2009.