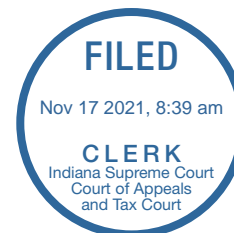


## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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In the Matter of the Termination  
of the Parent-Child Relationship  
of: D.E., and M.E. (Minor  
Children), and

J.E. (Father),

*Appellant-Respondent,*

v.

Indiana Department of Child  
Services,

*Appellee-Petitioner.*

November 17, 2021

Court of Appeals Case No.  
21A-JT-895

Appeal from the Madison Circuit  
Court

The Honorable Thomas Clem,  
Senior Judge

Trial Court Cause Nos.  
48C02-2003-JT-52  
48C02-2003-JT-53

**Brown, Judge.**

[1] J.E. (“Father”) appeals the involuntary termination of his parental rights to his children, D.E. and M.E. (“Children”). We affirm.

### *Facts and Procedural History*

[2] Father and T.H. (“Mother”) are the parents of D.E., born July 14, 2015, and M.E., born October 13, 2016.<sup>1</sup> On February 22, 2017, the Department of Child Services (“DCS”) filed petitions alleging that Children were children in need of services (“CHINS”) because Father could not restrict Mother’s access to Children when she was under the influence of drugs, the home Children were living in lacked running water, and parents could not provide stable, suitable housing for Children. On October 3, 2017, Father admitted Children were CHINS due to his incarceration and inability to care for them. Following a hearing, the court entered a dispositional order on October 31, 2017, requiring Father to participate in services after his release from incarceration. The dispositional order required Father to participate in individual and family counseling, complete a drug and alcohol assessment and anger management assessment and follow all recommendations, submit to random drug screens, successfully complete parenting classes, secure and maintain adequate housing and a source of income, and abstain from the use of drugs and alcoholic beverages.

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<sup>1</sup> Mother’s parental rights were also terminated, but she does not participate in this appeal. We limit our recitation of the facts to those relevant to Father.

[3] Father was released from incarceration on January 18, 2018, but did not contact DCS upon his release to begin the services required by the dispositional order. On March 7, 2018, the permanency plan for Children was reunification with a concurrent plan for adoption. On July 25, 2018, Father was charged with domestic battery committed in the presence of a child less than sixteen years old as a level 6 felony, which was later dismissed on April 11, 2019. On August 20, 2018, the court held a review hearing at which it found that Father was incarcerated and unable to participate in or complete the required services. The court held a permanency hearing on February 13, 2019, and found that Father had been arrested several times, had “numerous no-shows for random drug screens,” missed six visits with Children through Children’s Bureau, and was unable to provide Children a safe and stable home. Appellant’s Appendix Volume II at 30.

[4] On April 3, 2020, DCS filed petitions to terminate Father’s parental rights. On June 10, 2020, at the initial hearing on the termination petitions, the court appointed Father counsel and set a fact-finding hearing for August 11, 2020. Review hearings held after the filing of the termination petitions showed that Father had been noncompliant with services, missed numerous scheduled visits with Children, tested positive for hydrocodone and amphetamine when he submitted to random drug screens, and was otherwise unable to provide stability or a safe home environment for Children.

[5] An August 10, 2020 entry in the court’s chronological case summary (“CCS”), shows that the court reset the fact-finding hearing to December 1, 2020. A

December 1, 2020 order following the fact-finding hearing indicates the court heard “partial evidence” and continued the hearing until February 2, 2021.<sup>2</sup> *Id.* at 53. On January 28, 2021, DCS, at the request of Children’s Court Appointed Special Advocate (“CASA”), moved to continue the fact-finding hearing because CASA was on maternity leave and was “physically unable to participate, even in a Zoom format.” *Id.* at 51. Father had no objection to the continuance, and on January 29, the court granted the request and rescheduled the hearing for March 16, 2021.

[6] A March 1, 2021 CCS entry indicates Children’s CASA filed a report on March 1, 2021, for the March 16, 2021 fact-finding hearing. The report noted that after nearly four years of reunification efforts, Father continued to struggle with maintaining stability, that he had “not taken full advantage of the recommended services/assistance provided” in order “to improve [his] current/future situations,” and that he was unable to provide “a well-balanced life for [Children].” *Id.* at 59. CASA further opined that Father was currently unable to remedy the “reoccurring issues that would result in abuse and/or neglect” of Children and that “adoption is the best permanency decision for [Children].” *Id.*

[7] On March 12, 2021, Father moved for a continuance because Father’s counsel had several other hearings scheduled for March 16, 2021. Father’s motion

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<sup>2</sup> The transcript of the December 1, 2020 fact-finding hearing is not included in the record.

indicated that DCS had no objection to the continuance and that he had not previously sought a continuance in the termination case, and that CASA objected to the continuance. On March 15, 2021, the court granted Father's motion and rescheduled the fact-finding for April 27, 2021.

[8] On April 27, 2021, the court held the fact-finding hearing, but Father did not appear. At the outset of the hearing, the following exchange occurred:

THE COURT: . . . I had a message from the Court Reporter that says that uh Father has suffered a heart attack and is in the hospital. Do you have any confirmation of that?

[DCS's Counsel]: I do not your Honor. This is the first I've heard of it (INAUDIBLE) previous hearing.

THE COURT: Oh I I know. I know you had to struggle with me. . . . [A]ny information on that from anybody?

[Father's Counsel]: Your Honor I am the attorney for Father and . . . I have not had any communication with him for quite a while. He has had health problems in the past but I was not aware of any recent heart attack but I was not able to get a hold of him last week at all prior to me going on vacation.

THE COURT: Well if he's had a heart attack and is in the hospital that that's certainly a . . . circumstance that . . . is (INAUDIBLE) continuance I believe. [I]f it can be confirmed. Did you say Brittni let us know that?

THE COURT REPORTER: Yes. His family had telephoned the office and let her know that. [S]he is the one who answered the phone. [W]e do have a phone number for him. I don't know

who it's for but they left a phone number. I don't know if it's his family member or [Father].

Transcript Volume I at 4-5.

[9] The court then asked Father's counsel if he would call the number that had been provided to try to reach Father. CASA told the court that Father "has used in the past that he has had health issues specifically a heart attack at times where myself and the family case manager have confirmed that they were actually panic attacks that he went to the Hospital" and that "CASA would really hope that we do not have to continue this um because he has used this . . . health concern in the past and actually has not had a heart attack." *Id.* at 6-7.<sup>3</sup> The court stated that "[i]f there is a confirmation that he did have a . . . heart attack and he is in the Hospital now, that is one thing . . . and I . . . think that in anybody's book that would be prima fascia [sic] basis to continue" the fact-finding hearing. *Id.* at 7.

[10] Father's counsel then stated he "called the number . . . if it's what I believe to be [Father's] number" but "no one is picking up." *Id.* His counsel then stated "I am duty bound to request a continuance. I can't . . . (INAUDIBLE) in the hospital or not. [T]his case has been pending for quite a while . . . and he has

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<sup>3</sup> Molly Benitez, who provided supervised visitation services for Father, also stated that Father would "claim to feel that he was having heart attacks but the documentation would show that he just had a . . . panic attack or anxiety attack" and that Father was inconsistent in providing documentation to substantiate or confirm the reason, health-related or otherwise, as to why he missed scheduled visitations. Transcript Volume I at 21-22.

not contacted me directly or contacted the office directly about this[.]” *Id.* The court stated that “the manner in which it came before the Court is semi questionable . . . it sort of come in out of the . . . blue and I would think that if it was going to be some legitimate situation certainly the first person they would have contacted would be counsel . . . .” *Id.* at 7-8. In response, Father’s counsel then proposed, “Your Honor if we . . . what I might suggest is we move forward today and then possibly you give my client ten days to respond one way or the other . . . .” *Id.* at 8. The court stated, “in the absence of confirmation between now and the end of the hearing, I will . . . take . . . suggestions[.]” and Father’s counsel responded, “Okay[.]” *Id.* at 8. The court then called the case for hearing, and asked if there were any preliminary comments, and Father’s counsel stated “[n]o your Honor.” *Id.*

[11] Father’s counsel was then able to contact Father, and the following exchange occurred:

[Father’s Counsel]: I apologize . . . I did finally get [Father] on my telephone. He is on speaker here now. He is currently at Ascension in Anderson in the emergency room. He (INAUDIBLE) did verify that he is there and . . . he is on my . . . cellphone if you wan[t] . . . for me to ask him a few questions real quick.

THE COURT: Well is he able to hear the proceeding? In this format?

[Father’s Counsel]: He can hear the proceedings in this format. I am not sure he can really participate in the proceedings and . . . given the way it sounds like he is not doing very well so.

THE COURT: Well we will go . . . and do the protocol we set up before-

[Father's counsel]: Okay-

THE COURT: And then perhaps we will move to medical personnel and see what his situation is.

[Father's counsel]: Okay that will work. Thank you.

*Id.* at 14. Shortly thereafter, the court asked Father's counsel if he was ready to proceed, and Father's counsel said "Yes I am ready to go. My . . . client is not going to be able to participate but subject to what we talked about before I am (INAUDIBLE)." *Id.* at 15. The court then proceeded with the fact-finding hearing and heard evidence.

[12] After DCS rested, the court asked Father's counsel if there was any improvement with respect to Father's health situation, to which Father's counsel stated "No your Honor. He . . . is not going to get back on. If he is not having a heart attack he is having a very serious panic attack one way or the other. He is going to probably be in the emergency room at Ascension for quite awhile today." *Id.* at 95. At the conclusion of the hearing, the court stated it would "allow the parties to submit proposed findings of fact and conclusions of law and a proposed order" because Father's counsel was "in a sort of a . . . situation where he . . . might just need a little bit more time to try to fill in some gaps of the record," and that it would take the matter "under advisement for ten days." *Id.* at 106-107.



[13] On April 30, 2021, the court issued an order, finding that Father had not enhanced his ability to parent Children, failed to follow Children’s case plan and to comply with court-ordered services, and had a history of positive screens for drugs for which he had no valid prescription. The court concluded that DCS proved by clear and convincing evidence the necessary elements of Ind. Code § 31-35-2-4(b)(2) and terminated Father’s parental rights.

### *Discussion*

[14] Father argues that the trial court abused its discretion by failing to continue the hearing.<sup>4</sup> “Generally speaking, a trial court’s decision to grant or deny a motion to continue is subject to abuse of discretion review.” *In re K. W.*, 12 N.E.3d 241, 244 (Ind. 2014). The record reveals that Father’s counsel stated he was “duty bound to request a continuance” because of Father’s health issues, but subsequently withdrew his oral request for the continuance and proceeded with the hearing. Transcript Volume I at 7. Specifically, Father’s counsel stated: “what I might suggest is *we move forward today* and then possibly you give my client ten days to respond one way or the other . . . .” *Id.* at 8 (emphasis added). Father’s counsel later stated “I am ready to go” although Father was unable to participate. *Id.* at 15. The court then proceeded with the fact-finding

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<sup>4</sup> Father does not develop an argument that either the court’s findings or conclusions were clearly erroneous and has therefore waived any argument on that basis. *See Matter of C. C.*, 170 N.E.3d 669, 675 (Ind. Ct. App. 2021).

hearing. Under these circumstances, we cannot say Father is entitled to reversal.

[15] To the extent Father argues the court violated his due process rights in failing to continue the hearing, Father failed to raise an objection on due process grounds at the fact-finding hearing. Accordingly, his argument is waived. *See In re N.G.*, 51 N.E.3d 1167, 1173 (Ind. 2016) (holding that a party may waive a constitutional claim, including a claimed violation of due process rights, by raising it for the first time on appeal) (citing *McBride v. Monroe Cnty. Off. of Fam. & Child.*, 798 N.E.2d 185, 194-195 (Ind. Ct. App. 2003)). Waiver notwithstanding, the record shows that, while Father was not present at the fact-finding, he was represented by counsel, and his counsel was not denied the opportunity to present evidence, confront adverse witnesses, or make arguments. In addition, and to the extent he argues that the trial court erred by issuing its order before he could submit proposed findings, we note that, although the court issued the order before the expiration of the ten-day period, there is no indication that Father attempted to submit proposed findings and conclusions or other materials after the court issued the order. There is also no indication that he otherwise attempted to challenge the termination order before the ten-day period expired. And, again, on appeal, he does not challenge any of the trial court's findings or conclusions, and we cannot say that Father is entitled to reversal.

[16] Affirmed.

Najam, J., and Riley, J., concur.