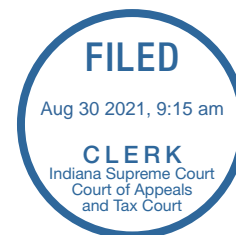


## MEMORANDUM DECISION

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

F.R.,

*Appellant-Respondent,*

v.

Indiana Department of Child  
Services,

*Appellee-Petitioner.*

August 30, 2021

Court of Appeals Case No.  
21A-JT-420

Appeal from the Lake Superior  
Court

The Honorable Thomas P.  
Stefaniak, Jr., Judge

Trial Court Cause Nos.  
45D06-2007-JT-81 & 45D06-2007-  
JT-82

**Riley, Judge.**

## STATEMENT OF THE CASE

- [1] Appellant-Respondent, F.R. (Father), appeals the trial court's denial of his motion for a continuance of the fact-finding hearing on a petition to terminate his parental rights to his minor children, A.M. and F.M. (collectively, Children).
- [2] We affirm.

## ISSUE

- [3] Father presents the court with one issue, which we restate as the following: Whether the trial court abused its discretion when it denied his motion for a continuance.

## FACTS AND PROCEDURAL HISTORY

- [4] F.M. was born on January 17, 2016, and his brother, A.M., was born on March 14, 2017, to A.M. (Mother) and Father (collectively, Parents). On June 16, 2017, the Department of Child Services (DCS) removed Children from Parents' care based on allegations of ongoing gang activity, gun violence, drug use, and domestic violence in their home. On June 20, 2017, DCS filed a petition alleging that Children were children in need of services (CHINS). On October 17, 2017, the trial court adjudicated Children to be CHINS. Parents were offered clinical assessments, substance abuse assessments, random drug and alcohol screens, homebased services, domestic violence counseling, individual counseling, a parenting assessment, Real Fatherhood Initiative services, and supervised parenting time. In addition, Father was ordered to establish

paternity. These services were aimed at addressing Parents' housing and employment instability, drug use, and parenting abilities, among other things.

[5] On October 3, 2019, Mother was killed in a drive-by shooting. Children were never returned to Father's care. Father was incarcerated for various reasons throughout the CHINS and the instant proceedings and was only at liberty in society for five months during the period from June 2017 to February 2021. Father completed parental and clinical assessments at the beginning of the CHINS case but did not follow through with any of the resulting recommendations for treatment. Father attended only three out of seventeen CHINS review hearings for Children and did not attend any hearings after October 2019. Father did not establish paternity, stable employment, stable housing, or a bond with Children. Father only submitted to two random drugs screens after October 2017, and he did not complete individual therapy or domestic violence counseling.

[6] Father's last period of being free in society was between February and April of 2020. After he was released from incarceration on February 14, 2020, Father contacted DCS family case manager Emanuel Weekley (FCM Weekley), who again referred Father to Real Fatherhood Initiative services. Despite Real Fatherhood Initiative service providers' efforts to accommodate Father's needs and schedule, Father completed only four of eight sessions offered to him, and he attended only one out of eight scheduled individual therapy sessions. During the same two-month period, Father attended only two out of six scheduled parenting time sessions with Children. Father's last contact with

Children was over the telephone on April 14, 2020. Although Father had expressed his desire to improve himself so that he could retain his parental rights, Father had also told FCM Weekley that he was unable to care for Children.

[7] On April 15, 2020, Father was arrested on charges of Level 3 felony armed robbery, Level 5 felony battery by means of a deadly weapon, Level 5 felony felon carrying a handgun, Level 6 felony battery resulting in moderate bodily injury, and two counts of Level 6 felony pointing a firearm at another. Due to the on-going COVID-19 pandemic, Real Fatherhood Initiative services were provided virtually to Father through his jailhouse Telmate account. However, Father was unable to attend his services consistently because he lost his Telmate account privileges as punishment for his poor behavior in jail.

[8] On July 6, 2020, DCS filed a petition seeking to terminate Father's parental rights to Children. On July 17, 2020, DCS personally served Father at the Lake County Jail with a copy of its petition to terminate, a summons and notice of hearing, and a notice of possible default judgment. On October 13, 2020, the trial court appointed Termination Counsel, who represented Father throughout the termination proceedings. On January 15, 2021, Father and Termination Counsel were served with the trial court's order setting a virtual hearing on February 3, 2021, on DCS' termination petition. On January 22, 2021, DCS sent Father a letter at the Lake County Jail regarding the termination fact-finding hearing set for February 3, 2021. The letter explained that due to the COVID-19 pandemic, the hearing would be conducted virtually; Father had a

right to appear at the hearing; and that Father's failure to appear at the hearing would result in decisions being made in his absence. DCS' letter explained that if Father could not appear at the hearing, he should call or write the judge presiding over the case. DCS also provided the address and telephone number of the trial court.

[9] On February 3, 2021, the trial court convened the virtual termination fact-finding hearing. Father was still being held in jail on his latest charges and did not appear in-person or virtually. Termination Counsel requested a continuance on Father's behalf because Counsel had not communicated with Father regarding how Father wished to proceed at the hearing. In support of Father's motion, Termination Counsel stated that Father's Telmate account had been suspended, he had not received any emails from Father, and Counsel did not feel comfortable meeting with Father in person at the jail because of the danger presented by COVID-19. Termination Counsel stated that, at some unspecified point, he had received a letter from Father, but the nature of the letter is not clarified in the record. Termination Counsel asked the trial court if Father had reached out directly to the court to request a telephonic hearing, and the trial court indicated that it had checked for such a request and had not found any.

[10] DCS objected to the continuance, arguing that Father must show that he was free from fault in requesting the delay. DCS proffered that the evidence would show that Father's Telmate account had been suspended at least three times since June 2020 due to his bad behavior, Father had only appeared at three out

of the seventeen hearings held in the CHINS proceedings, and that he had last appeared in September 2019. Based on his pattern of Telmate suspensions and his failure to appear in the CHINS proceedings, DCS argued that it was unlikely that Father would appear for any additional hearings.

[11] The trial court confirmed with DCS' counsel that Father's history of having his Telmate privileges suspended would come into evidence. After receiving that assurance, the trial court denied the motion for a continuance, finding that Father had failed to show good cause. The trial court further found that it was "common knowledge" that jail officials used Telmate account suspension as a punishment for bad behavior, Father's past inability to communicate with his counsel was his own fault, and Father's history of Telmate suspensions permitted an inference that his most recent suspension was also his fault. (Transcript p. 7).

[12] The initial FCM on the CHINS case and FCM Weekley both testified at the hearing and were cross-examined by Termination Counsel. FCM Weekley reported that Children were then living in a pre-adoptive home with a relative. FCM Weekley testified that being able to do virtual services in jail was a privilege that a prisoner loses for breaking jailhouse rules. FCM Weekley confirmed that Father had lost his privileges for two weeks in June 2020, one week in August 2020, the entire months of October and November 2020, and he was presently suspended. Prior to a group admission of DCS' exhibits, counsel for DCS confirmed that all its proffered exhibits had been provided to

Termination Counsel prior to the hearing. Termination Counsel provided closing argument on Father’s behalf.

[13] On February 11, 2021, the trial court issued its Order, terminating Father’s parental rights to Children.

[14] Father now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### I. *Standard of Review*

[15] Father contends that the trial court improperly denied his motion for a continuance made on the morning of the termination fact-finding hearing.<sup>1</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, 243-44 (Ind. 2014). A trial court abuses its discretion when its denial of a continuance 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.” *Id.* at 244. We may find that a trial court has abused its discretion in denying a continuance motion when the moving party has shown good cause, but we will not find an abuse of discretion when

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<sup>1</sup> Father states in his “Issues Presented on Appeal” that his due process rights were violated when the trial court denied him a continuance. Father did not object on this basis at trial, thus waiving the issue. *See In re K.S.*, 750 N.E.2d 832, 834 n.1 (Ind. Ct. App. 2001) (finding that mother had waived her due process claim because it was brought for the first time on appeal). Father also fails to develop any separate argument regarding his due process claim, further waiving his argument. *See* Ind. Appellate Rule 46(A)(8)(a) (providing that contentions in an appellant’s brief must be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal). Therefore, we do not address the issue.

the moving party has not demonstrated that he or she was prejudiced by the denial. *Id.* “The party seeking a continuance must show that he or she is free from fault[,]” and there is a “strong presumption that the trial court properly exercised its discretion.” *In re B.H.*, 44 N.E.3d 745, 748 (Ind. Ct. App. 2015), *trans. denied*. The decision to grant or deny a continuance turns on the facts and circumstances present in a particular case. *In re M.S.*, 140 N.E.3d 279, 285 (Ind. 2020).

## II. *Analysis*

[16] Termination Counsel requested a continuance in order to consult with Father regarding the representation. Thus, we are not presented with a scenario wherein a continuance was sought in order to allow Father to attend at some later date after his release from incarceration or to transport Father from jail to the termination hearing. *Compare In re K.W.*, 12 N.E.3d at 244-48 (applying an eleven-factor test relevant to a transport request to mother’s claim that the trial court improperly denied her a two-week continuance so she could be present after her release from jail). Termination Counsel represented to the trial court that he had not consulted with Father regarding how to proceed at the hearing because (1) Father’s Telmate account had been suspended; and (2) Counsel was uncomfortable visiting Father at the jail due to the danger of COVID-19.

[17] The historic COVID-19 pandemic has presented unique dangers to public health and challenges to legal representation. Father was not responsible for the pandemic or Termination Counsel’s reluctance to visit him in person at the Lake County Jail. However, in-person consultation was not the only option for



Father to communicate with Termination Counsel regarding the termination proceedings. Termination Counsel was appointed on October 13, 2020, and on January 21, 2021, Father and Termination Counsel were served with an order setting the February 3, 2021, termination fact-finding hearing. DCS also sent Father and Termination Counsel a letter on January 22, 2021, furnishing details about the hearing. There was no evidence presented that Father could not have written his counsel regarding the representation and how he wished to proceed; indeed, he wrote his counsel at least one letter prior to the fact-finding hearing. Electronic mail was also apparently an option for communication, as Termination Counsel represented at the hearing that he had received no emails from Father. In addition, Father's Telmate privileges were not suspended during the entire representation, yet there is no evidence that Father made any effort to contact Termination Counsel using that mode of communication when it was available to him. More importantly, it was Father's burden to show that he was without fault in seeking the continuance. *See In re B.H.*, 44 N.E.3d at 748. Father did not show that he was without fault in having his Telmate privileges suspended, so he did not meet that burden. Father argues that "there was no evidence to verify that the reason that [he] did not or could not appear at the virtual fact-finding was because of his own nonfeasance or malfeasance." (Appellant's Br. p. 11). This argument is not persuasive because it ignores that Father bore the burden of proof to show his lack of fault, and so the dearth of evidence regarding the reason for Father's non-attendance and/or unavailability for consultation was fatal to his motion.

[18] We also conclude that Father has failed to demonstrate to us that he was prejudiced by the denial of his motion for a continuance. Relying on this court's decision in *In re A.S.*, 100 N.E.3d 723 (Ind. Ct. App. 2018), Father argues that he was prejudiced because he “was ultimately judged as an incarcerated parent[,]” and a short delay would not impact the Children. (Appellant's Br. p. 14). However, *In re A.S.* involved a father whose continuance request came just twenty-four days before he was to complete Purposeful Incarceration and would receive a guaranteed modification of his thirteen-year sentence. *Id.* at 725-26. During the fifteen-month pendency of his drug charges case, the father had bonded with his child by exercising supervised parenting time every sixty days, and he had completed some behavioral skills programing. *Id.* at 725. We concluded that under those circumstances, the father had shown prejudice resulting from the denial of the continuance because it had allowed DCS to argue, and the trial court to find, that the father's release date was five years in the future, even though it was apparent to all that was most likely not the case. *Id.* at 728. Thus, we held that the father “was judged as an incarcerated parent, rather than as a parent whose incarceration status was about to change.” *Id.*

[19] We do not find *A.S.* to be helpful to Father because he did not seek to continue the hearing to a date after he had been released from incarceration, as *A.S.* had. Therefore, the cases are factually distinguishable. Even if he had, there is no evidence in the record regarding Father's release date, let alone that his release from prison was imminent. In addition, Termination Counsel was present at

the termination hearing, had the opportunity prior to the hearing to review all the exhibits admitted by DCS, cross-examined DCS' witnesses, and argued in his closing statements against the termination of Father's rights. Under these circumstances, Father has failed to show that he was prejudiced by the denial of his motion for a continuance. *See In re B.H.*, 44 N.E.3d at 749 (declining to reverse due to the denial of mother's continuance motion despite her absence from trial where she was represented throughout the termination proceedings, her counsel cross-examined witnesses, and her counsel had the opportunity to introduce evidence on her behalf).

## **CONCLUSION**

- [20] Based on the foregoing, we conclude that the trial court did not abuse its discretion when it denied Father's motion for a continuance.
  
- [21] Affirmed.
  
- [22] Najam, J. and Brown, J. concur