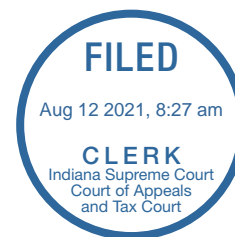


## MEMORANDUM DECISION

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.



---

### ATTORNEYS FOR APPELLANT

Riley L. Parr  
Lebanon, Indiana  
Randall L. Parr  
Indianapolis, Indiana

### ATTORNEY FOR APPELLEE

Scott F. Bieniek  
Bieniek Law, P.C.  
Greencastle, Indiana

---

## IN THE COURT OF APPEALS OF INDIANA

---

Kelly Lyons,  
*Appellant-Respondent,*

v.

Harold Parker,  
*Appellee-Petitioner.*

August 12, 2021

Court of Appeals Case No.  
21A-JP-386

Appeal from the  
Putnam Superior Court

The Honorable  
Daniel W. Kelly, Special Judge

Trial Court Cause Nos.  
67D01-1711-JP-75  
67D01-1711-JP-76

**Kirsch, Judge.**

[1] Kelly Lyons (“Mother”) appeals the trial court’s order granting Harold Parker’s (“Father”) motion to modify custody. Mother raises several issues for our review on appeal, and we find the following issues dispositive:

- I. Whether Special Judge Daniel W. Kelly (“Special Judge Kelly”) had jurisdiction to issue orders and make rulings in the case; and
- II. Whether the trial court abused its discretion when it denied Mother’s motion to continue the hearing on Father’s motion to modify custody.

[2] We reverse and remand.

### **Facts and Procedural History**

[3] Mother and Father are the parents of twin girls, H.P. and E.P. (“the Twins”), who were born in April 2014. *Appellee’s App. Vol. 2* at 2. From April 19, 2018, until August 8, 2019, Mother and Father shared joint legal and physical custody of the Twins. *Id.*; *Appellant’s App. Vol. II* at 36-39. In August 2019, the trial court conducted an expedited hearing to modify custody because the Twins’s enrollment in kindergarten made the joint custodial arrangement impractical. *Appellant’s App. Vol. II* at 36-39. The trial court found no “decisive advantage” in favor of either parent, and after expressing concerns about Mother’s work schedule and its impact on the Twins, the trial court awarded primary physical custody of the Twins to Mother, subject to Father’s parenting time under the Indiana Parenting Time Guidelines. *Id.*

[4] On January 9, 2020, Mother filed a petition to modify parenting time and simultaneously filed a petition for change of judge and transfer of venue. *Id.* at 48-54. In her petition to modify parenting time, Mother asserted that she and Father were experiencing difficulties with transportation concerning midweek visitations. *Id.* at 52-54. On January 17, 2020, Father filed a petition to modify custody and a partial opposition to Mother’s petition for change of judge and change of venue. *Id.* at 55-59. On February 6, 2020, Mother and Father entered into an Agreed Entry, providing, in pertinent part, that the parties agreed that: (1) Mother’s motion for change of venue was denied; (2) Mother’s motion for change of judge was granted; (3) under Trial Rule 79(D), the case would be submitted to Magistrate Melinda Jackman-Hanlin (“Magistrate Jackman-Hanlin”), subject to her acceptance of the appointment as special judge; and (4) a guardian ad litem (“GAL”) would be appointed to represent the interests of the Twins. *Id.* at 60-61. The trial court approved the Agreed Entry on February 7, 2020. *Id.* at 62.

[5] Magistrate Jackman-Hanlin did not file an acknowledgment and acceptance of her appointment as special judge in the case. *Id.* at 2-26. Nothing further was done by either party or the trial court to ensure that a special judge was appointed. *Id.* Neither party notified the trial court that Magistrate Jackman-Hamlin did not file an acknowledgement and acceptance of the appointment

within the time frame provided in Trial Rule 79(D),<sup>1</sup> and neither party sought the appointment of a special judge under Trial Rule 79(H).<sup>2</sup> *Id.*

[6] On August 6, 2020, Father filed a Motion to Set Hearing on All Contested Issues. *Id.* at 67-68. Special Judge Kelly, as the trial court, issued an order on the same date setting all pending matters for hearing on February 5, 2021 and ordering the GAL to prepare and file a report at least thirty days before the scheduled hearing. *Id.* at 69. Neither party objected to the trial setting with Special Judge Kelly. *Id.* at 2-26. The GAL filed his report with the trial court on January 26, 2021. *Id.* at 71-90. On January 28, 2021, Father filed a Motion for Telephonic Testimony, which was granted by the trial court the next day. *Id.* at 126-27.

[7] On January 29, 2021, Mother, by counsel, filed a Motion to Continue the Modification Hearing, alleging that: (1) the GAL submitted his report on January 26, 2021, and counsel shared and discussed the report with Mother; (2)

---

<sup>1</sup> Under Trial Rule 79(D), “[a] judge appointed under this section shall have seven (7) days from the date the appointment as special judge is noted in the [CCS] to decide whether to accept the case.”

<sup>2</sup> Under Trial Rule 79(H), “[i]n the event . . . the agreed upon judge does not accept the case under Section (D), the appointment of an eligible special judge shall be made pursuant to a local rule . . . .” Under Putnam County local rule LR67-TR79-GEN-8, the judges and magistrate of the county shall certify to the Presiding Judge cases for reassignment and special judge appointment, and such certification shall include a prepared order of appointment. Putnam Co. Local R. LR67-TR79-GEN-8, available at <https://www.in.gov/courts/files/putnam-local-rules.pdf>. When the Presiding Judge receives a certification requiring reassignment, the Presiding Judge is required to appoint a judge or magistrate from a list compiled yearly, and each judge or magistrate will receive a new case for each case from which he or she has been removed – a one-off, one-on formula. *Id.* Upon receiving a certification, the Presiding Judge shall assign the case to the first eligible judge or magistrate on the list. *Id.* The order of appointment shall be filed in the court where the case originated and shall constitute acceptance, and neither oath nor additional evidence of acceptance is required. *Id.*

there had been a breakdown in the attorney-client relationship, and counsel was no longer able to adequately represent Mother's interests; and (3) Mother would require additional time to hire new counsel and prepare for the modification hearing. *Id.* at 129-30. On the same date, Father filed an objection to the request for a continuance, citing the GAL's report and that any further delay in holding the hearing would result in harm to the Twins. *Id.* at 132-33. On February 1, 2021, the trial court, by Special Judge Kelly, denied Mother's motion to continue the modification hearing. *Id.* at 139. On February 2, 2021, Mother's attorney filed a Motion for Leave to Withdraw Appearances, which the trial court granted on February 3, 2021. *Id.* at 136-37, 138.

[8] On February 5, 2021, Special Judge Kelly conducted a hearing on Father's petition to modify custody at which Father appeared in person and by counsel, and Mother appeared pro se. *Tr. Vol. II* at 1-116. At the hearing, the GAL testified and recommended that Mother and Father continue to share joint legal custody, but that physical custody be modified in favor of Father. *Id.* at 6. At the conclusion of the hearing, the trial court took the matter under advisement. *Id.* at 113, 115.

[9] On February 9, 2021, Special Judge Kelly issued an order questioning whether he had authority to issue a custody order due to Mother's motion for a change of judge and the Agreed Entry from February 7, 2020 approved by the trial court that appointed Magistrate Jackman-Hanlin as special judge, subject to her acceptance. *Appellant's App. Vol. II* at 140-41. The trial court stated that it believed that it was without authority to issue an order at that time and only

had the authority, under the local rule, to refer the case to the presiding judge for appointment of an alternative special judge. *Id.* However, the trial court further stated that if both parties submitted in writing their consent for Special Judge Kelly to reassume jurisdiction of the case, then he would proceed to issue an order on the modification issue. *Id.* On February 19, 2021, both parties submitted an agreed entry in which they consented to Special Judge Kelly reassuming jurisdiction over the case. *Id.* at 142.

[10] Special Judge Kelly, acting as the trial court subsequently issued an order that modified custody and awarded Father primary physical custody of the Twins and found that Mother should have parenting time no less than that provided by the Parenting Time Guidelines and that Mother and Father should both retain joint legal custody. *Id.* at 143-45. Mother now appeals.

## **Discussion and Decision**

### **I. Jurisdiction of Special Judge**

[11] Initially, we note that Mother argues that the trial court's order is void because Special Judge Kelly lost jurisdiction when he approved the Agreed Entry entered into by Mother and Father in which a new special judge was named. Mother asserts that, once Special Judge Kelly approved the Agreed Entry in February 2020, he no longer had authority to issue orders and all orders issued after that date were void. However, we need not address Mother's contention because she has waived the issue.

[12] “It is well established that ‘where a defendant does not object to an irregularity in the appointment of a special judge, he accepts the appointment, submits to the jurisdiction, and waives the irregularity.’” *Woodward v. Norton*, 939 N.E.2d 657, 661 (Ind. Ct. App. 2010) (quoting *Catt v. State*, 749 N.E.2d 633, 644 (Ind. Ct. App. 2001) (citing *Bivins v. State*, 485 N.E.2d 89, 92 (Ind. 1985)), *trans. denied*). Therefore, “a party may not submit matters to and await rulings by a special judge before objecting to the special judge’s presence in the action.” *Id.* (citing *Thomas v. State*, 656 N.E.2d 819, 821 (Ind. Ct. App. 1995)).

[13] Here, Mother did not object at any point during the proceedings to Special Judge Kelly presiding as special judge in this case after Special Judge Kelly approved the Agreed Entry -- either before the modification hearing or at the time of the hearing. By filing motions with Special Judge Kelly, accepting the orders issued on those motions, and attending the modification hearing presided over by him, Mother waived any objection regarding Special Judge Kelly’s presence in the action. *Id.* Further, Mother actually reflected her consent to Special Judge Kelly issuing an order regarding custody modification when she and Father submitted an agreed entry in which they consented to Special Judge Kelly reassuming jurisdiction over the case. *Appellant’s App. Vol. II* at 142. A party may not sit idly by and remain silent about a missing acceptance of appointment for over a year, and only complain about it when an unfavorable ruling is entered. We conclude that Mother has waived review of any challenge to the Special Judge Kelly’s authority and is not entitled to any relief on this basis. *See Woodward*, 939 N.E.2d at 661.

## II. Motion to Continue

[14] Mother next raises the issue of whether the trial court abused its discretion in failing to grant her motion for continuance.

The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court. We will reverse the trial court only for an abuse of that discretion. 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. 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. *If good cause is shown for granting the motion, denial of a continuance will be deemed to be an abuse of discretion.* No abuse of discretion will be found when the moving party has not shown that he was prejudiced by the denial.

*Smith v. Smith*, 136 N.E.3d 656, 658-59 (Ind. Ct. App. 2019) (quoting *F.M. v. N.B.*, 979 N.E.2d 1036, 1039 (Ind. Ct. App. 2012) (citations and quotations omitted) (emphasis added)). “[A]mong 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.” *J.P. v. G. M.*, 14 N.E.3d 786, 790 (Ind. Ct. App. 2014) (quoting *Hess v. Hess*, 679 N.E.2d 153, 154 (Ind. Ct. App. 1997)). We also consider whether the record demonstrates dilatory tactics on the part of the movant designed to delay coming to trial. *Id.* We must also consider whether a delay would have prejudiced the opposing party to an extent sufficient to justify denial of the continuance. *Id.*



[15] Mother argues that the trial court abused its discretion in denying her motion to continue the modification hearing because her original counsel indicated her intention to withdraw within one week of the scheduled hearing. Although Mother recognizes that a party is not entitled to a continuance merely because her counsel withdraws, *Hess*, 679 N.E.2d at 154, she asserts that good cause was shown for granting the motion to continue because her counsel withdrew so close to the date of the modification hearing and did not follow the local rule, which required that Mother be given a ten-day notice before the attorney could withdraw. Mother also contends that the trial court failed to recognize the crucial stage of the proceedings during which Mother would be without counsel since she was facing the modification of the custody of the Twins. She further maintains that the record does not show any dilatory tactics on her part and that there was no evidence that a minimal delay to allow Mother to prepare for the hearing would have prejudiced Father.

[16] In *Hess*, five days before the final dissolution hearing, Husband's counsel withdrew because of "statements of distrust made by Husband to his attorney." *Id.* at 154. Husband, pro se, requested a continuance, which the trial court denied on the day of trial. *Id.* On appeal, this court reversed and found that the trial court abused its discretion, reasoning that, although the court could not say that Husband was free from fault, there was nothing in the record demonstrating that he could have foreseen that his counsel would withdraw and that it was "significant that the record [did] not demonstrate dilatory tactics on the part of Husband designed to delay coming to trial." *Id.* at 155. Further, this

court concluded that Husband was deprived of counsel at a crucial stage in the proceedings, the final dissolution hearing, that he presented no case-in-chief, and that a brief continuance in order to allow Husband to obtain representation would not have been so prejudicial to Wife to justify deprivation of counsel to Husband during such a crucial stage of the proceedings. *Id.*

[17] In *J.P.*, maternal grandparents filed a petition to visit the father's child, and the day before the hearing, the father learned for the first time that the grandparents would be represented by counsel at the hearing. 14 N.E.3d at 788. Because the father did not have time to hire an attorney, he appeared pro se at the hearing and requested a continuance so he could hire counsel, telling the trial court that, up until he learned that the grandparents had hired an attorney, he had believed that involvement of attorneys was unnecessary. *Id.* at 788-89. The trial court denied the father's request for a continuance, and during the hearing on the grandparents' petition for visitation, the father asked no questions and presented almost no substantive testimony, explaining that he wanted a lawyer to assist him because he did not completely understand the proceedings. *Id.* at 789. On appeal, we ruled that the trial court should have granted the motion for continuance because the father was prejudiced by participating in the hearing without an attorney, thus depriving him of his fundamental right in the care, custody, and control of his child. *Id.* at 790-91.

[18] In *Smith*, the final dissolution hearing was set for March 5, 2019, and on the day before, husband's attorney filed a motion to withdraw, indicating a breakdown of the attorney-client relationship and that husband no longer

wished counsel to represent him. 136 N.E.3d at 657. The husband appeared pro se at the final dissolution hearing and told the trial court that he had recently had surgery, had never been provided his paperwork from his prior attorney, and requested a continuance so that he could get an attorney. *Id.* at 657-58. The trial court denied the request, reasoning that husband fired his attorney at the last minute, no continuance was requested with counsel's motion to withdraw, and the matter did not involve children. *Id.* On appeal, this court reversed and remanded, finding the trial court abused its discretion when it denied the husband's request for a continuance and reasoning that, "the circumstances in this case show that [h]usband demonstrated good cause as to why the motion to continue should have been granted." *Id.* at 659-60. This court specifically held that there was no evidence in the record that husband was attempting to prolong the proceedings or engage in dilatory tactics and that "among the things to be considered on appeal from the denial of a motion for continuance [is] whether the denial of a continuance resulted in the deprivation of counsel at a crucial stage in the proceedings." *Id.* at 660.

[19] Here, on January 17, 2020, Father filed a petition to modify custody. *Appellant's App. Vol. II* at 55-59. On August 6, 2020, Father filed a Motion to Set Hearing on All Contested issues, and the trial court issued an order on the same date setting all pending matters for hearing on February 5, 2021. *Id.* at 67-68, 69. Although ordered to file his report at least thirty days before the scheduled hearing, the GAL filed his report with the trial court on January 26, 2021, only ten days before the hearing date. *Id.* at 71-90. On January 29, 2021,

Mother, by counsel, filed a Motion to Continue the Modification Hearing, alleging that: (1) the GAL submitted his report on January 26, 2021, and counsel shared and discussed the report with Mother; (2) there had been a breakdown in the attorney-client relationship, and counsel was no longer able to adequately represent Mother's interests; and (3) Mother would require additional time to hire new counsel and prepare for the modification hearing. *Id.* at 129-30. On the same date, Father filed an objection to the request for a continuance, alleging that any further delay in holding the hearing would result in harm to the Twins. *Id.* at 132-33. On February 1, 2021, the trial court denied Mother's motion to continue the modification hearing. *Id.* at 139. On February 2, 2021, Mother's attorney filed a Motion for Leave to Withdraw Appearances, which the trial court granted on February 3, 2021. *Id.* at 136-37, 138.

[20] The circumstances of this case show that Mother demonstrated good cause as to why the motion to continue should have been granted. First, there is no evidence in the record that Mother was attempting to prolong the proceedings or engage in dilatory tactics. One week before the date of the hearing, Mother requested a continuance based on the fact that her counsel wished to withdraw due to a breakdown in the attorney-client relationship, and the trial court denied her request the next day, approximately six days before the hearing date. While Mother may not be free from fault as she requested the continuance because her original counsel wished to withdraw on account of a breakdown in their relationship, the record does not show dilatory tactics on her part as she

asserts that the reason for the breakdown in their relationship was due to the late filing of the GAL report and her desire to challenge the report. *Tr. Vol. II* at 78. Further, although Mother’s counsel withdrew based on the breakdown of the attorney-client relationship, Mother was not provided ten-day notice of her attorney’s withdrawal as required by the local rule.<sup>3</sup>

[21] Second, the denial of a continuance resulted in the deprivation of counsel at a crucial stage of the proceedings as it happened while a petition to modify custody was pending and as the trial court was in the course of determining whether to modify custody from Mother to Father. Such a hearing involved Mother’s substantial rights as the evidence presented determined whether the trial court would modify Mother’s custody of the Twins and affect her parenting time. At the hearing, Mother, who was pro se, engaged in very little cross-examination of the GAL, whose report was central to the trial court’s determination to modify custody, and she presented no evidence of her own in support of objection to the modification of custody. *Id.* at 21-22, 113.

[22] Lastly, we cannot conclude that a brief continuance of the modification hearing in order for Mother to obtain new representation and have an opportunity to prepare for the hearing would have been so prejudicial to Father to justify

---

<sup>3</sup> Putnam County Local Rule LR67-TR3.1-GEN-3, regarding the withdrawal of an appearance by counsel, states that: “[p]ermission to withdraw shall be given only after the petitioning attorney has given his/her client [ten] days written notice of his intention to withdraw.” Moreover, pursuant to the rule: “The written notice to the client shall explain the possible effects of failure to secure new counsel and shall set forth any hearing or trial dates and any pleading, discovery or other pre-trial deadlines.”

deprivation of counsel to Mother during such a crucial stage of the proceedings. Although a party is not entitled to a continuance merely because her counsel withdraws, consideration of such withdrawal is relevant when looking at whether the trial court abused its discretion in failing to grant a motion to continue at a crucial stage in the proceedings, especially when substantial rights such as those in the present case are involved. *See Smith*, 136 N.E.3d at 660.

[23] Under these circumstances, we conclude that Mother demonstrated good cause for a continuance of the hearing, that this case involved a fundamental right of Mother, and that Mother was prejudiced by the denial of her motion for a continuance. We also conclude that a delay would not have prejudiced Father to an extent to justify denial of the continuance. The trial court's denial of Mother's motion for a continuance was clearly against the logic and effect of the facts and circumstances before the trial court, and we, therefore, conclude that the trial court abused its discretion in denying Mother's request for a continuance. We reverse the trial court's denial of Mother's motion to continue and remand for a new hearing.

[24] Reversed and remanded.

May, J., and Vaidik, J., concur.