

## 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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ATTORNEY FOR APPELLANT

Julianne L. Fox  
Evansville, Indiana

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## IN THE COURT OF APPEALS OF INDIANA

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Bradley V. Wilson,  
*Appellant-Respondent,*

v.

Courtney N. Wilson,  
*Appellee-Petitioner.*

July 6, 2022

Court of Appeals Case No.  
22A-JP-74

Appeal from the Vanderburgh  
Superior Court

The Honorable Leslie C. Shively,  
Judge

Trial Court Cause Nos.  
82D01-1904-JP-478  
82D01-1904-JP-479

**Tavitas, Judge.**

### Case Summary

- [1] Bradley Wilson (“Father”) appeals the order of the trial court granting Courtney Wilson’s (“Mother”) petitions to find Father in contempt, to require Father to pay Mother’s attorney’s fees, and to modify custody of the parties’

two children. Father claims that the trial court violated his due process rights when it denied his motion to continue so that he could obtain new counsel. We conclude that the trial court did not err by denying Father's motion to continue. Accordingly, we affirm.

### **Issue**

- [2] Father presents one issue, which we restate as whether the trial court violated Father's due process rights by denying his request for a continuance.

### **Facts**

- [3] Father and Mother are the parents of two children: C.W., who was born in 2013, and A.W., who was born in 2015. On April 4, 2019, Mother filed petitions to establish parenting time and child support for both children. Following court-ordered mediation, the parties entered into an agreed settlement, which the trial court approved on September 10, 2019. Pursuant to this agreed order, the parties had joint legal custody and shared physical custody of the children. Mother was ordered to pay Father \$125 per week in child support. The agreement also contained a non-disparagement clause, which provided that neither party would speak about the other in a negative fashion, nor allow others to do so, in the presence of or within the hearing of either child.
- [4] Both parties sought to have the other held in contempt for what they perceived to be violations of the agreed order. Mother was successful in her efforts, and the trial court found Father in contempt on February 4, 2020, for violating the

non-disparagement clause. The trial court withheld sanctions but informed Father that any further violation of the order would result in Father being ordered to pay Mother's attorney's fees.

[5] On July 22, 2020, Father filed a petition to modify custody. On March 1, 2021, Mother filed a motion to compel discovery, and the trial court ordered Father to comply with the discovery requests by March 17, 2021. On March 23, 2021, Mother filed a motion to exclude evidence regarding Father's income because he had failed to respond to Mother's discovery requests for documents detailing his income. Mother also requested attorney's fees due to Father's non-compliance with her discovery requests. On April 13, 2021, Father filed a motion in which he claimed Mother should be held in contempt for various alleged violations of the trial court's orders.

[6] The trial court held a hearing on these matters on April 28, 2021. The trial court granted Mother's motion and ordered that Father's evidence in support of his motion to modify custody would be excluded due to his non-compliance with the court's discovery orders. The court took Mother's request for attorney's fees under advisement and, on May 4, 2021, ordered Father to pay \$2,500 in attorney's fees to Mother within ninety days of the court's order. The trial court does not appear to have ruled on Father's pending petition to modify custody.

[7] On August 19, 2021, Mother filed a motion in which she claimed that Father should be held in contempt for, among other things, violating the non-disparagement clause and impeding her communication with the children. The

trial court set the matter for a hearing to be held on November 30, 2021. Prior to that date, on September 27, 2021, Father's counsel filed a motion to withdraw his appearance, which the trial court granted the following day.

[8] On the scheduled hearing date of November 30th, Mother filed a petition to modify custody. Mother appeared in court in person and by counsel. Father appeared pro se by video but was suffering from a stomach ailment and was too ill to continue with the hearing.<sup>1</sup> Father, therefore, requested a continuance. The trial court granted the request and reset the matter for a hearing on December 10, 2021.

[9] At the start of the December 10th hearing, Father requested another continuance and claimed he needed more time to hire counsel. The trial court denied the request and heard evidence from both parties. At the conclusion of the hearing, the trial court found Father in contempt for failing to pay the previously ordered attorney's fees. The trial court also announced its ruling granting Mother's petition to modify custody. Mother's counsel then informed the trial court that Mother planned on relocating at the end of the school year. Mother gave the trial court her address and stated that the children would finish the school year at their current school and change schools after the move.

[10] On December 13, 2021, the trial court entered a written order modifying custody. The court found that the current custody arrangement was not

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<sup>1</sup> The transcript contains multiple references to "(MR. WILSON VOMITING)." Tr. Vol. II p. 4.

working and granted modification of custody to Mother. The order provides in relevant part:

**MODIFIED JOINT LEGAL CUSTODY:** The parties shall have modified joint legal custody of the Children and therefore are required to civilly and openly discuss, communicate in advance concerning, and attempt to agree upon major decisions involving the Children such as healthcare, religion, education, and participation in extracurricular activities, through OFW [a mobile phone application]. In the event the parties are unable to reach an agreement, however, the Mother shall retain the right to make the ultimate decision and shall promptly notify the Father through OFW of that decision.

**RELOCATION AND SCHOOLING:** The Mother has indicated in open Court that she intends on relocating soon to Evansville's West side and her new address will be [ ] Hillview Drive, Evansville, Indiana 47720. Therefore, the filing of a relocation notice by the Mother shall not be required. The Mother, however, shall notify the Father of the date when she will be moving since it will affect the exchange location for parenting time. Both parties are ordered to comply with Indiana's relocation notice statute for any subsequent moves.

The Children shall complete the 2021-2022 school year at their current schools, but for the 2022-2023 school year the Mother may enroll the Children in the appropriate [Evansville Vanderburgh School Corporation] schools in their new school district.

**PRIMARY PHYSICAL CUSTODY:** The Mother shall have primary physical custody of the Children.

**PARENTING TIME:** The Father shall be the non-custodial parent and shall have parenting time pursuant to the most recent version of the Indiana Parenting Time Guidelines (hereinafter "IPTG"), which are made applicable in all respects to this case.

Both parties are further ordered to run off a copy of the IPTG for further reference.

The Father's alternating weekend will commence on Friday December 17, 2021, since this weekend is the Mother's scheduled alternating weekend.

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CHILD SUPPORT: Attached hereto is the Mother's Exhibit "G", which is adopted by the Court as the appropriate child support amount. Therefore, commencing on Friday, December 17, 2021, the Father shall begin paying to the Clerk of this Court the annual statutory fee for collection of support money together with the sum of \$91.00 (rounded up from \$90.93) per week as child support. The Mother's responsibility to pay child support to the Father as previously ordered is terminated as of that date.

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ATTORNEY FEES: The Father has an outstanding Order to pay to the Mother's attorney, \$2,500.00 which was to have been paid within sixty (60) days following the Court's ruling of May 4, 2021. That amount remains unpaid. The Father shall pay the same within sixty (60) days on or before February 10, 2022. The Father is ordered to pay to [Mother's counsel] an additional \$3,500.00 for today's proceeding within ninety (90) days on or before March 10, 2022. Such payments shall be made directly to his office . . . without the necessity of any additional Court Orders being issued or billings being generated.

FINDING OF CONTEMPT: The Father is found to be in indirect contempt of this Court for his wilful [sic] and intentional violations of previous Court Orders. The Court will order that the Father serve 45 days in the Vanderburgh County jail. However, the Court suspends the execution of that jail time pending the Father fully complying with the terms and conditions of this Entry. The Court admonishes both parties that it will have zero tolerance with regard to further violations of this

and previous Court Orders not specifically modified by the terms of this Entry. To the extent not specifically modified by the terms of this Entry, the previous Orders of this Court shall remain in full force and effect without change.

Appellant's App. Vol. II pp. 5-9.<sup>2</sup> Father now appeals.

### **Analysis**<sup>3</sup>

- [11] Father argues that the trial court abused its discretion by denying his motion to continue so that he could hire counsel. Father claims that the hearing was critical, that he had good cause for the continuance, and that Mother would not have been prejudiced by granting a continuance. He, therefore, argues that requiring him to proceed pro se deprived him of due process.
- [12] The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court. *Smith v. Smith*, 136 N.E.3d 656, 658 (Ind. Ct. App. 2019) (citing *F.M. v. N.B.*, 979 N.E.2d 1036, 1039 (Ind. Ct. App. 2012)). On

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<sup>2</sup> If an individual is in jeopardy of incarceration because of a contempt proceeding and that person is indigent, he or she may not be incarcerated without having counsel appointed to represent him or her. *In re Paternity of C.N.S.*, 901 N.E.2d 1102, 1106 (Ind. Ct. App. 2009) (citing *Marks v. Tolliver*, 839 N.E.2d 703, 706 (Ind. Ct. App. 2005)). In such circumstances the individual has a right to appointed counsel and be informed of that right prior to the commencement of the contempt hearing. *Moore v. Moore*, 11 N.E.3d 980, 981 (Ind. Ct. App. 2014) (citing *In re Marriage of Stariha*, 509 N.E.2d 1117, 1121 (Ind. Ct. App. 1987)). Here, Father makes no argument that he was indigent or entitled to court-appointed counsel. Moreover, it is within the discretion of the trial court to deny a last-minute continuance to hire new counsel, even in criminal cases. *Lewis v. State*, 730 N.E.2d 686, 689 (Ind. 2000)).

<sup>3</sup> Mother did not file an appellee's brief. Where an appellee does not submit a brief, we will not develop an argument for the appellee but instead will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error. *Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020). This less-stringent standard of review "relieves [us] of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee." *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014) (citing *Wright v. Wright*, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002)). Nevertheless, we are obligated to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id.* (citing *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006)).

appeal, we review the trial court’s decision only for an abuse of that discretion, “and there is a strong presumption the trial court properly exercised its discretion.” *Gunashekar v. Grose*, 915 N.E.2d 953, 955 (Ind. 2009)). The denial of a motion for a continuance is an abuse of discretion only if the movant demonstrates good cause for granting it. *Id.* Indeed, “a trial court shall grant a continuance upon motion and ‘a showing of good cause established by affidavit or other evidence.’” *Id.* (quoting Ind. Trial Rule 53.5). However, “[n]o abuse of discretion will be found when the moving party has not shown that he was prejudiced by the denial.” *Smith*, 136 N.E.3d at 659.

[13] Father contends that he met his burden of showing good cause for granting his motion to continue because he was unrepresented by counsel. A party is not entitled to a continuance merely because his or her counsel withdraws. *Hess v. Hess*, 679 N.E.2d 153, 154 (Ind. Ct. App. 1997). Under certain circumstances, however, the withdrawal of counsel can constitute good cause for a continuance if the moving party is free from fault and the party’s rights are likely to be prejudiced by the denial. *F.M.*, 979 N.E.2d at 1040 (citing *Koors v. Great Sw. Fire Ins. Co.*, 530 N.E.2d 780, 783 (Ind. Ct. App. 1988)).

[14] Father does not explain the circumstances for the withdrawal of his counsel. The record simply shows that Father’s counsel withdrew from the case on September 27, 2021. When Father appeared pro se at the hearing on November 30th, he already had over two months to hire counsel, yet he failed to do so. By the time of the hearing on December 10th, seventy-three days had elapsed since Father’s counsel withdrew, yet Father still had not hired counsel. Father did



not explain to the trial court, nor does he explain on appeal, why he should have been given additional time to hire an attorney when he already had ample time to do so. We conclude, therefore, that Father was not without fault for his lack of representation by counsel.

[15] Moreover, Father waited until the day of the hearing on December 10th to request a continuance. Motions to continue filed on the same day as the scheduled hearing are disfavored. See *Blackford v. Boone Cnty. Area Plan Comm'n*, 43 N.E.3d 655, 664 (Ind. Ct. App. 2015) (citing *Lewis v. State*, 512 N.E.2d 1092, 1094 (Ind. 1987)). Father knew in September that his counsel had withdrawn and could have filed a motion to continue well before either the November 30th or December 10th hearing dates. Father did request a continuance at the hearing on November 30th, but he based his request on his illness, not a lack of counsel. The trial court granted that request and reset the hearing for December 10th. Instead of filing a motion to continue prior to the December 10th hearing date, Father waited until the day of the hearing to request yet another delay. This also shows that Father was not without fault.

[16] We find *Gunashekar* persuasive here. In that case, the defendants' counsel withdrew forty-five days before the scheduled trial. Eleven days before the trial, the defendants filed a pro se motion to continue so that they could hire counsel. The trial court denied the motion, and, on appeal, the defendants claimed that the trial court erred by denying their motion. Our Supreme Court disagreed and noted that the defendants presented no evidence that indicated that they were diligent in trying to engage new counsel. *Gunashekar*, 915 N.E.2d at 955.

The Court also rejected the defendants' claims that the trial court should have been more lenient on them due to their self-representation. *See id.* (noting that pro se litigants are held to the same established rules of procedure that trained attorneys are bound to follow).

[17] Here, Father had even more time to hire counsel than the defendants in *Gunashekar*. And unlike the defendants in *Gunashekar*, Father did not file his request for continuance eleven days before the hearing; instead, he waited until the beginning of the hearing to request a continuance.

[18] In *Smith*, we held that the trial court deprived the husband of due process by denying his request for a continuance after his counsel had withdrawn *the day before* the dissolution hearing, contrary to the local rule requiring ten days' notice before withdrawing. 136 N.E.3d at 659-60. Given this sudden withdrawal of counsel, the lack of dilatory tactics on the husband's part, and the fact that the case had only been pending a short time, we held that the trial court's denial of the husband's motion to continue was an abuse of discretion. *Id.* at 660. Here, Father's counsel did not withdraw the day before the hearing; instead, he withdrew over seventy days before the hearing, giving Father time to hire counsel or request a continuance before the hearing date.

[19] Because Father had time to hire counsel and waited until the last minute to request a continuance, Father was not without fault for his predicament. The trial court, therefore, did not abuse its discretion by denying Father's request for a continuance.

[20] In a related argument, Father claims that he was unaware that Mother had filed a petition to modify custody and was consequently especially harmed by the lack of counsel at the hearing. The record supports a reasonable inference that Father was given notice of the petition to modify. Attached to Mother's petition to modify is a certificate of service by Mother's counsel stating that the motion was served on Father "by either E-service to the registered user electronically or pursuant to Trial Rules 4 and 5 (sheriff service, certified mail or regular US mail) to all non-registered parties." Appellant's App. Vol. II p. 52. This petition was filed on November 30, 2021.

[21] Moreover, the petition to modify was entered into the trial court's docket on November 30, 2021, as evidenced by the chronological case summary. *Id.* at 24, 37. It was Father's duty as a pro se litigant to check the trial court's records and monitor the progress of his case. *See City of Indianapolis v. Hicks*, 932 N.E.2d 227, 231 (Ind. Ct. App. 2010) (noting that attorneys have a "general duty to regularly check the court records and monitor the progress of pending cases."), *trans. denied*; *Gunashekar*, 915 N.E.2d at 955 (noting that pro se litigants are held to the same standards as trained attorneys). Father's claim that he was unaware of Mother's petition to modify is, therefore, not supported by the record.

[22] Father also claims that he was prejudiced by the trial court's denial of his motion to continue because the trial court improperly considered Mother's request to relocate within Vanderburgh County, which required the children to attend a different school. Parties in child custody proceedings under the paternity statutes must comply with Indiana Code Chapter 31-17.2.2, the

Relocation Statute. *See* Ind. Code § 31-14-13-10.5 (requiring relocating parents in a paternity action to comply with the Relocation Statute). Pursuant to the Relocation Statute, a party intending to relocate must, under most circumstances,<sup>4</sup> file a notice of intent to relocate and serve the notice on the non-relocating party so that the non-relocating party has the opportunity to object to the proposed relocation. Here, Mother filed no such notice. Instead, her counsel brought up the issue of her relocation at the end of the hearing on December 10th. Father, however, made no objection to the relocation at the hearing when Mother’s counsel raised the issue. It is well settled that a party may not present an argument for the first time on appeal. *Reynolds v. Reynolds*, 64 N.E.3d 829, 834 (Ind. 2016).

[23] In addition, Father does not present his argument regarding the relocation as a free-standing claim of error; instead, he argues that the introduction of the relocation issue at the hearing was a reason why the trial court should have granted his motion to continue. *See* Appellant’s Br. p. 12 (“[Father] should have been permitted a continuance of time to hire an attorney to represent his

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<sup>4</sup> A relocating party is not required to file a notice of intent to move if:

- (1) the relocation has been addressed by a prior court order, including a court order relieving the relocating individual of the requirement to file a notice; or
- (2) the relocation will:
  - (A) result in a decrease in the distance between the relocating individual’s residence and the nonrelocating individual’s residence; or
  - (B) result in an increase of not more than twenty (20) miles in the distance between the relocating individual’s residence and the nonrelocating individual’s residence;and allow the child to remain enrolled in the child’s current school.

I.C. § 31-17-2.2-1(b).

and his children's interests concerning Mother's relocation."'). We have already concluded that Father was not without fault for his lack of counsel and, therefore, did not show good cause for a continuance.

## **Conclusion**

[24] The trial court did not abuse its discretion by denying Father's untimely request for a continuance to hire new counsel. Father had ample time to hire counsel prior to the hearing and time to file a motion to continue well before the start of the hearing. Due to his lack of counsel, Father was in a difficult position. But it was not the trial court's denial of his request for a continuance that placed Father in this difficult position; it was Father's own lack of diligence in securing counsel that put him in that position. We, therefore, affirm the judgment of the trial court.

[25] Affirmed.

Riley, J., and May, J., concur.