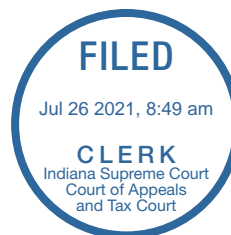


MEMORANDUM DECISION

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

In the Matter of the Marriage of:
Morgan S. Mayer a/k/a Morgan
Sweet,

Appellant-Respondent,

v.

Jeffrey L. Mayer,
Appellee-Petitioner.

July 26, 2021

Court of Appeals Case No.
21A-DC-288

Appeal from the
DeKalb Superior Court

The Honorable
Monte L. Brown, Judge

Trial Court Cause No.
17D02-1712- DC-233

Kirsch, Judge.

- [1] Morgan S. Mayer a/k/a Morgan Sweet (“Mother”) appeals from the trial court’s order granting Jeffrey L. Mayer’s (“Father”) motion to modify custody.

Mother raises one issue for our review: whether the trial court abused its discretion when it denied her motion to continue the hearing on Father's motion to reopen evidence in the custody modification proceedings.

[2] We reverse and remand.

Facts and Procedural History

[3] Mother and Father were married on June 25, 2010, and two children were born during the marriage, C.M. and E.M. ("Children"). *Appellant's App. Vol. 2* at 32. On December 4, 2017, Father initiated a dissolution action against Mother, and the Order on Provisional Matters, entered on March 28, 2018, provided that the parties would have joint legal custody, Mother would have primary physical custody, and Father would have parenting time in excess of the Indiana Parenting Time Guidelines. *Id.* at 32-33, 42-44. On July 17, 2018, the parties filed a Mediated Marital Settlement Agreement, which provided that the parties were to retain joint legal custody of Children and that Mother would retain primary physical custody, while Father would have regular, holiday, special day, and extended parenting time as defined in the Indiana Parenting Time Guidelines, with two deviations; namely, that Mother would have holiday parenting time on Memorial Day and Labor Day holidays each year, and Father would have holiday parenting time for the week inclusive of the Independence Day holiday each year. *Id.* at 53-57. On the same date, the trial court issued a Decree of Dissolution of Marriage, dissolving the marriage between Mother and Father. *Id.* at 64-65.

[4] On August 20, 2019, Father filed a motion to modify custody (“Motion to Modify”), asserting it was in the best interest of Children that Father be granted primary physical custody based upon Mother’s relocation of her residence into a different school district, failure to pay for appropriate childcare, and his belief that Mother was residing in a home with inadequate space for Children. *Id.* at 66-67. The trial court ordered the parties to mediation, and on November 26, 2019, the parties entered a Mediation Stipulation, which modified parenting time so that Father was entitled to an additional overnight on alternative Sundays and modified the division of holidays governed by the Indiana Parenting Time guidelines. *Id.* at 74-75. The parties also agreed to continue the hearing on the Motion to Modify and to appoint a Guardian Ad Litem (“GAL”). *Id.* The hearing on the Motion to Modify was set for April 7, 2020. *Id.* at 11.

[5] On March 30, 2020, Mother filed her motion to continue the hearing, which was granted by the trial court, and the hearing was reset for September 8, 2020. *Id.* at 84. On July 21, 2021, Father filed a Rule to Show Cause, asserting that Mother unexpectedly moved residences with Children without first providing the requisite written notice, and that she was taking Children to a new daycare rather than offering Father the opportunity for additional parenting time as required. *Id.* at 85-86. The trial court set the Rule to Show Cause for hearing on September 8, 2020, as well. *Id.* at 87. On September 3, 2020, Mother filed another motion to continue the hearing on Motion to Modify because the parties had not yet received the GAL report. *Id.* at 88. The trial court granted

the request for a continuance and reset the hearing for November 10, 2020. *Id.* at 90.

[6] On October 29, 2020, the GAL filed her proposed GAL report, wherein she recommended, in pertinent part, that the parties should retain joint legal custody and that parenting time should be modified so that the parties share equal parenting time. *Id.* at 91-105. The report also addressed Mother's relationship with Nathan McEntarfer ("McEntarfer") and the GAL's belief that "[g]iven the end of the relationship between [Mother and McEntarfer], and confirmation that there has not been any contact since they ended their relationship, I believe [Children] have been safely removed from the situation in which DCS investigated." *Id.* at 94.

[7] On November 10, 2020, the trial court conducted a half-day hearing on the Motion to Modify, which both parties attended with their respective counsel. *Tr. Vol. 2* at 4. Father requested that the trial court modify custody such that he be granted primary physical custody and sole legal custody of Children. *Id.* at 84-85. The GAL testified that there was no dispute that Children are loved and adored by their parents and that they love and adore their parents. *Id.* at 144. The GAL also testified that both parents had a stable job and stable home and that what would ultimately be best for Children was the opportunity for them to have equal time with their parents. *Id.* at 145. She testified that it was her recommendation that Father have sole legal custody as to medical issues only, and joint legal custody on school and religion, and that the parents share equal parenting time. *Id.* at 148-49.

[8] At the end of the hearing, the trial court took the matter under advisement. *Id.* at 157. On December 3, 2020, Father filed his Motion to Reopen Evidence in the custody modification proceedings, contending that “[s]ince the close of evidence on November 10, 2020, material facts and information that would assist [the trial court] in its decision have been discovered by [Father].” *Appellant’s App. Vol. 2* at 107-09. Father alleged that the GAL report contemplated that McEntarfer would no longer be around Children and had stated that “[g]iven the end of the relationship between [Mother] and McEntarfer, and confirmation that there has not been any contact since they ended their relationship, [the GAL] believe[d] the children have been safely removed from the situation in which DCS investigated.” *Id.* at 107. However, he further alleged that, since the November 10, 2020 hearing, there was evidence that Mother was again spending time with McEntarfer, contrary to Mother’s testimony that they were no longer in a relationship. *Id.* at 108. Father requested that the trial court to reopen the evidence for a hearing, contending that this new information should be considered in the trial court’s determination of the request for custody modification. *Id.* at 107-08.

[9] On December 6, 2020, the GAL filed a motion in support of Father’s motion to reopen evidence and referenced that she had received photographs of Mother’s vehicle parked in front of McEntarfer’s residence on two separate occasions and of the two together on one of the same occasions. *Id.* at 112-14. The GAL stated that she had attempted to contact Mother several times to discuss her relationship with McEntarfer but was informed by Mother that she was advised

by her then-counsel not to speak with the GAL about that specific matter. *Id.* at 113. The GAL too requested that the trial court reopen the evidence for hearing in light of the recent developments. *Id.* at 113. On December 11, 2020, the trial court set the motion to reopen evidence for hearing on December 29, 2020. *Id.* at 115.

[10] On December 16, 2020, Mother’s counsel filed a motion to withdraw, stating that, on December 15, Mother “requested that Counsel withdraw as her attorney of record for the reason she is obtaining new counsel.” *Id.* at 118. On the same date, Mother’s then-counsel filed a motion to continue the December 29, 2020 hearing on Mother’s behalf, stating, “Mother requests the continuance for the opportunity to obtain new counsel and for that counsel to have time to prepare for the hearing.” *Id.* at 116. On December 21, 2020, the trial court denied the request for a continuance. *Id.* at 120. On December 28, 2020, Mother, pro se, mailed a letter to the trial court again requesting a continuance, which provided:

Judge Brown:

. . . Currently, I am going through a custody battle with my ex-husband, As you know, I have recently asked [my counsel] to withdraw as being my legal representative. I feel that I need to go a different route, as this custody battle is my #1 priority. I have a virtual hearing with you on December 29, 2020 at 1:30pm. I do not have a legal representative, currently. I have scheduled an [appointment] with my new attorneys [sic] office on December 16, 2020. The soonest my new attorneys [sic] office could get me in, due to the holiday’s, [sic] is Jan. 6, 2021 at 1:30,

as they are closed for 2 weeks and not opening back up till Jan. 4, 2021. I am not comfortable going through with this hearing without my legal representative.

If I can get a continuance, that would be great and very much appreciated. My new attorney will be retained on Jan. 6. With that being said, if we could move this hearing out to a later date, so that my new attorney has time to investigate all evidence, documents, etc. and prepare for the hearing, that would be much appreciated.

Id. at 122. This request for a continuance was never ruled on by the trial court.

Id. at 15.

[11] On December 29, 2020, the hearing on Father’s motion to reopen evidence was held with Father appearing with counsel and Mother appearing without counsel. *Tr. Vol. 2* at 160. When Mother was called to testify, she again renewed her request for a continuance, stating, “I really don’t feel comfortable doing this with an attorney [sic], . . . which I do have a meeting with an attorney on January 6th. Due to the holiday, I could not get in any sooner than that, so I really don’t feel like going forward with this without my attorney.” *Id.* at 162. The trial court denied Mother’s request. *Id.*

[12] Mother then testified that, following the November 10, 2020 hearing, she had met with McEntarfer for purposes of getting her belongings from his home. *Id.* She also testified that she and McEntarfer were only friends and were not engaged to McEntarfer, and she had no intention of becoming engaged to McEntarfer at that time. *Id.* at 162, 179-80. Mother also testified that Children

were her number one priority, and if the trial court ordered McEntarfer not be around Children, she confirmed that she would comply. *Id.* at 183-84. The GAL testified that having heard the additional evidence, her recommendation was no longer the same as her prior report. *Id.* at 195. She stated that her modified recommendation was that Father should have primary physical custody of Children and Mother should have parenting time consistent with a noncustodial parent under the Indiana Parenting Time Guidelines. *Id.* at 200. The GAL further recommended that McEntarfer never be left unsupervised with Children. *Id.*

[13] At the conclusion of the hearing, Mother again renewed her concerns about participating without an attorney. *Id.* at 202. The trial court told her that “that’s history” and asked her if there was anything else she wanted to add. *Id.* The trial court took the matter under advisement and instructed Mother to tell her new counsel that proposed findings of fact were to be filed by January 15, 2021. *Id.* at 202-03.

[14] On January 29, 2021, the trial court issued its Order on Custody, Parenting Time, and Child Support. *Appellant’s App. Vol. 2* at 20-30. As to the motion to modify custody, the trial court found that there was a substantial change pursuant to the factors under Indiana Code section 31-17-2-8 and awarded Father sole legal custody and primary physical care and custody of Children and ordered Mother to have parenting time consistent with the Parenting Time Guidelines. *Appellant’s App. Vol. 2* at 27. The trial court also granted the Rule to Show Cause, finding Mother willfully and intentionally violated the orders of

the trial court, resulting in Father incurring attorney fees to address the violations. *Id.* at 29. As a result, the trial court ordered Mother to pay Father’s attorney fees associated with the Rule to Show Cause. *Id.* at 29-30. Mother now appeals.

Discussion and Decision

[15] Mother raises the sole 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.*

[16] Mother argues that the trial court abused its discretion in denying her motion to continue the hearing on Father’s Motion to Reopen Evidence because her original counsel had withdrawn, and she was unable to meet with her new counsel until after the date of the originally 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 she established good cause for granting the motion to continue because her new counsel was not able to meet with her until after December 29, 2020, due to the holidays and that new counsel would also need time to prepare for the Motion to Reopen Evidence hearing. 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 Children. 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 meet with her new counsel would have prejudiced Father.

[17] In support of her contentions, Mother cites to several cases. 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.*

[18] 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.

[19] 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 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.

[20] Here, on December 3, 2020, Father filed his Motion to Reopen Evidence in the custody modification proceedings, contending that “[s]ince the close of evidence on November 10, 2020, material facts and information that would assist [the trial court] in its decision have been discovered by [Father].” *Appellant’s App. Vol. 2* at 107-09. On December 6, 2020, the GAL filed a motion in support of Father’s motion to reopen evidence and also requested that the trial court reopen the evidence for hearing in light of the recent developments. *Id.* at 113. On December 11, 2020, the trial court set the motion to reopen evidence for hearing on December 29, 2020. *Id.* at 115. On December 16, 2020, Mother’s counsel filed a motion to withdraw, stating that, the previous day, Mother had requested that counsel withdraw because Mother was going to obtain new counsel. *Id.* at 118. Contemporaneous with the motion to withdraw, counsel filed on Mother’s behalf a motion to continue the December 29, 2020 hearing, stating that Mother was requesting a continuance in order to obtain new counsel and for that counsel to have time to prepare for the hearing. *Id.* at 116. On December 21, 2020, the trial court denied the request for a continuance. *Id.* at 120. On December 28, 2020, Mother sent a pro se letter to the trial court again requesting a continuance and explaining that, “The soonest my new attorneys [sic] office could get me in, due to the holiday’s, [sic] is Jan. 6, 2021 at 1:30, as they are closed for 2 weeks and not opening back up till Jan. 4, 2021. I am not comfortable going through with this hearing without my legal representative.” *Id.* at 122. The trial court did not rule on this second request for a continuance, and before she testified at the December 29, 2020 hearing, Mother again reiterated he desire for a continuance so that she could have

counsel present and that she did not feel comfortable going forward without counsel. *Tr. Vol. 2* at 162.

[21] 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. Almost two weeks before the date of the hearing, Mother requested a continuance based on the fact that she wanted to obtain new counsel, and the trial court denied her request several days later, approximately one week before the hearing date. Mother then sent the court a letter again requesting a continuance and explaining that she had secured new counsel, but that her new counsel could not meet with her until after the hearing date due to the holidays. While Mother may not be free from fault as she requested the continuance because she wanted to obtain new counsel, the record does not show dilatory tactics on her part as she did in fact secure new counsel but was unable to meet with counsel due to the holidays. 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 substantial rights of Mother as the evidence presented determined whether the trial court ordered Mother's custody of Children and her parenting time with them to be modified. Lastly, we cannot conclude that a brief continuance of the hearing on the Motion to Reopen Evidence in order for Mother to obtain new

representation and have an opportunity for the new counsel to prepare for the hearing would have been so prejudicial to Father to justify 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.

[22] 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.

[23] Reversed and remanded.

Altice, J., and Weissmann, J., concur.