

## 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 re the Guardianship of Patrick  
Rishor, an incapacitated person

Earl Lasater,

*Appellant-Petitioner,*

v.

Shirley Rishor,

*Appellee-Respondent*

August 2, 2022

Court of Appeals Case No.  
21A-GU-2713

Appeal from the  
Clark Circuit Court

The Honorable  
Susan L. Orth, Senior Judge

The Honorable  
Daniel E. Moore, Judge

Trial Court Cause No.  
10C01-1801-GU-166

**Vaidik, Judge.**

## Case Summary

- [1] In 2018, the trial court awarded Shirley Ann Rishor guardianship over her husband, Patrick Rishor. Three years later, Patrick's nephew, Earl Lasater, moved to remove Shirley as guardian. Following a hearing, the trial court denied the petition and awarded Shirley attorney's fees. Lasater now appeals, arguing in part that the trial court erred in denying his motion to continue the hearing. We agree and therefore reverse and remand.

## Facts and Procedural History

- [2] Patrick and Shirley married in 2013. In 2018, eighty-two-year-old Patrick began exhibiting a significant decline in cognitive function, including memory loss, delusions, and aggression. In September, he was diagnosed with advanced brain ischemia and dementia. In November, the trial court granted Shirley temporary guardianship over Patrick. A year later, the court extended the temporary guardianship and added Bryan Hurst, CPA, as a co-guardian with Shirley to handle Patrick's finances. The court also appointed a guardian ad litem (GAL) for Patrick. The guardianship was made permanent in June 2020.
- [3] In April 2021, Lasater transported Patrick from his care facility in Jeffersonville to Columbus, where he was evaluated by Dr. Bradley Estes. Dr. Estes determined Patrick had a mild cognitive impairment but "currently maintains sufficient abilities, knowledge, and awareness to make important decisions, including decisions regarding guardianship and changes to his Will."

Appellant's App. Vol. II p. 121. Shirley was unaware of and did not consent to the evaluation. That night, Patrick fell and broke his hip and pelvis. Since the fall, Patrick is "bedridden or confined to a wheelchair" and requires 24-hour care. Appellant's App. Vol. III p. 5. In July, Lasater petitioned to remove Shirley as guardian,<sup>1</sup> citing Dr. Estes's evaluation and arguing Patrick "has regained capacity and is no longer in need of a guardianship." Appellant's App. Vol. II p. 112. Although Lasater attached Dr. Estes's report to the petition, he did not mark the petition "confidential," so the petition and report were filed as publicly available documents. Lasater also failed to mention in the petition that Patrick's health had declined in the months since Dr. Estes's evaluation.

[4] A hearing on the petition was scheduled for later in July. A few days before the hearing was to take place, Shirley moved to reschedule. Before the court ruled on that motion, the GAL also moved for a continuance. Over Lasater's objection, the trial court continued the hearing to September 27.

[5] On September 24, Lasater, who lives in Idaho, moved for a continuance or to conduct his testimony via Zoom, alleging he had been diagnosed with COVID-19 in mid-August, was still experiencing symptoms, and was not able to travel to Indiana. Lasater attached a doctor's note dated September 23, advising him not to fly for his own health and the health of other passengers. The trial court

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<sup>1</sup> It appears from the record that Lasater was unaware Hurst had been appointed as co-guardian, as the petition alleges the "current guardian" should be removed but mentions only Shirley.

denied the motion and held the hearing as scheduled. At the hearing, the trial court explained,

I will say that the reasons for my ruling, number one, to have an all day, for this Court, is nearly impossible to get and that was today we had scheduled it because this was filed well enough in advance, we had today scheduled for that. To get another all-day date we were talking 2022. Secondly, this Courtroom is not set up for Zoom when part of the people appear by Zoom and part do not . . . and we have made attempts on much lesser important hearings and it has just been not well, and any contested hearing we've had live here, just for the fact that the audio is not, and something this important, I think, needs to be in person so that's why.

Tr. Vol. II p. 14. Lasater did not attend the hearing or testify. Dr. Estes testified about the April 2021 evaluation. Dr. Heather Henderson, a psychologist who evaluated Patrick a month before the hearing, testified he is “cognitively disabled” and “incapable of managing his affairs and property, necessitating a guardianship.” *Id.* at 101-02. The GAL also testified the guardianship should be maintained. Finally, Shirley testified about Patrick’s current health and mental capacity, including that he fell in April 2021 and had continued to decline since then.

[6] After the hearing, the trial court issued an order denying Lasater’s petition, finding “ample evidence to support leaving the Guardianship intact.” Appellant’s App. Vol. III p. 12. The trial court also found Lasater litigated in bad faith, citing his involvement in the April 2021 evaluation, that he “distribut[ed] and disclos[ed] Patrick’s medical condition and health care to a

site available for public access,” and did not “advise the Court of Patrick’s change in his health condition from the time of the evaluation in April 8, 2021 to July 7, 2021, the time the Petition was filed . . . .” *Id.* at 13. As such, the trial court awarded Shirley \$51,596.72 in attorney’s fees. Additionally, the trial court granted Shirley’s request for a no-contact order, barring Lasater from contacting or visiting Patrick.

[7] Lasater now appeals.

## Discussion and Decision

[8] Lasater argues the trial court violated his due-process rights by denying his motion to continue. Indiana Trial Rule 53.5 provides, “Upon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon a showing of good cause established by affidavit or other evidence.” “A trial court’s decision to grant or deny a motion to continue a trial date is reviewed for an abuse of discretion, and there is a strong presumption the trial court properly exercised its discretion.” *Blackford v. Boone Cnty. Area Plan Comm’n*, 43 N.E.3d 655, 664 (Ind. Ct. App. 2015) (quotation omitted). If good cause is shown for granting the motion, denial of a continuance will be considered an abuse of discretion. *J.P. v. G.M.*, 14 N.E.3d 786, 790 (Ind. Ct. App. 2014). We will reverse the trial court’s decision only if the moving party can show that he was prejudiced by the denial. *In re A.S.*, 100 N.E.3d 723, 727 (Ind. Ct. App. 2018).

[9] The denial of a continuance may also violate due process. *Blackford*, 43 N.E.3d at 664. “There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request was denied.” *Smith v. Smith*, 136 N.E.3d 656, 659 (Ind. Ct. App. 2019) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), *reh’g denied*).

[10] The circumstances here show Lasater demonstrated good cause for why the motion to continue should have been granted. He provided a doctor’s note explaining he had been diagnosed with COVID-19, was still experiencing symptoms, and should not fly for his own health and the health of other passengers.<sup>2</sup> See *Powers v. Blunck*, 109 N.E.3d 1053, 1055 (Ind. Ct. App. 2018) (finding mother showed good cause for continuance of custody-modification hearing where, among other reasons, she provided doctor’s note stating she could not travel). There is no evidence in the record to suggest this was an attempt to prolong the proceedings or engage in dilatory tactics. Given his objection to Shirley’s continuance, Lasater was apparently prepared to go through with the hearing as originally schedule in July. Nor is this the type of case needing a quick resolution. While the case was pending, Shirley remained

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<sup>2</sup> Shirley argues Lasater could have driven to the hearing. But Lasater lives in Idaho, and it would have taken more than 24 hours of driving time to reach Jeffersonville from Idaho. And he had not been told by his doctor not to fly until just a few days before the hearing. We agree with Lasater that given his illness, the time limitations, and the length of travel involved, the doctor’s directive not to fly essentially prevented Lasater from attending in-person at all.

Patrick's guardian and the status quo remained unchanged. In fact, Lasater, as the moving party trying to alter the status quo, would be the one most prejudiced by a delay. And Lasater had never requested or been given a continuance—although both Shirley and the GAL had. It is also notable that the trial court did not deny the continuance because Lasater's reasons were insufficient or due to any potential prejudice to Shirley. Instead, the court denied the continuance due to scheduling concerns and would not allow Lasater to testify remotely due to technological concerns.

[11] Shirley argues that, even if the trial court should have granted Lasater a continuance, he was not prejudiced by the denial. We disagree. Because of the denial, Lasater could not testify about his communications with and observations of Patrick. Given that the key issue at trial was Patrick's capacity, and several other witnesses including Shirley and the GAL testified about their observations, we cannot say the denial of the continuance was not prejudicial. Perhaps even more prejudicial was the trial court's finding that Lasater litigated the suit in bad faith—a finding the trial court made without seeing Lasater or hearing his side of the story and which required him to pay Shirley \$51,596.72 in attorney fees.

[12] Based on the circumstances of this case, the trial court's denial of Lasater's motion to continue was an abuse of discretion that infringed on his due-process rights. We therefore reverse the trial court's order and remand for a new hearing.

[13] Reversed and remanded.<sup>3</sup>

Crone, J., and Altice, J., concur.

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<sup>3</sup> Lasater also challenges the merits of the attorney-fee award and the issuance of a no-contact order. Because we are reversing the trial court's entire order and remanding for a new hearing, we need not address these issues.