

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.

ATTORNEY FOR APPELLANT:

MICHAEL B. TROEMEL
Lafayette, Indiana

ATTORNEY FOR APPELLEE:

CHARLES DEIBLE
Lafayette, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JOSHUA YUEN,)

Co-Appellant-Respondent,)

vs.)

TIPPECANOE COUNTY DIVISION)
OF CHILD SERVICES,)

Appellee-Petitioner.)

No. 79A02-0704-JV-350

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Loretta H. Rush, Judge
Cause No. 79D03-0609-JT-240; 79D03-0609-JT-241;
79D03-0609-JT-242; 79D03-0609-JT-243

August 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Joshua Yuen (Father), appeals the trial court's denial of his motion for continuance in proceeding to terminate his parental rights due to his incarceration in the Tippecanoe County Jail.

We affirm.

ISSUE

Father raises one issue on appeal, which we restate as: Whether the trial court abused its discretion in denying father's motion for continuance.

FACTS AND PROCEDURAL HISTORY

On September 27, 2006, the Tippecanoe County Department of Child Services (TCDACS) filed two Verified Petition to Terminate Parental Rights (the Petitions), one petition on behalf of Ju.Y. and the other on behalf of Ja.Y. On November 30, 2006, a trial on the Petitions was held. The morning of trial, Father moved for a continuance until he was released from jail in January 2008 providing him with the opportunity to "get his life back together." (Transcript p. 3). The trial court denied Father's motion for continuance. On December 6, 2006, the trial court entered its Order to Terminate the Parent-Child Relationship, stating in pertinent part:

Order to Terminate Parent-Child Relationship

* * *

1. [Mother] and [Father] are the parents of two (2) daughters, [Ju.Y.], born October 30, 1997, and [Ja.Y.], born February 5, 2003.
2. Parents have an extensive history with [TCDACS]. In February 2005[,] [TCDACS] received a report that Father appeared to be under the

influence of drugs or alcohol while at his daughters' pediatrician's office and that [] Father had stolen items from the office. During the investigation, Father admitted to using methamphetamine. Parents agreed to enter into a Service Referral Agreement[;] however[,] both failed to comply with the terms of the Agreement and did not sign the document.

3. [TCDCS] was again contacted with a report that the family was residing with an individual who was using methamphetamine and cocaine, and whose own children had been removed from the home. Neglect was substantiated against Mother for having her children in a life and health endangering environment. Father had recently been arrested for possession of methamphetamine, possession of paraphernalia and operating a vehicle while intoxicated when his toddler child was in the vehicle.
4. On August 8, 2005, [TCDCS] received another report that both parents were using drugs, including crystal methamphetamine, Loratab and [X]anax. Neglect was again substantiated against the parents.
5. On August 29, 2005, Father tested positive for drugs and Mother admitted to using drugs. During the investigation, Father admitted to introducing Mother to methamphetamine.
6. On November 12, 2005, [TCDCS] received a report that Mother had battered her daughter while coming down off a drug high and Mother fled the scene. At that time, Father was incarcerated in the Tippecanoe County Jail. Criminal battery charges were filed against the Mother and the charges are currently pending. Both children were placed in foster care with their maternal grandmother and have remained in her care since that time. Neglect was substantiated as to the Mother for the physical abuse and life and health endangerment.
7. Following a fact finding hearing, the [c]ourt found both children to be Children in Need of Services, "CHINS", under [I.C. § 31-34-1-1] and [I.C. § 31-34-1-2] based on the physical abuse and drug usage of the parents. On January 12, 2006, dispositional services were ordered for the parents, including that they remain drug free; complete substance abuse and psychological evaluations; and participate in CA/RE Group, drug and alcohol rehabilitation programs and home-based preservation services. Additional treatment and services were ordered for the children. Additional services were ordered at frequent review

hearings, including that Mother participate in a residential drug treatment program, individual therapy and the Thinking for a Change program.

* * *

9. Father has an extensive criminal history over the past eleven (11) years including conspiracy to commit burglary, conspiracy to commit counterfeiting, forgery, attempted theft, 2006; theft, 2005; possession of a narcotic drug [methamphetamine], operating while intoxicated [with his child in vehicle], operating while intoxicated with a prior conviction, 2006[;] and two (2) counts of possession of a controlled substance, two (2) counts of resisting law enforcement, 2005. Father currently has charges pending against him pertaining to burglary, four (4) counts of theft and attempted theft.
10. Father was sentenced on June 2, 2006[,] to nine and ½ years; six (6) years at the Department of Correction[], one (1) year at Community Corrections and two (2) years of probation.
11. Mother and Father have a history of destructive behavior together that includes domestic violence, drug use and criminal activity. Mother and Father have never been able to work on their issues together. Examples of such inability to focus on any development include Mother's early departure from visitation so she could talk to Father on [the] phone, and Mother's failure to follow through after filing a dissolution action.

* * *

16. Father has failed to appear on numerous criminal and civil matters, evictions, collection cases and traffic violations. Father does not have a driver's license.
17. Father was out of jail and able to participate in services for several months in the beginning of the CHINS action. Father failed to attend the CA/RE Group, was dishonest with service providers, drove to visitation on a suspended driver's license and continued to use drugs.

* * *

21. Julie Holladay [(Holladay)], CASA, testified that it is in the best interests of the children for parental rights to be terminated. The children are not safe in parents' care. Holladay testified that Mother's

drug use, mental health and other life instabilities continued to stand in the way of providing a safe home for her children. Father's continued drug usage, pattern of criminal activity, extended period of incarceration and instabilities in all aspects of his adult life prohibit him from providing a minimally safe environment for his children.

22. The [c]ourt finds, as a matter of law, that reasonable, appropriate and necessary services have been offered to parents and children over an extended period of time, commencing with the initial removal on November 12, 2005[,] to date. The services have been exhaustive and have been designed to address the difficulties presented by the family in the initial CHINS petitions upon the initial removal of the children from the family, and to address other difficulties that have arisen since the [TCDCS] became involved with this family. The services have been aimed at alleviating the problems requiring the removal of the children from Parents' care; permitting reunification; and minimizing safety, health, mental health and emotional concerns.
23. The [c]ourt finds, as a matter of law, that after approximately one (1) years of rendering services of various kinds with different providers to this family that there is not any basis for any reasonable belief that the circumstances which resulted in the removal of the children from Parents' care or the reasons for continued placement outside the home will be remedied. Parents' pattern of erratic behavior, new arrests and continuing drug usage establishes that they have failed to fully cooperate with and learn from services. Parents do not indicate that they have a basic understanding or belief of the harm their children have suffered in direct result of Parents' drug usage, criminal behavior and unstable lifestyle. Parents are, therefore, unable to provide a minimally safe, secure and stable home for their children.
24. The [c]ourt finds, as a matter of law, that the continuation of parent-child relations poses a threat to the well-being of these children.
25. The [c]ourt finds, as a matter of law, that it would not be in the best interests of the children to try to reunite this family.
26. The [c]ourt further finds that the DCS has an acceptable, reasonable, appropriate and satisfactory plan for the care and treatment of the children. The children can be adopted. The plan is that they be adopted.

27. The [c]ourt finds it would be in the best interests of the children for the rights of [Mother and Father] and their children [to] be terminated so that the children can be placed for adoption at the earliest possible time.
28. Further efforts to reunify will have continuing deleterious effects of these children. An appropriate, adoptive home can provide what these children need to enable them to grow up to be responsive and capable adults who are able to participate and interact in society in a positive way.

(Appellant's App. pp. 541-44).

Father now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Father argues the trial court erred in denying his motion to continue. Specifically, Father contends that although he was incarcerated when the children were removed and throughout the CHINS proceeding he is scheduled for release approximately one year from the dispositional hearing and should have been allowed to re-establish himself as a father to his children; thus, he claims his motion for continuance should have been granted.

We note that the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *Rowlett v. Vanderburgh County Office of Family and Children*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), *trans. denied*. We will reverse a trial court only for an abuse of that discretion. *Id.* An abuse of discretion may be found in the denial of a motion for a continuance when the moving party has shown good cause for granting the motion. *Id.* However, no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial. *Id.*

In support of his argument, Father directs us to *Rowlett*, where two months after the children were taken into protective custody and before Rowlett was ordered to perform any services, he was incarcerated for dealing in methamphetamine and possession of precursors with intent to manufacture. *Id.* at 618. Rowlett was still incarcerated at the time his parental rights were terminated, not providing him with the chance to participate in services. *Id.* At the scheduling conference four months prior to the termination trial, Rowlett objected to the date set because he was to be released six weeks after the scheduled date of the hearing. *Id.* Then, a month later, still three months before the hearing, Rowlett filed a motion to continue, which was denied by the trial court. *Id.* On appeal this court held that because of the positive strides Rowlett had made in turning his life around while in prison, including not using drugs, participating in a Therapeutic Community, participating in nearly 1,100 hours of individual and group services, and earning twelve hours of college credit, there was not clear and convincing evidence that the conditions which resulted in the children's removal would not be remedied upon his release from prison. *Id.* at 622. As such, we held the trial court abused its discretion by Rowlett's motion for continuance. *Id.* at 619-20.

Rowlett is clearly distinguishable from Father's case. First, Rowlett objected to the date set for the termination hearing at the scheduling conference four months before the hearing was scheduled to take place and subsequently filed a motion to continue. Our review of the record in this case indicates an initial hearing occurred September 28, 2006, where the termination hearing was set for November 30, 2006. However, at no time

between September 28 and November 29, 2006, did Father file a motion for continuance. Rather, Father waited until the day of the hearing to orally request a continuance.

Second, Rowlett only had six weeks of his sentence remaining when the hearing was scheduled to occur; whereas, in the instant case, Father's anticipated release date was more than a year after the date of the hearing. Additionally, Father had a year of Community Corrections to serve following his release from jail, the format of which was unknown at the time of the hearing making it uncertain whether upon being released from jail it would even be possible for Father to have his children in his care. In *Rowlett* we also noted a "compulsion to proceed with termination" proceedings to "ensure that children [do] not spend long periods of their childhoods in foster care or other settings designed to be temporary." *Rowlett*, 841 N.E.2d at 619; *Phelps v. Sybinsky*, 736 N.E.2d 809, 813 (Ind. Ct. App. 2000), *trans. denied*. In spite of such desires, we found in favor of Rowlett because "continuation of the dispositional hearing until sometime after [Rowlett] was released would have had little immediate effect upon the children." *Id.* Rowlett's children had been in the custody of their maternal grandmother and the adoption plan was for her to adopt the children. Even though the children in the instant case were in the care of their maternal grandmother and the TCDCS' plan was for her to adopt them, the disparity between the two time frames is so significant we find continuing this case would have had a significant effect upon the children.

Additionally, we are not inclined to reverse the trial court after comparing Rowlett's obvious desire to turn his life around in order to care for his children upon being released from prison to Father's complacency at improving his life, and as a result

the care he could provide for his children. As noted by the trial court, “Father was out of jail and able to participate in services for several months in the beginning of the CHINS action,” but did not. (Appellant’s App. p. 542). He “failed to attend the CA/RE Group, was dishonest with service providers, drove to visitation on a suspended driver’s license and continued to use drugs.” (Appellant’s App. p. 542). Therefore, Father has not shown good cause for granting his motion to continue, and the trial court did not abuse its discretion in denying his motion.

CONCLUSION

Based on the foregoing, we conclude Father has not demonstrated good cause that he was prejudiced by the denial of his motion for a continuance and do not find the trial court abused its discretion by its denial.

Affirmed.

SHARPNACK, J., and FRIEDLANDER, J., concur.