

[Cite as *In re D.K.*, 2015-Ohio-546.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY**

IN THE MATTER OF:

D.K., a Dependent Child

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Appellate Case No. 2014-CA-37

Trial Court Case No. N44339

(Civil Appeal from
Greene County Juvenile Court)

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OPINION

Rendered on the 13th day of February, 2015.

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HALL, J.

{¶ 1} A.K. (“Mother”) appeals from the trial court’s denial of her oral motion for a continuance at the outset of a permanent-custody hearing involving her child, D.K.

{¶ 2} In her sole assignment of error, Mother contends the trial court erred in refusing to continue the hearing.

{¶ 3} The record reflects that appellee Greene County Children Services (“GCCS”) filed a September 2012 dependency and neglect complaint regarding D.K. The child later was adjudicated dependent and placed in GCCS’s temporary custody. The agency first moved for permanent custody in March 2013. That motion proceeded to a hearing on September 25, 2013. When Mother failed to appear for the hearing, her attorney requested a continuance. The trial court denied the motion. Mother’s attorney renewed the request following an afternoon recess. Counsel explained that she had spoken with Mother by phone and that Mother was at the hospital being treated for injuries suffered in a car accident. In light of this representation, the trial court agreed to continue the permanent-custody hearing to October 8, 2013. In a written entry, the trial court directed Mother to “bring medical records to said hearing which verify that she was treated on 9/25/13 for injuries related to a car accident.” (Doc. #90). Mother subsequently failed to appear for the October 8, 2013 hearing, which proceeded in her absence. (Doc. #92). Following that hearing, the trial court denied GCCS’s permanent-custody motion. The denial had nothing to do with Mother making progress on her case plan. The trial court expressly found that Mother had not made much progress. Rather, the denial had to do with no adoptive placement being identified and the foster parents not expressing an

interest in adoption. (*Id.*). As a result, the trial court extended GCCS's temporary custody. (*Id.*).

{¶ 4} GCCS filed a second permanent-custody motion in March 2014. Prior to holding a hearing on that motion, the trial court conducted an April 8, 2014 review hearing, which Mother failed to attend. (Doc. #124). GCCS's second permanent-custody motion then proceeded to a hearing on August 13, 2014. At the outset of the hearing, Mother's absence was noted. Mother's attorney, Jessica Moss, then engaged in the following discussion with the trial court and Brittany Hensley, counsel for GCCS:

MS. MOSS: Your honor, my understanding from Children's Services is that they were going to pick up my client this morning. She had called early this morning saying she was with a niece in the hospital, so for that reason I'd ask for a continuance of the permanent custody case.

JUDGE HUTCHESON: Your client is at the hospital with a niece?

MS. MOSS: That's the information I've received from Children's Services. I left her a message this morning and I spoke to her yesterday. That's apparently what she had informed one of the caseworkers this morning.

JUDGE HUTCHESON: Yeah, when you spoke to her yesterday, did any of that conversation include information about having to tend to a niece at the hospital?

MS. MOSS: We discussed the hearing, and it is my understanding that she was going to be here today, so ---

JUDGE HUTCHESON: So your answer to that is no?

MS. MOSS: That's correct.

JUDGE HUTCHESON: She didn't raise the issue of having---her niece was recently hospitalized?

MS. MOSS: No, your Honor.

* * *

JUDGE HUTCHESON: Any response of the guardian's issue [sic] about [Mother] being at the hospital with her niece --

MS. HENSLEY: Your Honor --

JUDGE HUTCHESON: -- or do you have any information about that?

MS. HENSLEY: Your Honor, it's my understanding that Heather Jamison of the agency was, in fact, going to pick up [Mother] but was notified by [Mother] that there was this issue regarding a niece being in the hospital, but it is also my understanding that this is not, in fact, her niece. The person that she is alleging, I believe it is her boyfriend's relative, no relative of her own.

JUDGE HUTCHESON: All right. The Court will proceed today with the hearing.

(Tr. at 6-7).

{¶ 5} The hearing then proceeded in Mother's absence. Based on the evidence presented, the trial court awarded GCCS permanent custody of D.K. (Doc. #150). The trial court found, among other things, that Mother had mental-health problems and substance-abuse issues, that she lacked the ability to provide a safe environment for her child, that she had failed to make much progress on her case-plan objectives, that she

was living with a registered sex offender in Kentucky, and that she had visited with D.K. only sporadically.

{¶ 6} On appeal, Mother does not address the merits of the trial court's permanent-custody decision. She argues only that the trial court erred in failing to grant her a continuance. Mother asserts that the trial court effectively prohibited her from attending the hearing, thereby depriving her of her due-process rights.

{¶ 7} Upon review, we find Mother's argument unpersuasive. GCCS stood ready to transport her to the permanent-custody hearing. Mother herself elected not to attend, purportedly choosing instead to accompany another person to the hospital. The issue before us is whether the trial court abused its discretion in denying a continuance under these circumstances. *In re Jackson*, 2d Dist. Montgomery No. 17514, 1999 WL 958512, *8 (Aug. 13, 1999) (recognizing that "[t]rial courts have broad discretion in deciding whether to grant a continuance").

{¶ 8} In her appellate brief, Mother urges us to apply the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), to determine whether the denial of a continuance violated her due-process rights. That test involves consideration of (1) the private interest affected, (2) the risk of erroneous deprivation and the probable value of additional safeguards, and (3) the governmental burden of additional procedural requirements. For its part, GCCS urges us to apply factors articulated in *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), to determine whether the trial court's denial of a continuance was an abuse of discretion and violated Mother's due-process rights. Those factors include: (1) the length of the delay requested, (2) whether other continuances had been requested and received, (3) the inconvenience

to those involved in the litigation, (4) whether the requested delay was for legitimate reasons, dilatory, purposeful, or contrived, (5) whether Mother contributed to the circumstances that gave rise to the continuance request, and (6) any other relevant factors depending on the unique facts of the case. *Id.* at 67-68. The Ohio Supreme Court applied the foregoing factors in *Unger* to determine whether the denial of a continuance violated due process. *Id.*

{¶ 9} This court applied *Mathews v. Eldridge* in *In re R.L.*, 2d Dist. Greene Nos. 2012CA32, 2012CA33, 2012-Ohio-6049, ¶ 27-29, to find no due-process violation arising from the court's failure to have an incarcerated parent conveyed from prison to attend a permanent-custody hearing. On the other hand, this court applied the *Unger* factors in *In re Martin*, 2d Dist. Montgomery No. 16919, 1998 WL 677214, *1 (Oct. 2, 1998), to find no abuse of discretion in the court's denial of a continuance where a parent failed to appear for a permanent-custody hearing.

{¶ 10} Consistent with *In re R.L.*, other appellate districts have applied *Mathews v. Eldridge* in permanent-custody cases most often when an incarcerated parent challenges a court's refusal to transport him or her from prison for a hearing. See, e.g., *In re Lisbon*, 5th Dist. Stark No. 2003CA00318, 2004-Ohio-126, ¶ 17-19; *In re Joseph P.*, 6th Dist. Lucas No. L-02-1385, 2003-Ohio-2217, ¶ 51-52; *In re C.M.*, 9th Dist. Summit Nos. 23606, 23608, 23629, 2007-Ohio-3999, ¶ 12-14; *In re N.T.*, 11th Dist. Ashtabula No. 2010-A-0053, 2011-Ohio-650, ¶ 84-86; *In re S.F.T.*, 12th Dist. Butler No. CA2010-02-043, 2010-Ohio-3706, ¶ 9. In such a case, the issue is whether preventing the incarcerated parent from attending the hearing violates due process. Here, however, the trial court did nothing to prevent Mother from attending the permanent-custody hearing. She had notice

of the hearing, and GCCS was available to provide transportation. She voluntarily chose to go to the hospital instead.

{¶ 11} The *Unger* factors have been applied far more frequently when, as in the present case, a non-incarcerated parent challenges a court's refusal to continue a permanent-custody hearing to accommodate or facilitate the parent's circumstances. See, e.g., *In re M.H.*, 2d Dist. Montgomery No. 25084, 2012-Ohio-5216, ¶ 29-30; *In re C.B.*, 3d Dist. Seneca Nos. 13-12-06, 13-12-07, 2012-Ohio-2691, ¶ 25-27; *In re N.A.P.*, 4th Dist. Washington Nos. 12CA30, 12CA31, 2013-Ohio-689, ¶ 20; *In re B.B.*, 5th Dist. Stark No. 2010CA00151, 2010-Ohio-4618, ¶ 35-38; *In re Nevaeh J.*, 6th Dist. Lucas No. L-06-1093, 2006-Ohio-6628, ¶ 43-46; *In re Kutcher*, 7th Dist. Belmont No. 02 BE 58, 2003-Ohio-1235, ¶ 26-27; *In re M.J.*, 8th Dist. Cuyahoga No. 100071, 2013-Ohio-5440, ¶ 21; *In re C.B.*, 9th Dist. Lorain No. 14CA010588, 2014-Ohio-4618, ¶ 12-17; *In re B.M.*, 10th Dist. Franklin No. 09AP-60, 2009-Ohio-4846, ¶ 10-12; *In re B.D.*, 11th Dist. Lake Nos. 2009-L-003, 2009-L-007, 2009-Ohio-2299, ¶ 47-49.

{¶ 12} We believe the *Unger* factors are applicable to Mother's case, which involves the denial of a continuance rather than a refusal to transport an incarcerated parent, and we will focus our analysis on them. As set forth above, *Unger* instructs that "[i]n evaluating a motion for a continuance, a court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case."

Unger at 67-68. In considering these factors, we bear in mind that we review the trial court's ruling for an abuse of discretion and that "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process[.]" *Id.* at 67, quoting *Unger v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). "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 is denied." *Id.*

{¶ 13} Here Mother's counsel did not specify the length of the delay requested. We reasonably can infer, however, that a relatively short continuance likely would have been sufficient. Nevertheless, granting any continuance would have inconvenienced GCCS's seven witnesses, the parties' respective counsel, and the trial court, all of whom were prepared to proceed that day. The record also reflects that other continuances had been requested. Most damaging to Mother's position is that she previously had requested a continuance of the first permanent-custody hearing under similar circumstances. On that occasion, she failed to appear for the hearing, claiming on the first day of testimony that she was at the hospital. The trial court granted her a continuance. Mother subsequently failed to appear for the rescheduled hearing, however, and never provided requested documentation supporting her claim to have been in a car accident. We note too that Mother previously had failed to appear for one or more review hearings.

{¶ 14} In light of Mother's prior failures to appear, and her prior unsubstantiated claim about being at the hospital due to a car accident, the trial court was entitled to doubt whether her most recent request for a continuance was legitimate. The trial court had received no verification that Mother actually was at the hospital with a niece. Mother had not mentioned the issue to her attorney the day before the hearing, and counsel for

GCCS represented that the hospitalized person was not Mother's niece. Mother herself provided no information about the severity of the hospitalized person's condition or whether the hospital trip had been planned or was unexpected. Nor did Mother ever contact her attorney or the trial court about her need to be at the hospital. Although Mother's attorney left a message for her, Mother simply told a GCCS worker that she was at the hospital with her niece. Under these circumstances, we cannot say the trial court abused its discretion in denying a continuance.

{¶ 15} In her appellate brief, Mother cites case law for the proposition that an emergency hospital stay or medical condition may warrant continuing a permanent-custody hearing. We do not disagree. As noted above, however, each case is dependent on its own particular circumstances. *Unger* at 67. For that reason, citation to other cases is of limited usefulness in determining whether the trial court's decision here constituted an abuse of discretion. In response to Mother's case law, we simply note that claimed hospitalization and medical conditions also have been found insufficient to require continuing a permanent-custody hearing. See, e.g., *In re Jordan H.*, 6th Dist. Lucas No. L-07-1136, 2007-Ohio-4091, ¶ 23-24; *In re A.G.M.C.*, 3d Dist. Marion No. 9-10-30, 2010-Ohio-5188, ¶ 43; *In re B.M.*, 10th Dist. Franklin No. 09AP-60, 2009-Ohio-4846, ¶ 23-24.

{¶ 16} Based on the reasoning set forth above, Mother's assignment of error is overruled. The judgment of the trial court is affirmed.

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DONOVAN, J., and WELBAUM, J., concur.

Copies mailed to:

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