

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

IN THE FAMILY COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

IN THE INTEREST OF:

)	DIV. 16
D.W.)	
Male, 10 years)	No. 11SL-JU0269
Birthdate: XX/XX/01)	
PID: XXXXX)	
MCID: XXXXX)	
A.W.)	DIV. 16
Female, 9 years)	
Birthdate: XX/XX/02)	No. 11SL-JU0270
PID: XXXXX)	
MCID: XXXXX)	

FINDINGS OF FACT, CONCLUSIONS OF LAW
SUPPORTING THE COURT'S DENIAL OF FATHER'S
REQUEST FOR A CONTINUANCE (OR, IN THE ALTERNATIVE, A MOTION
TO ALLOW ADDITIONAL EVIDENCE)

This court, having heard evidence and argument on Father's Motion for a Continuance, finds the following facts and conclusions of law:

I. FINDINGS OF FACT

On November 1, 2011, the parties set the matter for trial. The parties selected two dates – January 13 and 19, 2012, for the presentation of evidence.

On January 6, 2012, Father, through his attorney, moved to continue the first day of trial because he purportedly could not attend because of apparent employment obligations. The parties consented to Father's request for a continuance because Mother had submitted her written consent to terminate her parental rights (and therefore, the prosecutor had significantly less witnesses to present). The parties agreed that the rest of the evidence could be presented on the second day. Furthermore, the parties agreed to address only evidence pertaining to Mother's consent (which would be irrelevant to Father's case) on the first day of trial.

On January 19, 2012, nearly all of the remaining parties appeared in court for testimony relating to the termination of Father's parental rights. Father once again failed to appear. Father's attorney indicated that Father had informed him that morning that he was not available to appear in court because he was again out of town because of his employment. Father's attorney sought a continuance.

The juvenile officer and the GAL objected to Father's request for a continuance. The juvenile officer's professional witnesses had made special arrangements to appear in court for the second day of trial. This court denied Father's request.

The juvenile officer presented testimony that day; both Father's attorney and the GAL thoroughly cross-examined the juvenile officers' witnesses. The juvenile officer ultimately rested on the same day. At the end of the testimony, Father did not make an offer of proof establishing how Father could have contributed to assisting his counsel with cross-examination. Further, Father's attorney did not call any witnesses on behalf of Father.

After testimony was presented on January 19, 2012, this court continued the case for the limited purpose of addressing two very specific factual and legal matters. The case was continued to January 26, 2012 to address these issues.

On January 26, 2012, Father appeared. Through his attorney, Father moved to present testimony on his behalf (although Father was not ready to proceed at that time with any of his witnesses). This court asked Father's attorney to state what evidence Father would have presented if he had appeared for trial. Father's attorney indicated that Father would have testified about his compliance with most of the terms of the Children's Division service plan. He would explain why he did not comply with one major term of the plan in particular. * Father's attorney also indicated that Father would have presented witnesses (no names were given) that would have testified to Father's love of his children and his abilities as a father.

This court informed the parties that it was considering Father's request, despite objections from the juvenile officer and the Guardian ad Litem. The court decided to allow Father the opportunity to present limited testimony on the issue as to why he had failed to appear in court for the trial.

Father next testified that he had failed to appear in court on both days of trial because he was out-of-town through his employment as an over-the-road trucker. When cross-examined about the name of his employer company, the name of his immediate supervisor, the address of his employer, and about other details relating to the job, Father refused to answer, pleading the Fifth Amendment. Father, therefore, provided no information that would allow the juvenile officer or the GAL to verify or contradict his claims that he was unable to appear in court on the scheduled days of trial ...

This court found Father's explanation of why he had failed to appear for his trial not credible. This court also considered Father's previous offer of proof as to what testimony he would have presented if Father had appeared. (Interestingly enough, none of Father's witnesses appeared for the second day of trial.) This court also considered that the primary basis for the juvenile officer's petition for terminating Father's parental rights was Father's failure to complete a sexual offender program (that insisted on

* This court is aware of Father's claim that he did not progress with his court-ordered sex offender treatment because the completion of the program warranted his admitting to the commission of the sexual offense against his daughter. For the past four years, Father has adamantly denied that he had committed the offense (despite this court's finding otherwise). This court is unclear about what additional testimony Father could have provided about this subject matter. (Father's attorney mentioned no names of any purported witnesses.)

Father's admitting that he had committed an act of sexual abuse against his daughter, an act that this court had adjudicated to be true.)

II. CONCLUSIONS OF LAW

According to Missouri Civil Procedure Rule 65.03, “[a]n application for a continuance shall be made by a written motion accompanied by the affidavit of the applicant or some other credible person setting forth the facts upon which the application is based, unless the adverse party consents that the application for continuance may be made orally.” Rule 65.05 provides that “[i]f the court shall be of the opinion that the affidavit is insufficient, it shall permit it to be amended. If, after such amendment, the affidavit does not contain a sufficient statement of facts, the court shall overrule it ... The party moving for the continuance may read as the evidence of such witness the facts stated in the affidavit. The opposing party may disprove the facts disclosed, or prove any contradictory statements made by the absent witness, or otherwise impeach the credibility of the absent witness.”

On January 19, 2012 (the second scheduled day of trial), Father moved for a continuance. He was not in compliance with Rule 65.03 (clearly because his attorney was not aware that he would be absent until the morning of the trial). He had no affidavit supporting his request. Neither the juvenile officer nor the guardian ad litem – who were both opposing Father's request – consented to Father's making an oral application.

This court considered Father's renewed request for a continuance on January 26, 2012. While Father did not present an affidavit, he made himself available to testify about the reasons in support of his continuance motion. Father took the witness stand, giving a cursory explanation as to why he had failed to appear. Moreover, he provided practically no information at all on cross examination. Both opposing attorneys attempted to elicit facts to verify Father's account of his whereabouts on the scheduled two days of trial. Father provided them with nothing, refusing to reveal any means for the attorneys to obtain corroborating or conflicting testimony. Father, instead, repeatedly – and inexplicably – pled the Fifth Amendment.

This court gave Father an unorthodox opportunity to comply with Rule 65.03. In lieu of an affidavit, Father was allowed to provide testimony in support of his reasons for not being present on January 13 and 19, 2012. Father's “pleading the Fifth,” however, gave the opposing parties no opportunity to “disprove the facts disclosed” (as is provided for Rule 65.05). Father's testimony precluded the opposing attorneys from verifying from his employers his whereabouts on the days in question. His testimony amounted to little more than an insufficient affidavit – scant facts with no information to support them.

The denial of a motion for a continuance is reversed only in “extreme cases.” *In re P.D.*, 144 S.W. 3d 907, 911 (Mo. App. E.D. 2004). Nonetheless, the trial court does not have “absolute discretion.” *In the Interest of J.R., D.R., W.R. and K.R.*, No.E.D. 95833 (Aug. 16, 2011). This court can hardly take such requests lightly, given the gravity of the matter at hand, in this case in particular.

This court, therefore, provided Father with the opportunity to explain his absences on both of the trial dates; if his explanation had been reasonable and could have been verified, this court clearly would have granted a continuance. Father provided no such information.

This court's decision to deny Father's request for a continuance was similar to those decisions made by judges, who are presented with unverified written motions for continuances. (See: *In re E.T.C.*, 141 S.W. 3d 39, 45-46; *Nixon v. D.O.R.*, 883 S.W. 2d 945, 946 (Mo. App. E.D. 1994). These movants are hardly playing fairly, refusing to comply with court expectations.

This court also must take into consideration the inconvenience "to the other parties and participants, who were all ready to proceed." *In re I.B.*, 48 S.W. 3d 91, 99 (Mo. App. W.D. 2001). Father expects the juvenile officer's busy professional witnesses to ready themselves for trial a third time, when he did not bother to comply with court protocol.

After having presided over the "continuance hearing," this court was in a good position to gauge Father's credibility. His unwillingness to provide any information to the opposing attorneys that could corroborate or contradict his factual account of the two days in question caused this court to disbelieve him. He simply was not credible.

Father's testimony about his activities on January 13 and 19, 2012 was as supportive of his motion for a continuance as is a Rule 65.05 affidavit that fails to "contain a sufficient statement of facts." Motions with such unsupportive information warrant the courts to deny them. Father's Motion for a Continuance (or, in the alternative, Motion to Allow Additional Evidence) is DENIED.

SO ORDERED:

Michael D. Burton
Family Court Judge

cc: Attorneys