

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA10-253

CARA BUTLER

APPELLANT

V.

ARKANSAS DEPARTMENT of
HUMAN SERVICES

APPELLEE

Opinion Delivered September 1, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. JJN-08-500]

HONORABLE MELINDA RAE
GILBERT, JUDGE

AFFIRMED

KAREN R. BAKER, Judge

Appellant Cara Butler appeals from the December 10, 2009 order of the Pulaski County Circuit Court terminating her rights to her two minor children, L.B., born March 9, 2008, and E.H., born June 14, 2006. Appellant urges that the trial court abused its discretion in denying her request for continuance of the hearing. We find no reversible error and affirm.

On March 9, 2008, appellant gave birth to L.B., who was born with a high dosage of amphetamine in his system and in withdrawal. The Arkansas Department of Human Services (DHS) took a 72-hour hold on L.B. and his sibling, E.H., on March 11, 2008, and emergency custody was granted to DHS on March 17, 2008. At a hearing held on March 24, 2008, the

court found probable cause to believe that the children were dependent-neglected based on the mother's drug use and continued their custody with DHS. At the hearing, the court ordered appellant to have a psychological examination, attend residential drug treatment and counseling, visit her children, attend parenting classes, and obtain stable housing and employment. On May 12, 2008, the trial court adjudicated the minor children dependent-neglected and set the goal of the case as reunification. The court reviewed the case on September 8, 2008, and held a permanency planning hearing on March 2, 2009, at which time the goal of the case was changed to termination of parental rights. DHS filed a petition for termination of parental rights on May 18, 2009; however, the circuit court dismissed the petition on August 19, 2009, because the hearing was beyond the ninety-day hearing requirement.¹ DHS refiled the petitions on that same date, and the hearing was set for October 19, 2009.

Appellant was arrested on August 26, 2009, by the Sherwood Police Department for possession of a controlled substance, with intent to manufacture or deliver; possession of drug paraphernalia; and carrying a knife as a weapon. Appellant's car contained syringes, marijuana, assorted pills, plastic bags with white and brown substances, a bent spoon with white residue, rolling papers, pseudoephedrine, and digital scales. On September 27, 2009, appellant was injured in a motor-vehicle crash, which rendered appellant a paraplegic.

¹For reasons that do not appear in the record, appellant received a continuance of the first hearing date on July 13, 2009. The order continued the case until August 19, which was 92 days after the filing of the initial petition.

On the October 19, 2009 hearing date, the circuit court granted appellant's motion for a continuance, finding that there was good cause for the continuance due to the accident; however, in granting appellant's motion, the court rescheduled the hearing for November 18, 2009, and stated that there would be no further continuances. On November 18, 2009, appellant's counsel appeared at the hearing and orally requested another continuance due to appellant's injuries, stating, "Your Honor, my client has been texting me and she indicates that she's physically unable to be here and asked me to ask for a continuance with the understanding that I know the Court ordered last time that she would not entertain such a request. But for the record, I'm asking for a continuance based on my client's inability to be present for today's hearing." The court denied the request, heard the evidence, and granted DHS's petition to terminate appellant's parental rights.²

The court found that it was in the best interest of the children to terminate parental rights, that there was potential harm to the health and safety of the children from their mother because of her continued drug use and inability to maintain a stable living environment for the children, and that the children were adoptable. The court also found that DHS had presented clear and convincing evidence supporting termination of parental rights under Arkansas Code Annotated section 9-27-341, including that the children had been adjudicated dependent-neglected, that they had remained out of appellant's custody for a period of over twelve months, and that appellant had failed to remedy the conditions that caused the removal

²The parental rights of the children's putative fathers were also terminated, but that termination is not at issue in this appeal.

of the children from her custody despite DHS's meaningful efforts to assist in appellant's rehabilitation. Further, the court noted that appellant had not remained drug free, had not attended counseling or visitation, had not kept in contact with DHS, and had been arrested on felony charges. The court observed that other factors or issues had arisen since the filing of the original petition that demonstrated that the return of the children to appellant would be contrary to the health, safety, or welfare of the children, which despite the offer of appropriate services, appellant had manifested the incapacity or indifference to remedy. The court also stated that appellant could face incarceration based on the August 26, 2009 arrest, which would again cause instability in the lives of her children if they were in her custody. The final order was entered on December 10, 2009, and this appeal follows.

Appellant does not challenge the sufficiency of the evidence presented at the hearing to justify termination of parental rights. The only issue raised on appeal is whether the trial court erred in denying appellant's motion for continuance. Appellant argues that the trial court abused its discretion in denying her motion for continuance or "at least to make reasonable accommodations" so that appellant could participate in the proceedings. The request for reasonable accommodations is a novel argument that appellant makes for the first time on appeal. At the hearing, appellant failed to make or suggest arrangements to participate in the termination hearing via telephone. It is well settled that we will not consider arguments made for the first time on appeal. *See, e.g., Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001).

A motion for continuance shall be granted only upon a showing of good cause and

only so long as is necessary. *Smith v. Arkansas Dep't of Human Servs.*, 93 Ark. App. 395, 400–01, 219 S.W.3d 705, 708 (2005) (citing *Green v. State*, 354 Ark. 210, 118 S.W.3d 563 (2003)).

In *Smith*, this court stated as follows:

The law is well established that the granting or denial of a motion for continuance is within the sound discretion of the trial court, and that court's decision will not be reversed absent an abuse of discretion amounting to a denial of justice. When deciding whether a continuance should be granted, the trial court should consider the following factors[:] (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the witness's attendance in the event of postponement; (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true. Additionally, the appellant must show prejudice from the denial of a motion for continuance.

Id. at 401, 219 S.W.3d at 708.

The trial court did not abuse its discretion in denying appellant's motion for continuance. This was appellant's third request for continuance, and the trial court, in granting her second request, firmly stated that no further requests would be granted. Although appellant was not present at the hearing, her counsel was present and represented her throughout the hearing. Also, appellant's request for a continuance was transmitted to her counsel via text message at the beginning of the hearing, which does not demonstrate diligence on the part of the movant. Appellant offered no proof that would show the probable effect of appellant's appearance or testimony at the hearing. Appellant argues that the hearing should have again been postponed due to the extensive nature of her injuries and very slight progress in recovery since the last continuance had been granted thirty days before; however, no evidence or testimony was offered to demonstrate the likelihood of appellant's attendance in the event of another postponement. Moreover, appellant failed to file an

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affidavit stating what her proposed testimony would prove. Finally, the circuit court found that the evidence presented at the hearing supporting terminating appellant's parental rights was clear and convincing, and appellant failed to show how the denial of her motion for continuance resulted in prejudice against her.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.