

Children's Law Center of Indiana



Termination of Parental Rights (TPR)

07/11/2007

In **D.A. v. Monroe County Dept. of Child Services**, 869 N.E.2d 501 (Ind. Ct. App. 2007), the Court reversed and remanded the trial court's termination of Father's parental rights to his three children who were born December 27, 2002, November 14, 2003, and May 3, 2005. When the first child was born, he tested positive for cocaine and was removed from Mother, place in foster care, and subsequently determine to be a CHINS. After Mother and Father successfully completed drug treatment programs and Father completed an anger management class, the child was reunified with Mother fourteen months after he had been removed. In April 2005, Mother, who was pregnant with the third child, ingested cocaine and drove a car with the two older children as passengers. Mother fell asleep while driving and had an accident. Mother had a drug screen and tested positive for cocaine. Four days later, the third child was born and tested positive for cocaine. The Monroe County Department of Child Services (DCS) filed a CHINS petition on May 11, 2005 and removed the children from the Mother and placed them in foster care. The petition alleged that the youngest was a CHINS because he was born with drugs in his system and the other two were CHINS based on Mother's ingesting cocaine and driving with them in the car. Father appeared at the initial hearing, denied that the children were CHINS, and requested counsel. The trial court granted Father's request for counsel, and set a pretrial conference for June 20, 2005. Father's attorney entered her appearance and, at her request, the pretrial conference was reset for June 27, 2005. Father appeared at the pretrial conference but his attorney did not. Father and Mother admitted that the children were CHINS and the trial court determined that the children were CHINS based on their admissions. The CHINS dispositional hearing was held August 22, 2005, at which Father appeared with counsel and Father's counsel was granted permission to withdraw. The trial court entered a dispositional order, ordering Father, among other things, to attend parenting classes, participate in home based services and the development of a case plan, complete a substance abuse treatment program, and obtain and maintain adequate housing. Father regularly attended weekly supervised visitation with the children. Although he initially did not participate in services, in February 2006, he began working with an individual therapist with Family Solutions, increased his weekly visits with the children from one to three hours, started attending drug treatment, found employment, and "work[ed] on trying to figure out his housing situation." In April 2006, Father was released from his drug treatment program because he tested positive for cocaine from a saliva test after he had claimed his test would come back clean. Father asserted he had not used cocaine but it had probably entered his system because he had been around people who were smoking cocaine. On May 12, 2006, DCS filed a petition to terminate Father's parental rights. Father appeared at the initial hearing and requested pauper counsel. He was assigned the same attorney he had in the CHINS proceeding. The trial court informed the parties that a pretrial conference

would be held on July 17, 2006 and the termination hearing would be held on September 28, 2006. The Father's attorney entered her appearance and set an appointment to meet with Father, but later sent him a letter requesting that he reschedule. After attending the pretrial conference, Father's attorney sent him a letter on July 19, 2006 notifying him that his "next hearing [wa]s set for September 28, 2006" and requesting that he call to schedule an appointment with her prior to that hearing. On September 9, 2006, the trial court rescheduled the termination hearing for October 31, 2006, but did not send notice of the change to Father. On September 21, 2006, Father's attorney filed a motion to withdraw her appearance but did not copy Father on it or otherwise notify him of her intent to withdraw. The trial court set the motion to withdraw for hearing for October 31, 2006, but did not send notice of the motion or the hearing to Father. On October 27, 2006, DCS filed a "Petition for Authorization of the Release of Substance Abuse Treatment Records of Meng Ai Regarding the Respondents..." The Court set the Petition for hearing on October 30, but did not notify Father. During that hearing at which Father and Mother did not appear but their counsel did, the judge granted the motion of Father's attorney to withdraw, which motion had previously been set for hearing on the next day, October 31. At the October 31, 2006 termination hearing, the trial court noted that neither Father nor Mother were present, found that they had had proper notice of the hearing because they had been present at the initial hearing, and proceeded to take evidence from the DCS. The evidence indicated that Father loved the children and they loved him and Father's therapist testified that Father "has some very strong parenting skills and his interactions with the kids are superb. He's probably the best parent that I've seen in the seven years that I've had this job and has a really good relationship with the kids..." The therapist also expressed some concerns about Father's lack of follow through with services and with whether his environment was healthy for the children. At the end of the hearing, the trial court ordered that Father's parental rights be terminated. Father appealed contending that (1) the trial court abused its discretion by granting his attorney's motion to withdraw, and (2) the trial court violated his due process rights by terminating his parental rights after conducting a termination hearing in which Father was unable to present evidence and cross-examine witnesses because he was neither present nor represented by counsel.

It is clear from the record that Father was not notified of the intent of his attorney to withdraw, the date of the hearing on that motion, or the fact the motion was granted. Therefore, under the facts of this case, the trial court abused its discretion by granting the motion of Father's attorney to withdraw her appearance. *Id.* at 509. The Court found that the failure of Father's attorney to notify Father of her intention to withdraw and failure to apprise him of the pending termination hearing date prior to filing her petition to withdraw, was in violation of Monroe Circuit Court Civil Rule No. 2. *Id.* The Court noted that a trial court may set aside its own rule if the court assures itself that it is in the interests of justice to do so, that the substantive rights of the parties are not prejudiced, and that the rule is not a mandatory rule. *Id.* Here, however, according to the Court, Father's rights were prejudiced by his attorney's failure to follow the local rule because she neither informed him of the final hearing date nor of her intent to withdraw, and Father did not have time to secure new counsel. *Id.* Father was also prejudiced by the granting of his attorney's motion to withdraw because the trial court conducted a termination hearing in which Father was unable to present evidence and cross-examine witnesses because he was neither present nor represented by counsel. *Id.*

In balancing the three factors relevant to the nature of process due in a termination of parental rights proceeding, the Court recognized that the risk of error created by granting an attorney's motion to withdraw representation of a parent who has no knowledge of the attorney's withdrawal motion or the grant of the motion and then terminating the parent's parental rights the following day after conducting a hearing where evidence against the parent is presented with neither him nor his attorney present, is substantial because the parent is deprived of his statutory right to counsel and, more importantly, does not have an opportunity to present witnesses in his or her favor or to cross-examine opposing witnesses. *Id.* at 511. After balancing the substantial interest of Father with that of the State and in light of the substantial risk of error created by the challenged procedure, the Court concluded that the trial court's entry of judgment terminating Father's parental rights in this manner denied Father due process of law and violated I.C. 31-32-2-3(b). *Id.* at 511-12. The Court reviewed the rights of the parent in a TPR proceeding as provided in I.C. 31-35-2-6.5(e), I.C. 31-32-2-3(b), and the Due Process Clause of the United States Constitution. *Id.* at 510. The Court analyzed the case within the framework set forth in Lawson v. Marion County Office of Family and Children, 835 N.E.2d 577, 580, regarding the nature of process due in a termination of parental rights proceeding. That framework involves the balancing of three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. *Id.* The Court found that the substantial risk of error in granting the termination petition was great, and the error in this case was too great to ignore in view of the facts that: (1) Father was not given the opportunity to be heard at a meaningful time or in a meaningful manner; (2) Father was not notified of his attorney's intent to withdraw or of the fact the motion to withdraw was granted, and such lack of notification resulted in Father being unrepresented at the final termination hearing; (3) it is entirely unclear whether Father had timely notice or any notice of the final termination hearing; (4) Father did participate in weekly visitations with the children; and (5) Father made some effort in participating in services. *Id.* at 512.