

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

10/11/11

In ***In Re C.G.***, 954 N.E.2d 910 (Ind. 2011), the Court affirmed the trial court's order terminating Mother's parental rights. The Court discussed important due process issues and summarily affirmed the Court of Appeals in all other aspects. In December 2008 when Child was seven years old, Mother left Child with a male friend and traveled to Utah to visit family. In February 2008, the male friend brought Child to stay with Neighbor, who had watched Child after school the previous year. During the three months that Child was at Neighbor's house, Neighbor purchased clothes and a bed for Child and included her in family events but did not speak to Mother at all. Mother's male friend took Child on spring break in April 2008, and then left her at another individual's house in the neighborhood. Neighbor discovered that Child was back in the neighborhood and took Child to the hospital the same day Child began complaining of pain in her privates. Child was diagnosed with genital herpes and had scarring around the anus and perineum. Child's physician concluded that Child had likely been sexually abused. Child was hospitalized for two days, during which time Neighbor stayed with Child. DCS took custody of Child on April 17, 2008, when Child was released from the hospital, and Child was placed in a foster home, where Child still resides. Child's first assigned DCS family case manager learned that Mother had been arrested in Utah and called state and federal prisons in Utah. On April 18, 2008, DCS filed a CHINS petition alleging that Mother had "abandoned the child in the care of various individuals who are unable or unwilling to provide the child with appropriate care." In May 2008, a second family case manager (FCM 2) was assigned to the case. FCM 2 did not speak to family acquaintances regarding Mother's whereabouts, but signed an Affidavit of Diligent Inquiry (ADI) stating that he had done so. Based upon the ADI, Mother was served by publication in the CHINS case, and Child was adjudicated a CHINS on August 6, 2008.

Mother wrote a letter to DCS on October 14, 2008. The letter was written in Spanish, informed DCS she was incarcerated, asked that an investigation be brought against the male friend, and asked if Child was in DCS custody and if she could have a family member pick up Child. In November 2008 DCS learned that Mother was incarcerated in Henderson, Kentucky, after receiving her letter. On December 15, 2008, FCM 2 wrote to Mother, informing her that Child was currently in a foster home; asking Mother when her release date from jail would be; and stating that there were "legal procedures that go along with this case which can lead to termination of parental rights." Mother's second letter to DCS on December 23, 2008, stated that she had a court date in April, was unsure what the outcome would be, and requested that a family member come take Child. Mother received no response to her second letter and asked a

friend to call DCS on her behalf. DCS refused to give Mother's friend any information because she was not a parent. On February 12, 2009, Mother wrote a third letter to DCS asking for information about Child and the alleged sex abuse and inquiring whether Child would go live with Child's sister. Mother never provided DCS with the name of Child's father or the family members with whom she wanted Child placed. Cindy Duran, who had lived with Mother's brother for eleven years, had two children with him, and lived in Salt Lake City, called DCS in an attempt to get custody of Child. DCS did not consider Duran for possible placement because Mother's brother was incarcerated and Duran is not a blood relative.

DCS filed a petition to terminate Mother's parental rights on March 25, 2009, and served Mother by mail at the Henderson County Jail where she was incarcerated on federal charges. Mother filed motions to be transported to the trial or to allow her to participate by teleconference, but those motions were denied. Mother was allowed to participate telephonically in the proceedings. On January 11, 2010, the juvenile court entered an order terminating the parent-child relationship between Mother and Child. Child has since been adopted by foster parents. Mother appealed, contending that numerous due process violations occurred which culminated in the termination of her parental rights. Mother also alleges that there was a lack of evidence to support the trial court's determination. The Court observed that both the State and the parent have substantial interests affected by the proceeding, and went on to address the risk of error created by the actions of DCS and the trial court. Id. at 917-18.

The Court held that DCS's failure to locate Mother and the misrepresentation on the Affidavit of Diligent Inquiry did not violate Mother's due process rights. Id. at 918-19. Mother contends that DCS violated her due process rights, including a lack of service from DCS and a lack of effort by DCS in locating Mother. The Court said, "[i]t is of paramount importance in any DCS case for parents of children involved with DCS to receive notice of such involvement. When matters are at the termination stage of a case, and a child is already adopted, it is in nobody's interest that the case be remanded and the adoption potentially be undone due to improper service." Id. at 918. The Court noted that both family case managers contacted two county jails in Utah; looked for Mother through the Marion County Jail and Indiana Department of Correction; searched various DCS databases; and looked in the local telephone directory for Mother, but neither case manager was able to locate Mother. Id. The Court observed that there is no centralized technology whereby DCS can type in a person's name and learn her whereabouts if incarcerated. Id. The Court also said that DCS had no reason to suspect that Mother would be in federal custody, and no reason to suspect that Mother would be in Kentucky. Id. The Court opined that DCS cannot be expected to "find a needle in a haystack, which is what Mother is asking DCS to have done." Id.

Mother contends that the DCS misrepresentations on the Affidavit of Diligent Inquiry, which led to Mother being served by publication, substantially increased the risk of error leading to termination. The Court found it "extremely troubling" that a DCS representative would make a misrepresentation on the Affidavit. Id. The Court noted that, although he did not speak to any family acquaintances as stated in the Affidavit, FCM 2 did check with the Marion County Jail, Indiana Department of Correction, DCS internal databases, telephone directory, Utah State and

Federal Prisons, and the Salt Lake County Jail. *Id.* The Court noted that, in the present scenario, there were no known family acquaintances available for FCM 2 to contact about Mother’s whereabouts, and that Mother was able to cross-examine FCM 2 on this issue, which allowed the trial court to assess FCM 2’s credibility in determining what impact this had on Mother’s due process rights. *Id.* at 918-19.

The Court found that the delay from DCS in advising Mother of her rights and serving her with the CHINS petition upon locating Mother is a very poor practice model, but a reversal is not warranted. *Id.* at 920. The Court noted that, although DCS learned that Mother was incarcerated in Henderson, Kentucky in November 2008, DCS did not send Mother an advisement of rights form and a copy of the CHINS petition until it received Mother’s third letter sent on February 12, 2009. *Id.* at 919. The Court also noted that Mother did not receive counsel in the CHINS action until after DCS filed its termination petition. *Id.* The Court found that the delay in advising Mother of her rights and informing her of the CHINS action is “disturbing and inappropriate”, but could not conclude that the dilatory action resulted in fundamental error or deprived Mother of due processes. *Id.* The Court observed that the delays in the termination proceeding and the continuances granted provided further opportunity for Mother and her counsel to attempt to prove Mother’s fitness to parent and to prepare for trial and that Mother was fully and diligently represented in the termination proceeding. *Id.*

Citing State of West Virginia ex rel. Jeanette H., 529 S.E.2d 856, 877 (W. Va. 2000), the Court adopted a policy from West Virginia that whether or not an incarcerated parent is permitted to attend a termination of parental rights hearing is within the sound discretion of the trial judge and observed that there is no absolute right to be present at a termination hearing. *Id.* at 921-22. Mother argues that her due process rights were violated by denying her the opportunity to be present at trial due to the standing order existing in Marion County effective October 1, 2006, which prohibited the transportation of incarcerated parents to Marion County Juvenile Court proceedings. The Court cited Tillotson v. Clay County Dep’t. of Family and Children, 777 N.E.2d 741, 746 (Ind. Ct. App. 2002), in which the Court of Appeals found that parents were not denied due process when they were not transported to their termination hearing, but cautioned that alternative procedures should be used to allow a parent who could not be present in the courtroom to fully participate. *C.G.* at 920. The Court noted that: (1) Mother participated in both days of the termination hearing telephonically, with interpreters in the courtroom translating the proceeding into Spanish; (2) the courtroom was cleared out to provide Mother an opportunity to privately speak to her counsel; (3) the trial was bifurcated, giving Mother the opportunity to review the testimony presented by DCS with her counsel; (4) counsel had ample opportunity to confer with Mother, having been on the case for over six months. *Id.* at 921. The Court also noted the potential significant cost of transporting Mother from Henderson, Kentucky to Indianapolis for this hearing, and said that its analysis may have been different had Mother been across town in the Marion County Jail. *Id.*

The Court, quoting State of West Virginia ex rel. Jeannette H., 529 S.E.2d at 877, listed the following factors trial court judges should use in exercising discretion on whether an incarcerated parent is permitted to attend a termination hearing:

- 1) The delay resulting from parental attendance;
- 2) the need for an early determination of the matter;
- 3) the elapsed time during which the proceeding has been pending;
- 4) the best interests of the child(ren) in reference to the parent's physical attendance at the termination hearing;
- 5) the reasonable availability of the parent's testimony through a means other than his or her attendance at the hearing
- 6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means;
- 7) the affect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits;
- 8) the cost and inconvenience of transporting a parent from his or her place of incarceration to the courtroom;
- 9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings;
- 10) the inconvenience or detriment to parties or witnesses; and
- 11) any other relevant factors.

C.G. at 922-23.

The Court opined that a blanket order prohibiting transporting a prisoner to a termination hearing is "fraught with danger", and that if trial courts were allowed to hide behind such a blanket order, on review our appellate courts would be left with little or no information, forcing them to surmise why the trial court issued the order. Id. at 923. The Court also stated that videoconferencing equipment can be used in termination proceedings, subject to the provisions of Indiana Administrative Rule 14. Id. at 923 n.4.

The Court found that the evidence supports the trial court's findings that termination of the parent-child relationship is in Child's best interests. Id. at 925. Mother challenged five of the trial court's findings, claiming that they are not supported by the evidence. The Court stated that there was sufficient evidence to support the findings that: (1) a diligent inquiry to find and serve Mother was made to no avail; (2) to the best of Mother's knowledge she would be serving ten years of incarceration; (3) Child's therapeutic needs are being served; and (4) Child is bonded to her foster family and the goal is for Child to be granted a permanent home in a loving and stable environment. Id. at 924-25. The Court opined that the fifth finding, which was misleading because Child's aunt contacted FCM 2 and FCM 2 did not initiate the contact, was harmless error because the crux of the finding is that aunt was not interested in going through the process for placement. Id. at 924.

The Court concluded that several errors were made by DCS which should not have been made; however, none of the errors rose to the level of violating Mother's due process or warranting reversal. Id. at 925. The Court also set forth the above mentioned factors for the trial courts to determine whether an incarcerated parent is permitted to attend a termination hearing. Id.

The Derelle Watson-Duvall Children's Law Center of Indiana - A Program of Kids' Voice of Indiana
9150 Harrison Park Court, Suite C • Indianapolis, IN 46216 • Ph: (317) 558-2870 • Fax (317) 558-2945
Web Site: <http://www.kidsvoicein.org> • Email: info@kidsvoicein.org