

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

3/16/15

In ***In Re D.P.***, 27 N.E.3d 1162 (Ind. Ct. App. 2015), the Court reversed the trial court's order terminating Mother's parental rights. *Id.* at 1163. The Court remanded the case for further proceedings. *Id.* at 1168. Mother had two children, one born in 2010 and one born in 2011. Mother had a learning disability and was unable to care for the children without help from a friend or relative. On January 22, 2012, Mother was forced out of the home she shared with an aunt. Mother received Social Security disability income which was managed by her aunt. Mother found shelter with a friend, who alerted DCS that Mother could not care for the children without help. Without the ability to manage her own finances, Mother was unable to finance other housing. DCS removed the children from Mother's care, and on January 24, 2012, the children were adjudicated Children in Need of Services. Over the course of the CHINS action, the children were placed in a foster home, in which they thrived. Mother used some services but was unable to obtain permanent housing. She also missed several CHINS hearings and meetings associated with the CHINS action. Mother ceased appearing for visitation with the children, beginning in June 2014.

On June 17, 2014, a permanency plan of termination of parental rights was adopted, and DCS subsequently filed a termination petition. On August 19, 2014, an initial hearing on the termination petition was conducted. Mother did not appear for the hearing, but the trial court denied DCS's request to proceed with an evidentiary hearing that day. The trial court scheduled an omnibus hearing for September 24, 2014. On August 21, 2014, DCS sent a letter and a copy of the August 19, 2014 court order to Mother's last known address. The letter stated, "Please find enclosed with this letter a copy of the Court Order of August 19, 2014 setting your termination of parental rights matter for Omnibus Hearing on September 24, 2014 at 8:30.... If you fail to appear, the court will proceed in your absence. You have the right to appear in person or by sending a letter if unable to appear in person. You also have the right to an appointed attorney if you cannot afford to hire one yourself." On the day before the scheduled hearing, the DCS caseworker called Mother and confirmed that Mother knew about the hearing. Mother stated that she had arranged transportation for the hearing, and the caseworker told Mother that she could contact a DCS service provider for transportation assistance if her arrangements fell through.

Mother did not appear for the hearing on September 24, 2014. A DCS attorney, an attorney for the children's Court Appointed Special Advocate, the DCS caseworker, and the children's foster mother were present for the hearing. Mother did not have counsel, nor had counsel been

appointed for her. DCS moved for the trial court to proceed with a final evidentiary hearing on the termination petition. After hearing evidence on service of notice upon Mother of the “omnibus hearing” and her failure to appear for other appointments, the trial court permitted DCS to introduce evidence in support of the termination petition. Two witnesses testified for DCS. The DCS caseworker testified that she had told Mother of the hearing and “informed [her] that no matter if she is here or not here, the hearing will proceed. And I stressed to her that she needed to be here this morning.” The DCS caseworker’s testimony and documents were the bulk of the evidence. The foster mother was asked a total of four questions and provided short, one sentence answers. The children’s Court Appointed Special Advocate and DCS made representations to the court concerning Mother’s pattern of non-attendance at hearings and appointments related to services provided by DCS. At the conclusion of the hearing the trial court announced that DCS had met its evidentiary burden, terminated Mother’s parental rights, and entered a written order the same day. Mother appealed, and was represented by her guardian ad litem in the appeal.

The Court could not conclude that Mother’s due process rights received adequate protection; therefore, the Court found that reversal of the trial court’s order was warranted. *Id.* at 1168. Mother claimed that she was deprived of due process because: (1) the notice concerning the nature of September 24, 2014 hearing was inadequate; and (2) the trial court heard evidence and terminated her rights at a hearing held in her absence without representation by counsel. With regard to Mother’s claim of inadequate notice, the Court looked to IC 31-35-2-6.5, which requires notice to the parents and their legal counsel at least ten days before a termination hearing. *Id.* at 1166. The Court, citing *In Re H.K.*, 971 N.E.2d 100, 103 (Ind. Ct. App. 2012), noted that compliance with IC 31-35-2-6.5 is mandatory and is a procedural precedent, but is a defense that must be asserted, and, when placed in issue, DCS must bear the burden of proving compliance with the statute. *D.P.* at 1166. The Court noted that the hearing on September 24, 2014 was not initiated as an evidentiary hearing on the termination petition, but was scheduled as an omnibus hearing. *Id.* at 1167. The Court observed that neither the letter nor the court’s order defined the term “omnibus”, the term is not used in the statutory language of termination of parental rights statutes, but the purpose of an omnibus date in our criminal statutes generally refers to pretrial status hearings in criminal cases. *Id.* at 1164 n. 3. The Court agreed with Mother’s claim that DCS’s notice of the upcoming hearing was inadequate, and thus placed at issue compliance with the notice statute. *Id.* at 1166.

The Court noted that Mother did not have counsel present for the August 19, 2014 hearing or the September 24, 2014 hearing, nor was counsel appointed for her. *Id.* at 1167. The Court observed that there was no one present at either hearing to ensure that Mother’s due process rights were protected. Citing IC 31-32-4-3, the Court noted that parents are entitled to court appointed counsel when they have not already waived that right. *Id.* at 1166. Quoting *In Re G.P.*, 4 N.E.3d 1158, 1166 (Ind. 2014), the Court stated that, “if the State imparts a due process right, then it must give that right.” *D.P.* at 1166. Quoting *In Re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011), the Court said, “[t]he process due in a termination of parental rights proceeding turns on 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. D.P. at 1166. The Court’s review of the record disclosed no opportunity for Mother to seek counsel, save for a single sentence in the letter from DCS notifying Mother that she was entitled to counsel. Id. at 1168. The Court concluded that Mother did not affirmatively waive counsel. Id. The Court found this “particularly worrisome given DCS’s knowledge of Mother’s apparently significant learning and cognitive problems, and the placement of the children in a stable foster home where the foster parent intended to adopt the children.” D.P. at 1168. Finding that both constitutional and statutory guarantees were transgressed, the Court opined that the magnitude of Mother’s parental rights and the risk of error in the State’s procedural approach outweighed the State’s interests in its chosen procedural path. Id.