

Children's Law Center of Indiana



Termination of Parental Rights (TPR)

9/15/2006

In ***In Re E.E.***, 853 N.E.2d 1037 (Ind. Ct. App. 2006), the Court affirmed the trial court's judgment terminating the parent-child relationship of Father with his three children. On May 25, 2004, a petition was filed alleging that Father's three children were CHINS. The petition alleged regarding Father that he "has not successfully demonstrated to the [MCDCS] the ability or willingness to appropriately parent the children. [Father] has not established paternity over any of the children at this time." Subsequently, on January 11, 2005, MCDCS filed a petition to involuntarily terminate Father's parental rights. The trial court appointed counsel for Father and held six hearings; Father appeared at some of these hearings. The final hearing was set, and MCDCS sent Father notice of it stating, among other things, (1) that the trial was "set for January 20, 2006 as a second choice and March 8, 2006 as a first choice;" (2) his attorney's name, telephone number, and address; and (3) that all questions "about this Court matter" should be addressed to his attorney. The hearing was held January 20, 2006, but Father failed to appear. Father's attorney moved for a continuance, which the trial court denied. After the State had presented its case, Father's attorney advised the trial court, "On behalf of the father since he is not present, Your Honor, I have no evidence to present on his behalf." The trial court terminated the Father's parent-child relationship with his children. Father appealed.

Ambiguous notice to Father regarding the date and time of the final termination hearing was not grounds for setting aside the trial court's judgment terminating Father's parental rights: (1) Father waived the issue where he did not object to the form of the notice or check with his attorney for clarification; and (2) Father failed to prove that the ambiguous notice amounted to fundamental error. *Id.* at 1042-43. The Court discussed the requirement of I.C. 31-35-2-6.5 that the parent be sent notice reasonably intended to notify the parent of the date and time of the hearing at which the parent's parental rights may be terminated. The Court found that the notice sent to Father in this case was ambiguous in that the notice gave two dates for the final hearing -- January 20, 2006 as second choice and March 8, 2006 as first choice. The Court opined that the terminology "first choice" and "second choice" is not readily understood by lay people who receive these notices from the Department of Child Services (DCS), and discouraged the DCS from using this type of notice in the future. The Court noted that, although the Court found the notice Father received to be ambiguous, Father had neither objected to the form of the notice, nor called his attorney. The notice contained the name, address, and phone number of Father's attorney with the notation that Father should call his attorney if he had any questions. Therefore, the Court found that Father had waived this issue. *Id.* at 1042-43.

Regarding Father's argument that the fundamental error doctrine, which applies to egregious trial errors, applied here, the Court observed that, in order for it to reverse based on fundamental error, the error must have been a clearly blatant violation of basic and elementary principles, and the harm or potential for harm therefrom must be substantial and appear clearly and prospectively. S.M. v. Elkhart County Office of Family & Children, 706 N.E.2d 596, 600 (Ind. Ct. App. 1999). The Court held that, given that the notice provided two dates and the hearing was held on one them, and the notice told Father to contact his attorney with questions, Father had failed to prove that the ambiguous notice amounted to fundamental error. Id. at 1043.

The trial court's denial of Father's attorney's request for a continuance and the trial court's conduct of the final termination hearing in Father's absence did not violate Father's procedural due process rights inasmuch as Father failed to complete the court-ordered services, was represented by counsel at the final hearing, and did not have a constitutional right to be present at the final hearing. Id. at 1039. The nature of the 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. In Re CC, 788 N.E.2d 847, 852 (Ind. Ct. App. 2003), *trans. denied*. The Court found that, in this case, both the private interests and the countervailing governmental interests affected by the proceeding were substantial. In evaluating the risk of error created by the challenged procedure, the Court determined, contrary to Father's arguments, that Father's rights were not significantly compromised by the way in which MCDCS presented its case with regard to the evidence regarding Father's possible continued drug use, in that the case worker had testified that she was not able to determine whether Father had stopped using drugs because he had failed to complete drug treatment as ordered by the court, not because he did not show up at the final termination hearing. The Court also noted that (1) Father was represented by his attorney throughout the entire proceedings, even when Father failed to appear on the final date; (2) during the final termination hearing, Father's attorney was able to, and did cross-examine the State's witnesses; and (3) Father does not have a constitutional right to be present at a termination hearing. E.E. at 1043-44.