

# Children's Law Center of Indiana



## Termination of the Parent-Child Relationship

12/7/10

In **In Re J.S.O.**, 938 N.E.2d 271 (Ind. Ct. App. 2010) (Kirsch, J. dissenting), the Court reversed the trial court's order which terminated Father's parental rights. The child was born in Oklahoma in May 2008. At the time of the child's birth, Father and Mother had recently moved from Indiana to Oklahoma and were living together, but not married. Father signed a paternity affidavit at the hospital in Oklahoma and was listed as the child's father on the birth certificate. Shortly after the child's birth, Father was arrested and extradited to Indiana on an outstanding warrant. Mother moved back to Indiana with the child. In July 2008, Mother and the then six-week-old child were in a car wreck. Law enforcement officers who responded to the scene of the wreck observed crack cocaine and drug paraphernalia inside Mother's vehicle. Mother was arrested on Class D felony possession of cocaine and paraphernalia charges, and the child was taken into protective custody. At the time of her arrest, Mother informed the authorities that Father was incarcerated, and that there was no other adult available to assume custody of the child. The following day, the Porter County Department of Child Services (PCDCS) investigating case manager spoke to Mother at the Porter County Jail. Mother admitted that she had bought and used crack cocaine prior to getting into the car and driving with the child. Mother also gave the case manager Father's name, said he was the child's biological father, and explained that Father was incarcerated in the Lake County Jail. The investigating case manager included the information regarding Father's name and whereabouts in the "Detention Hearing Report to the Court" filed on July 10, 2008.

On July 16, 2008, PCDCS filed a verified CHINS petition which did not name Father as the child's biological or alleged father, but instead indicated that paternity of the child has not been established. The PCDCS case manager explained during the termination hearing that it is the Department's police to "presume paternity has not been established" if a child is born out of wedlock in a different state unless it receives a court order indicating otherwise. The PCDCS case manager admitted that she had received the child's Social Security Number and birth certificate which listed Father's name as the child's father. Father was not provided a copy of the CHINS petition nor informed of the CHINS initial hearing date. The child was adjudicated a CHINS on July 19, 2008, following an initial hearing. Father was not present at the CHINS hearing nor was he represented by counsel. The CHINS order, which PCDCS did not provide to Father, again indicated that the child's paternity had not been established and did not contain Father's name as the biological or alleged father. The PCDCS pre-dispositional report, filed on August 6, 2008, stated that paternity had not been established, but stated that Father is currently

in Lake County jail. Father was never made a party to the CHINS case, provided a copy of the pre-dispositional report, advised that the dispositional hearing had been set for August 19, 2008, or offered and/or referred for reunification services. PCDCS never attempted to contact Father, did not notify Father of any periodic case review hearing, did not provide Father with any copies of the case plans, and did not mail Father any copies of the trial court's orders. Mother continued to struggle with her cocaine addiction and failed to successfully complete court-ordered reunification services.

In March 2009, PCDCS filed a petition seeking the involuntary termination of Mother's and Father's parental rights to the child. Father was named as a party to the termination proceedings, and PCDCS mailed a copy of its termination petition to Father. Father, who remained incarcerated, participated in all termination hearings, either in person or telephonically. A two-day evidentiary hearing on the termination petition commenced on June 15, 2009, and concluded on October 13, 2009. Father repeatedly, yet unsuccessfully, objected to the termination proceedings, claiming his due process rights had been violated when PCDCS and the trial court failed to comply with the CHINS statutes by not making him a party in the underlying CHINS proceedings, not notifying him of court hearings, not advising him of the conduct he needed to perform to gain reunification with the child, and not providing him copies of the court's orders. On April 13, 2010, the trial court entered its judgment terminating Father's parental rights. Father appealed.

**The Court concluded that the trial court's order terminating Father's parental rights violated Father's due process rights due to failure to name Father as a party to the CHINS case and failure to follow other CHINS statutory mandates regarding Father.** *Id.* at 277. Citing Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005), the Court observed that a parent's interest in the care, custody, and control of his child is arguably one of the oldest of our fundamental liberty interests. *J.S.O.* at 274. Noting that parents' traditional right to raise their children is protected by the Fourteenth Amendment, the Court further stated that the Due Process Clause prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. *Id.* Citing Hite v. Vanderburgh County Office of Family & Children, 845 N.E.2d 175, 181 (Ind. Ct. App. 2006), the Court said that when the State seeks to terminate a parent-child relationship, it must do so in a manner that meets the constitutional requirements of the due process clause. *J.S.O.* at 274. The Court opined that the nature of process due in a termination proceeding turns on a balancing of the "three distinct factors" specified in Matthews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976): (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. *J.O.S.* at 274.

The Court further cited A.P. v. Porter County Office of Family & Children, 734 N.E.2d 1107, 1112-1113 (Ind. Ct. App. 2000), trans. denied, in which the Court explained that there is an interlocking statutory scheme governing CHINS and involuntary termination cases and that

“procedural irregularities in a CHINS proceeding may be of such import that they deprive a parent of procedural due process with respect to the termination of his or her parental rights.” J.O.S. at 274-75. With regard to the Matthews v. Eldridge factors, the Court observed that: (1) Father’s interest in the accuracy and fairness of the termination hearing is a commanding one; (2) the State’s parens patriae interest in protecting the health and welfare of children is also significant; (3) delays in the adjudication of a termination case impose significant costs upon the functions of government as well as an intangible cost to the lives of the children. Id. at 275. The Court also must consider the risk of error created by the challenged procedure when balancing these competing interests between a parent and the State. Id. The Court said that the challenged procedure involved the State’s initiation and prosecution of the underlying CHINS and involuntary termination proceedings without ever naming Father as a party to the CHINS case, notifying Father of any of the CHINS hearings, or providing Father with CHINS documents, orders, or case plans, notwithstanding PCDCS’s admitted knowledge of Father’s name and whereabouts since the time of the child’s initial detention. Id.

The Court cited, inter alia, the following CHINS statutes which required: (1) notice to Father of the child being taken into custody (IC 31-34-3-4); (2) written notice to Father of his rights (IC 31-34-4-6); (3) Father’s party status as a parent in the CHINS proceeding (IC 31-34-9-7); (4) court’s required notice to Father of the required parental participation (IC 31-34-10-5); (5) copy of case plans to be sent to Father (IC 31-34-15-3); (6) notice to Father by court that failure to participate in services required by the dispositional order can lead to termination of parental rights (IC 31-34-16-4). Id. at 275-76. The Court opined that a review of the record confirms Father’s allegations that PCDCS was well aware of Father’s name, place of residence, and alleged paternity of the child throughout the entirety of the CHINS proceedings. Id. at 276. The child’s family case manager admitted in her testimony at the termination hearing that she was given Father’s name and discovered Father was incarcerated in the Lake County Jail shortly after the child was initially removed from Mother’s care, but the case manager did not ever attempt to contact Father personally. Id. at 276-77. In addition, Mother confirmed that she had made PCDCS aware of Father’s name and paternity of the child early in the CHINS case, and the court appointed special advocate acknowledged that he knew Father’s name and that Father was incarcerated in the Lake County Jail at the time of the detention hearing in July 2008. Id. at 277. The Court, considering the Matthews v. Eldridge due process factors under these circumstances, found it “apparent that the risk of error created by PCDCS’s decision to refrain from naming Father as a party to the case while continuing with the underlying CHINS proceedings in Father’s absence, despite PCDCS’s actual knowledge of Father’s name and whereabouts, coupled with PCDCS’s and the trial court’s blatant disregard of statutory law mandating that Father be provided with notice of all CHINS hearings and copies of all CHINS order and case plans, resulted in a violation of Father’s right to due process.” Id. The Court also clarified that it was not commenting on the sufficiency of the evidence in this case or on the extent to which DCS must provide services to parents in a CHINS case. Id. The Court also said that this opinion should not be construed as adding an additional element to those already required by Indiana’s termination statute. Id.