

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

8/22/18

In **Matter of B.J.**, 110 N.E.3d 1178 (Ind. Ct. App. 2018), the Court held that although the Department of Child Services (DCS) failed to comply with the statutorily required notice of the termination factfinding hearing, the trial court acted within its discretion in denying Mother's motion to continue the hearing. The Court affirmed the trial court's order terminating Mother's parental rights.

Mother's child was found to be a CHINS after the child's sibling sustained extensive injuries to the brain, allegedly caused by Mother. Mother pled guilty and was sentenced to the Department of Corrections (DOC). DCS filed a petition to terminate the parent-child relationship between the child and Mother, and set a factfinding date of June 6, 2017. DCS filed a motion to continue, and the hearing was reset for November 7, 2017. On October 30, 2017, Mother's attorney filed a motion to continue the hearing, because Mother was going to be released from the DOC on November 1, 2017 and wanted to have more time to engage in services and potentially reunify with the child. The trial court continued the hearing to January 30, 2018, and on November 1, 2017, sent notice of the new hearing date to Mother's last known address, which was the DOC. After being released from the DOC, Mother failed to maintain consistent contact with DCS. At the time of the termination hearing, the last contact the FCM had from Mother was a text message from December 5, 2017. She did not provide DCS with her new address, and the FCM believed Mother was aware of the January 30, 2018 hearing date. On January 29, 2018, Mother's attorney filed a motion to continue the factfinding hearing, arguing that DCS had not provided sufficient notice of the hearing. Mother failed to appear at the January 30, 2018 hearing. The trial court heard argument on the motion to continue, denied it, proceeded with the factfinding hearing, and entered an order terminating Mother's parental rights. Mother appealed, arguing that DCS failed to give her the statutorily required notice of the factfinding hearing, and as a result, her due process rights were violated when the trial court denied her motion to continue.

Although DCS failed in its statutory duty to provide appropriate notice of the factfinding hearing, IC 31-35-2-6.5 does not contain a remedy for the failure to provide a parent with notice of a hearing; as such, granting a continuance is left to the discretion of the trial court. *Id.* at 1181. Since decisions about continuances are within a trial court's discretion, the Court will only reverse due to an abuse of discretion; the Court also noted that it would interpret the statute at hand under a de novo standard of review. *Id.* at 1180. IC 31-35-2-6.5 provides that at least ten days before a hearing on a termination petition or motion, the person who filed the petition to terminate the parent-child relationship must send notice to people listed in subsection (c), which includes parents, guardians, and custodians. *Id.* The Court opined that there was no evidence in the record that DCS gave notice of the January 30, 2018 factfinding hearing to Mother. *Id.* The plain language of the statute required DCS to provide notice of the termination hearing Mother at least ten days before the hearing. *Id.* citing *In Re H.K.*, 971 N.E.2d 100, 103

(Ind. Ct. App. 2012). The Court noted DCS did not send such notice, and strongly encouraged DCS to comply with the notice requirements of IC 31-35-2-6.5, especially given its recent problems with procedural due process compliance. B.J. at 1180-81. The statute does not contain an outlined remedy for the failure to provide a parent with notice of a hearing; however, it does contain a remedy if proper notice was not given to a foster parent. Id. at 1181, citing IC 31-35-2-6.6(f). Since a remedy was given to foster parents, but no remedy was given to parents, the Court interpreted that to mean that the legislature left the matter to the trial court to determine whether a continuance was warranted if DCS failed to provide the statutorily required notice. Id. The Court further noted that DCS's argument that the trial court, in lieu of DCS, could provide the ten-day notice was not convincing. Id., n.2. The Court opined that the statute clearly and plainly states that the party who files the termination petition is the one required to provide the proper notice. Id.

The trial court did not abuse its discretion by denying Mother's motion for a continuance of the January 30, 2018 termination factfinding hearing, and Mother's procedural due process rights were not violated. Id. at 1181. The Court noted the following: (1) the termination hearing had been continued at Mother's own request; (2) the trial court sent Mother notice of the hearing date at her last known address, even if Mother did not receive the notice because she was released the same day; (3) Mother failed to maintain consistent contact with DCS; (4) Mother did not give DCS, her attorney, or the trial court a current address; and (5) even if DCS had sent the proper notice to Mother, it would have gone to her last known address, which was the DOC, and Mother would not have been in any better situation than she was currently. Id. Mother could not show she was prejudiced by DCS's failure to comply with the proper notice requirements, and the Court could not say that the trial court erred by denying Mother's request for a continuance. Id. The Court also could not say that the procedural irregularity violated Mother's due process rights, because she requested the continuance, and she failed to provide anyone with a current address at which she could have been contacted. Id.