

Children's Law Center of Indiana



TPR

2/1/2019

In **Matter of D.H.**, 119 N.E.3d 578 (Ind. Ct. App. 2019), the Court held that the procedural irregularities in the CHINS case created a substantial risk of a premature, erroneous termination of Mother's parental rights, in violation of her due process rights. The Court reversed and remanded the matter.

Mother and Father's relationship was marked with domestic violence perpetrated by Father on Mother in the presence of their three children. Mother left Father, obtained protective orders, divorced Father, and remarried Father. DCS filed a CHINS petition in 2012 because Father was making methamphetamine in the home, and Mother tested positive for marijuana and methamphetamines. Father was incarcerated and Mother was reunited with their two children, the third having not yet been born. After the CHINS case closed, Father moved back in with Mother and the domestic violence continued. In 2016, DCS removed the children and Parents admitted they were CHINS, due to the conditions of the home and their positive drug tests. Parents were ordered to participate in services, to visit with the children, to maintain safe housing, to abstain from illicit substances, and engage in counseling. In September 2016, Father again physically abused Mother and Mother was referred to individual counseling. Mother and Father moved apart and Father entered residential drug treatment. During periodic case review, the trial court noted DCS's recommendations for therapy due to the domestic violence, Mother's improvement in some areas, but also Mother's failed drug tests. The trial court noted that while they were complying, Parents were not ready to parent. In June 2017, the trial court noted that Mother had engaged in services, acquired employment, and obtained suitable housing; Father had engaged in most services but refused to take a batterer's intervention program, as he did not want to admit guilt. An unsupervised trial home visit with Father was attempted, with visitation for Mother to be worked out between Mother and Father. Father assaulted Mother in the presence of the children at the home trial visit, and one of the children told Mother that Father had sexually abused her. The child did not disclose the allegations to DCS, but the trial court found that the trial home visit had failed. The trial court noted that Mother was cooperative and engaged despite Father's failure, but ordered no further additional services for the family.

There were five FCMs throughout the life of the case, the last being FCM Leas. FCM Leas spoke to one former FCM, reviewed most of the file, but was unaware of what services Mother had completed and what services Mother still had to complete. In November 2017, one of the children disclosed sexual abuse to DCS and was referred for therapy. Mother allowed Father to stay in her house in December 2017; he physically abused her again, was arrested and incarcerated. Mother reported this to FCM Leas, and when they discussed the sexual abuse allegations, Mother stated she couldn't believe it had happened.

DCS filed for termination of the parent child relationships in January 2018 for the following reasons: (1) Mother did not believe Father sexually abused the child; there was continued domestic violence throughout the entire relationship and case; (3) Father was incarcerated; (4) the parents still struggled with substance abuse issues. At a permanency hearing where Mother was not present, FCM Leas testified that the issues which were present at the time of removal had not been remedied, and that Mother did not believe that the sexual abuse had occurred. The GAL concurred with the plan for termination. At the termination hearing, the trial court noted that Father had relinquished his parental rights. Mother testified that she believed the child about the sexual abuse. There was testimony from FCM Leas which indicated the large number of FCMs, the lack of the FCM's certainty regarding the services provided to Mother and whether she had done them, the fact Mother had not been referred for additional services despite Mother requesting them, and that FCM Leas was worried that even with Father out of the picture Mother would just find another relationship marked by domestic violence. The trial court terminated Mother's parental rights.

DCS's procedural failings meant that the termination of Mother's parental rights must be reversed; DCS failed to adhere to statutes regarding the mandatory reporting of reasons a termination petition should be dismissed, and failed to adhere to its own policies regarding contact, visitation, ongoing assessment of needed services, and provision of services. Id. at 591. When the State seeks to terminate parental rights, it must do so in a manner that complies with due process. Id. at 588. Furthermore, if the State imparts a due process right, it must give that right. Id. at 588-89. IC 31-35-2-4(b)(2) provides that before an involuntary termination of the parent-child relationship can occur, DCS must prove, among other things, that the child has been removed from the parent for at least fifteen of the most recent twenty-two months, that there is a reasonable probability that the conditions resulting in the child's removal will not be remedied or the continuation of the relationship poses a threat to the child's well-being, and termination is in the child's best interests. DCS must also state whether any circumstances exist that could apply as the basis for filing a motion to dismiss the termination petition. Id., citing IC 31-35-2-4.5(d). IC 31-35-2-4.5(d)(2) and (3) require DCS to dismiss an otherwise required termination petition when DCS has failed to provide family services and either the time frame for the completion for services has not passed or the services are substantial and material in facilitating the return of the child to the home. Id. at 589. DCS's own policy manual makes similar unequivocal directions to DCS to provide services, regularly communicate with the family and children, reassess needs of the children and family throughout the case, meet identified needs, adjust services, and offer services regardless of participation. Id. DCS's policy manual provides that the FCM must work with the family to identify needed services, maintain contact with service providers, adjust services as needed, document services and progress, and follow up with providers and families. Id. "In looking at the risk of error created by DCS's actions, we keep in mind that 'due process protections at all stages of CHINS proceedings are vital because every CHINS proceeding has the potential to interfere with the rights of parents in the upbringing of their children.'" Id. at 588 (internal citations omitted). This is because CHINS and TPR are interwoven proceedings, and the outcomes of one proceeding flow into and affect the other proceeding. Id.

FCM Leas's testimony showed that she did not perform her own duties as laid out in the DCS policy manual. Id. FCM Leas knew very little about Mother's service needs or compliance but

DCS moved for termination anyway. Id. at 589-90. DCS moved for termination without noting, as required by statute, that there were grounds to move to dismiss because of DCS's failure to identify or provide necessary family services while the CHINS case was open. Id. DCS also failed to note in its termination petition that it failed to comply with its own policy regarding the provision of a visitation plan for families in which domestic violence has been identified. Id. DCS has specific policies about implementing visitation when domestic violence is an issue. And yet the trial court and DCS left visitation to Mother and Father to figure out. Id. This forced Mother and Father to be in contact with each other, with predictable results. Id. DCS contributed to the children witnesses domestic violence in this manner. Id. DCS's failures created the risk of a premature, erroneous termination of Mother's parental rights on the grounds that she was not complying with services, and their failures resulted in more domestic violence incidents, which were also the basis of the termination of Mother's parental rights. Id. at 590-91. This violated Mother's due process rights. Id. at 591. The matter was remanded to the trial court for reinstatement of the CHINS case, a re-examination of the requirements for Mother's reunification with the children, and a revised dispositional order outlining the services Mother must complete to reunify with the children. Id. at 591.