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# IN THE COURT OF APPEALS OF INDIANA

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| IN THE MATTER OF THE INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP OF J.C., MINOR CHILD AND HIS MOTHER: | ) | |
| M.C., | ) | |
| Appellant-Respondent, | ) | |
| vs. | ) | No. 49A04-0912-JV-728 |
| MARION COUNTY DEPARTMENT OF CHILD SERVICES and CHILD ADVOCATES, INC., | ) | |
| Appellee-Petitioner. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn Moores, Judge
The Honorable Larry Bradley, Magistrate
Cause No. 49D09-0906-JT-26176

**July 20, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

M.C. (Mother) appeals the involuntary termination of her parental rights to her child J.C. Although Mother raises two issues for our review, we address only the following dispositive issue: Did the juvenile court abuse its discretion in granting Mother's trial attorney's request to withdraw her appearance?

We reverse and remand with instructions.

Mother is the biological mother of J.C., born on July 2, 2008. The facts most favorable to the trial court's judgment reveal that J.C. was born while Mother was receiving inpatient psychiatric treatment at Wishard Hospital. Prior to her hospitalization, Mother had been homeless for approximately five years. When J.C. was ready to be discharged from the hospital, Mother remained unstable and required further hospitalization. Because there were no known relatives available to care for J.C,[1] the Indiana Department of Child Services, Marion County (MCDCS), took J.C. into emergency protective custody and filed a petition alleging the child was a child in need of services (CHINS). J.C. was thereafter placed in foster care.

Meanwhile, a continued hearing on the CHINS petition was held in November 2008. Mother, whose whereabouts were unknown to MCDCS, failed to appear for the hearing and J.C. was adjudicated a CHINS. The juvenile court then proceeded to disposition and formally removed J.C. from Mother's care pursuant to a dispositional order[2] the same day. For the ensuing months, Mother refused to maintain consistent contact with MCDCS and failed to appear for all scheduled CHINS hearings. Although Mother requested visitation

[1] At the time of the termination hearing, J.C.'s biological father remained unknown.

[2] The juvenile court's dispositional order was not included in the record on appeal.

privileges with J.C., the juvenile court denied her request until such time as Mother appeared in court. Mother never appeared in court, and therefore never participated in visitation or reunification services. In addition, although a Comprehensive Family Profile was offered to Mother by MCDCS family case manager Christine Schmelzer in August 2008, Mother informed Schmelzer that she was "not ready to do services." *Transcript* at 13.

Following a permanency hearing in May 2009, the juvenile court ordered the permanency plan changed from reunification to termination of parental rights and adoption. MCDCS filed a petition seeking the involuntary termination or Mother's parental rights to J.C. the following month. Mother was personally served with the Summons, the statement of her rights in the termination action, and the involuntary termination petition but failed to appear for the initial hearing on the termination petition. In July 2009, Mother appeared for a default hearing, so the juvenile court treated it as the initial hearing and appointed counsel for Mother. Despite receiving notice, Mother continued to fail to appear for several scheduled court hearings, including a rescheduled pre-trial hearing in October 2009, and two court-ordered mediation hearings. Mother also failed to maintain contact with her attorney.

At the commencement of the termination hearing in November 2009, Mother's attorney acknowledged that Mother was not present for the hearing and requested a continuance, stating she had had "very little contact" with Mother since the last hearing and needed "additional time to prepare. . . ." *Id.* at 3. The juvenile court denied counsel's request for a continuance, and Mother's counsel immediately made an oral motion to withdraw her appearance. In so doing, Mother's attorney testified as follows:

I mailed [Mother] a letter on September 18th and informed her that … there

> are specific things that [Mother's] required to attend, if she did not attend those that I would have to withdraw. I sent the letter on September 18th. I did not get a copy back. As far as I know it's her correct address so I would move to withdraw.

*Id.* at 4. The juvenile court thereafter verified that Mother's attorney had sent Mother the letter more than ten days before counsel's current request to withdraw, granted her request to withdraw her appearance as counsel for Mother, and proceeded with the termination hearing in Mother's absence. Later the dame day, the juvenile court issued an order terminating Mother's parental rights to J.C. Mother now appeals.

Mother asserts on appeal that the juvenile court abused its discretion under local court rules when it allowed Mother's attorney to withdraw her appearance. Mother further asserts that she was denied procedural due process when the juvenile court proceeded with the termination hearing in her absence after granting her attorney's motion to withdraw. Because we find the first issue dispositive, we decline to discuss Mother's second allegation of error.

We begin our review by observing that Mother does not directly challenge the trial court's substantive findings in its termination order, nor does Mother argue that insufficient evidence supports the trial court termination order. Rather, Mother claims she is entitled to reversal because the juvenile court abused its discretion when it permitted her trial counsel to withdraw her appearance at the commencement of the November 2009 termination hearing. The decision to grant or deny an attorney's motion to withdraw his or her appearance is left to the sound discretion of the trial court. *In re K.S.*, 917 N.E.2d 158, 162 (Ind. Ct. App. 2009). An abuse of discretion exists only when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* In addition, this court

will not reweigh the evidence or judge the credibility of witnesses when reviewing a case for an abuse of discretion. *Id.*

Here, the local rule regarding withdrawal of appearances in Marion County reads as follows:

> All withdrawals of appearances shall be in writing and by leave of Court. Permission to withdraw shall be given *only* after the withdrawing attorney has given his client ten days written notice of his *intentions to withdraw*, has filed a copy of such with the Court; and has provided the Court with the party's last known address; or upon a simultaneous entering of appearance by new counsel for said client. *The letter of withdrawal shall explain to the client that failure to secure new counsel may result in dismissal of the client's case or a default judgment may be ordered against him, whichever is appropriate, and other pertinent information such as trial setting date or any other hearing date.* The Court *shall no*t grant a request for withdrawal of appearance unless the same has been *filed with the Court at least ten days prior to trial date*, except for good cause shown.

Marion Circuit and Superior Court Civil Rule LR49-TR3.1-201, http://www.in.gov/judiciary/marion/docs/lr030310.pdf (last visited June 15, 2010) (hereinafter referred to as "the local rule") (emphasis supplied). Thus, to withdraw an appearance in accordance with the local rule, an attorney must give both the client and the court "timely, written notice of the intent to withdraw." *In re K.S.*, 917 N.E.2d at 163. Moreover, the attorney's written letter to the client must "expressly inform the client" that "failure to secure new counsel may result in dismissal…or default judgment" as well as other pertinent information, and the trial court "will not grant a request for withdrawal of appearance unless the same has been filed with the Court at least ten days prior to [the] trial date, except for good cause shown." *Id*.

Based on the foregoing and the record before us, we are constrained to find that the juvenile court abused its discretion when it granted Mother's attorney's oral motion to withdraw from the case at the commencement of the termination hearing. Counsel for Mother did not provide the juvenile court with a copy of her timely, written notice to Mother of counsel's intention to withdraw her appearance. Rather, in support of her oral motion to withdraw her appearance at the commencement of the termination hearing, Mother's attorney stated as follows:

> I mailed [Mother] a letter on September 18th and informed her that … there are specific things that [Mother's] required to attend, if she did not attend those that I would have to withdraw. I sent the letter on September 18th. I did not get a copy back. As far as I know it's her correct address so I would move to withdraw.

*Transcript* at 4. Although this statement to the juvenile court indicates counsel informed Mother that counsel *may* "have to withdraw" in the future if Mother failed to attend certain "specific things," we conclude that this ambiguous statement alluding to counsel's potential withdrawal if certain unnamed conditions were not met did not satisfy the local rule's requirement that counsel must inform Mother, in writing, of her intent to withdraw her appearance as trial counsel. Even assuming, *arguendo*, that this vague statement by counsel was sufficient to establish the "intent to withdraw appearance" requirement, Counsel's testimony cited above makes clear that Mother was never properly informed that "failure to secure new counsel may result in dismissal…or a default judgment" against Mother as required by the local rule. *See* Rule LR49-TR3.1-201.

This court has previously explained that "once a trial court promulgates a rule, the court and all litigants are generally bound by the rule." *Andrews v. Monroe County Dep't of*

*Child Services (In re D.A.)*, 869 N.E.2d 501, 509 (Ind. Ct. App. 2007). Although a court may, in certain limited situations, set aside its own rule "if the court first assures itself that it is in the best interests of justice to do so, that the substantive rights of the parties are not prejudiced, and that the rule is not a mandatory rule," *id.*, nothing in the Record here suggests that the juvenile court intended to set aside the local rule when it granted Mother's attorney's request to withdraw. To the contrary, the juvenile court appears to have attempted to ascertain whether the requirements of LR49-TR3.1-201 had been satisfied when it inquired as to whether Mother's attorney's letter had been mailed more than ten days before counsel's motion to withdraw.

Mother's consistent, blatant lack of cooperation and involvement in the termination proceedings understandably caused her attorney to conclude that she could no longer adequately represent her client in this matter. Nevertheless, parental rights are of a constitutional dimension in Indiana and parents involved in a termination proceeding have a statutory right to counsel. *See* Ind. Code Ann. § 31-32-2-5 (West, Westlaw through 2009 1st Special Sess.); *In re K.S.*, 917 N.E.2d at 165. Thus, at a minimum, we must require that all statutes and rules governing such representation are strictly observed. Furthermore, even though the statements in the dissenting opinion are factually correct, given the extremely serious nature of a termination of parental rights, Mother is not required to show prejudice in order to be entitled to relief. Therefore, the juvenile court's failure to follow LR49-TR3.1-201 in the present case constituted an abuse of discretion. Consequently, we must reverse the

juvenile court's decision, vacate the termination order, and remand for further proceedings.[3]

Reversed and remanded with instructions.

ROBB, J., concurs.

KIRSCH, J., dissents with separate opinion.

[3] We wish to stress that our decision is not premised upon any substantive infirmities in the trial court's ruling with respect to either the merits of counsel's request to withdraw or indeed even the decision to terminate parental rights. We merely observe that any request to withdraw must strictly comply with all applicable statutes and rules, including LR49-TR3.1-201.

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**KIRSCH, J.,** ***dissenting***

For the reasons set forth in my dissenting opinion in *In re K.S.*, 917 N.E.2d 158, 162 (Ind. Ct. App. 2009)(Kirsch, J. dissenting), I respectfully dissent. Here, as there, Mother put counsel and trial court in an untenable position. Here, as there, Mother makes no claim of prejudice. Here, as there, Mother makes no showing of any evidence that counsel could or should have offered, no question counsel could or should have asked, no objection that counsel could or should have made.

I would affirm the trial court in all respects.