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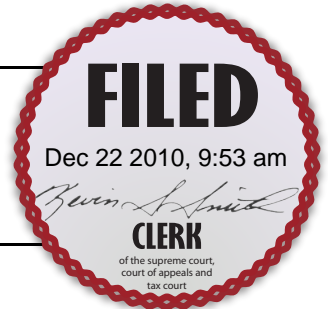
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**IN THE
COURT OF APPEALS OF INDIANA**



G.B. and B.B.,)
)
Appellants-Respondents,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD SERVICES,)
)
Appellee-Petitioner.)

No. 42A05-1005-JT-318

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable W. Timothy Crowley, Judge
Cause Nos. 42D01-0912-JT-50, 42D01-0912-JT-51 and 42D01-0912-JT-52

December 22, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

G.B. (“Mother”) appeals the trial court’s order terminating her parental rights over her minor children G.B., K.B., and E.B.¹ Mother raises a single issue for our review, namely, whether the trial court violated her due process rights when it conducted a final termination hearing without first advising her of her right to counsel and without affording her a meaningful opportunity to cross-examine witnesses or present evidence.

We reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Mother is the biological mother of minor children G.B., K.B., and E.B. In November 2008, the Indiana Department of Child Services (“DCS”) filed petitions alleging that each of the three children were children in need of services (“CHINS”).² DCS placed the children with their maternal grandfather (“Grandfather”), and they were adjudicated as CHINS. During a dispositional hearing on December 10, the trial court ordered Mother to comply with a case plan, which included maintaining contact with the family case manager, Elizabeth Argo; completing a drug and alcohol evaluation; submitting to regular drug screens; visitation with the children; and participation in home-based parenting education sessions. While Mother initially participated “somewhat” in the ordered services, Argo lost contact with Mother in August 2009. Transcript at 17.

¹ B.B. (“Father”) was a party below but has not filed an appearance in this appeal.

² Mother has not included copies of the CHINS petitions in the record on appeal. From what we glean from the parties’ briefs, the children were removed from Mother’s care for issues related to Mother’s methamphetamine abuse.

In December 2009, DCS filed petitions to terminate Mother's parental rights with regard to each of the three children. Because Mother had not maintained contact with Argo or Grandfather, in January 2010, DCS filed notice by publication of the initial hearing scheduled for February 26, 2010.

Sometime in February 2010, Mother contacted Argo to request visitation with the children. Mother advised Argo at that time that she was aware of the termination proceedings against her. Argo then advised Mother that she could still try to comply with her case plan in an effort to try to get custody of the children back, and Argo "made the referrals" for Mother. *Id.* at 19. But Mother never followed through with any of the services or attempted visitation, and Argo again lost contact with Mother.

Mother did not attend the initial hearing on February 26, and Mother did not have counsel present. Accordingly, DCS requested that Mother be defaulted, and the trial court entered default judgment against Mother on the petitions to terminate her parental rights. Father was present and represented by counsel at the initial hearing, and the trial court scheduled the final factfinding hearing for April 8. At the time of the factfinding hearing, Mother was incarcerated, and the trial court ordered that she be transported from jail to the hearing.³ Accordingly, Mother was present for the final hearing on the termination petitions, but she was neither advised of her right to counsel nor represented by counsel. Nor was Mother provided an opportunity to present evidence or cross-

³ On appeal, the parties do not discuss the trial court's apparent inconsistency in ordering Mother to attend the factfinding hearing when she had already been "defaulted" after failing to show at the initial hearing. We will address this issue further below.

examine witnesses. Instead, after evidence was heard,⁴ the trial court asked Mother whether she had “anything [she] want[ed] to say” before he entered judgment on the termination petitions. *Id.* at 22. Mother declined.

The trial court issued separate orders terminating Mother’s parental rights to each of the three children.⁵ The trial court found and concluded in relevant part as follows:

5. It was established by clear and convincing evidence that the allegations of the petition are true in that:

a. The child has been removed from his parents for a continuous period of at least six (6) months under a dispositional decree

b. There is a reasonable probability that the conditions that resulted in the child’s removal or the reasons for the placement outside the parent’s home will not be remedied in that the father, [B.B.], has voluntarily terminated his parental rights and the mother, [G.B.], is currently incarcerated, has failed to cooperate in services in the [CHINS] proceeding . . . and has failed to maintain contact with the child and the Family Case Manager for many months.

c. Termination is in the best interest of the child in that the parents have failed to make steps towards reunification in the [CHINS] proceeding and the child has been in his current placement since removal and is very bonded with his grandfather and requires stability and permanency in his life which adoption can provide.

d. The Indiana Department of Child Services has developed a satisfactory plan of care and treatment for the child, which is adoption of the child.

Appellant’s App. at 8-9. This appeal ensued.

DISCUSSION AND DECISION

Mother contends that the trial court violated her rights to due process when it conducted a final termination hearing without first advising her of her right to counsel

⁴ Incidentally, at the factfinding hearing, before any evidence was presented, Father submitted to the trial court signed forms voluntarily relinquishing his parental rights with respect to all three children.

⁵ Each of the three orders is identically worded.

and without affording her a meaningful opportunity to cross-examine witnesses or present evidence. We set out the applicable law in D.A. v. Monroe County Department of Child Services, 869 N.E.2d 501, 510 (Ind. Ct. App. 2007), as follows:

Indiana Code Section 31-35-2-6.5(e), which governs hearings for petitions to terminate a parent-child relationship, provides that “[t]he court shall provide to a [parent] an opportunity to be heard and make recommendations to the court at the hearing. The right to be heard and to make recommendations under this subsection includes the right of a [parent] to submit a written statement to the court. . . .” Furthermore, Indiana Code Section 31-32-2-3(b) provides that in proceedings to terminate the parent-child relationship, “[a] parent, guardian, or custodian is entitled: (1) to cross-examine witnesses; (2) to obtain witnesses or tangible evidence by compulsory process; and (3) to introduce evidence on behalf of the parent, guardian, or custodian.”

In addition to these statutory provisions, the Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. Thompson v. Clark County Div. of Family and Children, 791 N.E.2d 792, 794-95 (Ind. Ct. App. 2003), trans. denied. When the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process. Lawson v. Marion County Office of Family and Children, 835 N.E.2d 577, 579 (Ind. Ct. App. 2005). “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” Thompson, 791 N.E.2d at 795 (quoting Mathews v. Edlridge, 424 U.S. 319, 333 (1976)).

The nature of 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. Lawson, 835 N.E.2d at 580. The balancing of these factors recognizes that although due process is not dependent on the underlying facts of the particular case, it is nevertheless “flexible and calls for such procedural protections as the particular situation demands.” Thompson, 791 N.E.2d at 795 (quoting Mathews, 424 U.S. at 334).

In this case, both the private interests and the countervailing governmental interests that are affected by the proceeding are substantial. In particular, the action concerns a parent’s interest in the care, custody, and

control of his children, which has been recognized as one of the most valued relationships in our culture. Lawson, 835 N.E.2d at 580. Moreover, it is well settled that the right to raise one's children is an essential, basic right that is more precious than property rights. Id. As such, a parent's interest in the accuracy and justice of the decision is commanding. Id. Furthermore, a parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship. See I.C. § 31-32-2-5. On the other hand, the State's parens patriae interest in protecting the welfare of the children involved is also significant. Lawson, 835 N.E.2d at 580. Delays in the adjudication of a case impose significant costs upon the functions of the government as well as an intangible cost to the lives of the children involved. Id.

(Emphasis added).

Here, on appeal, DCS “concedes that, since Mother was not appointed trial counsel, and there does not appear to be any indication she was advised of her right to counsel, her due process rights were infringed upon.” Brief of Appellee at 5. Still, DCS maintains that “under the particular facts of this case, argument can be made that Mother suffered no harm.” Id. at 8. We cannot agree.

In Thompson v. Clark County Division of Family and Children, 791 N.E.2d 792 (Ind. Ct. App. 2003), we addressed a mother's due process challenge to the termination of her parental rights under somewhat analogous circumstances, and we find our analysis in that case instructive here. In Thompson, we held that Mother's due process rights were violated where the trial court conducted the final termination hearing “as a summary proceeding where no witnesses testified and no cross-examination was conducted[.]” Id. at 793. In particular, Mother, who was represented by counsel, failed to appear at the final termination hearing, but telephoned the court to report that she had “checked herself into” a drug and alcohol rehabilitation facility. Id. at 794. But when the trial court

telephoned that facility to confirm that Mother was there, the court learned that she was not there.

Mother's trial counsel moved for a continuance, but the trial court denied that motion and proceeded to conduct the final termination hearing in "an expedited manner" because mother "has failed to appear as a result of inexcusable neglect." Id. Neither the Division of Family and Children nor mother's counsel called any witnesses, but each side "gave summaries of what their witnesses would have testified to had a full hearing been conducted." Id. At the conclusion of the hearing, the trial court "grant[ed] the request by the Division of Family and Children for entry of a Default Judgment" and ordered that mother's parental rights be terminated. Id.

On appeal, we acknowledged that mother "should not be rewarded for her deception and delay tactics" and that the trial court could have properly conducted the hearing in her absence since her counsel was present. Id. at 796. But we concluded that "[e]ssentially, what happened here was no hearing at all." Id. And we observed that "[e]ven though [mother] was given the opportunity to be heard at a meaningful time, she was not given the opportunity to be heard in a meaningful manner." Id. Thus, we held that the summary proceeding terminating mother's parental rights violated her due process rights, and we remanded to the trial court for a "proper final termination hearing." Id.

Here, we note at the outset that neither DCS nor the trial court proceeded at the factfinding hearing as though the default judgment entered against Mother at the initial hearing had any legal effect. Indeed, if the default judgment had been observed, there

would have been no reason to hear any evidence at the factfinding hearing in light of Father's voluntary relinquishment of his parental rights at the beginning of that hearing. Nevertheless, on appeal, both Mother and DCS frame their arguments as though the default judgment was a nullity and the factfinding hearing was necessary to terminate Mother's parental rights.

While DCS presented evidence against Mother at the factfinding hearing and Mother was present, Mother had not been advised of her right to counsel, and she was not given a meaningful opportunity to present evidence or cross-examine witnesses. Mother declined an opportunity to make a statement at the conclusion of the evidence, but that opportunity was illusory given that the witnesses had been excused and she had been denied her right to counsel. Mother was a bystander in her own case. As we did in Thompson, we hold that Mother was denied her right to be heard in a meaningful manner. In light of this due process violation, we reverse entry of judgment terminating Mother's parental rights with regard to each of the three children and remand this case to the trial court with instructions "to hold a proper final termination hearing." See id. The trial court shall first advise Mother of her right to counsel. Our decision shall not be interpreted to have any bearing on the sufficiency of the evidence against Mother. Rather, we reverse solely on the basis that Mother was denied her fundamental constitutional right to due process.

Reversed and remanded with instructions.

DARDEN, J., and BAILEY, J., concur.