

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

Yvette M. LaPlante
LaPlante LLP
Evansville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana
Indianapolis, Indiana

Robert J. Henke
Director, Child Services Appeals
Unit
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Termination of the Parent-
Child Relationship of D.C. and
M.C. (Minor Children), and
K.G. (Mother),
Appellant-Respondent,

v.

Indiana Department of Child
Services,
Appellee-Petitioner

December 20, 2022
Court of Appeals Case No.
22A-JT-1753
Appeal from the Warrick Superior
Court
The Honorable J. Zack Winsett,
Judge
Trial Court Cause Nos.
87D01-2205-JT-86
87D01-2205-JT-87

May, Judge.

[1] K.G. (“Mother”) appeals the involuntary termination of her parental rights to her children, D.C. and M.C. (collectively, “Children”). Mother argues she did not knowingly and voluntarily waive her right to counsel during the termination of parental rights proceedings and thus the trial court violated her right to due process when it did not appoint her counsel. We reverse and remand.

Facts and Procedural History

[2] Mother¹ gave birth to D.C. on February 29, 2012, and M.C. on March 18, 2015. On September 24, 2020, the Department of Child Services (“DCS”) received a report Children were victims of neglect by Mother, Father, and J.G. (“Stepfather”). The report alleged Mother and Stepfather had unstable housing and food insecurity, Children did not regularly attend school, and Children were exposed to domestic violence and drug abuse. Based thereon, DCS filed petitions alleging Children were Children in Need of Services (“CHINS”) on November 16, 2020. On January 15, 2021, Mother admitted Children were CHINS. On February 19, 2021, the trial court ordered Mother to participate in several services. During the CHINS proceedings, Mother was represented by appointed counsel Sherry Smith (“Attorney Smith”). Regarding Attorney Smith’s appointment, the trial court noted in the Chronological Case Summary

¹ Children’s father is R.C. (“Father”). Father voluntarily relinquished his parental rights to Children and does not participate in this appeal. As Father was not an active participant in the underlying proceedings, we will limit our recitation of the facts to those relevant to Mother.

for the CHINS case involving D.C., “Court appoints Ms. Smith to represent [Mother] in this matter.” (JT-86 Ex. Vol. III at 5.)²

- [3] Mother did not consistently participate in services. On March 1, 2022, Mother and Father executed consents to Children’s adoption by their foster placement. However, Mother revoked her consent to adoption on March 29, 2022. On May 6, 2022, the trial court entered a “Hearing Journal Entry” in the Chronological Case Summary in the CHINS case involving D.C. that stated:

Comes now DCS by its [Family Case Manager] and counsel, Tara Hunter. Mother appears by counsel, Sherry Smith. . . . DCS advises that Mother has withdrawn her consent to adoption and that [it] will be filing a new [Termination of Parental Rights Petition]. Court sets Status hearing on June 3, 2022 at 9:00 a.m. Ms. Smith advises that she is unavailable on that date. This case is tracking the new JT case that will be filed.

(*Id.* at 14.)

- [4] On May 12, 2022, DCS filed petitions to terminate Mother and Father’s parental rights to Children based on Mother’s noncompliance with services. On May 13, 2022, the trial court sent Mother³ a document entitled, “**TPR**

² The trial court entered separate orders as to each child. While the appeal before us concerns both cause numbers, the records for each are not identical. The termination cause number for D.C. is 87D01-2205-JT-86 (“JT-86”). The termination cause number for M.C. is 87D01-2205-JT-87 (“JT-87”). We will cite to the exhibit volumes based on the relevant cause number.

³ The Chronological Case Summary indicates this document was sent only to Mother at her place of residence. The Chronological Case Summary does not list Attorney Smith as someone who received this notice.

SUMMONS AND NOTICE OF HEARING AND NOTICE OF POSSIBLE DEFAULT JUDGMENT[.]” (App. Vol. II at 70) (emphasis in original). The document stated:

YOU ARE HEREBY NOTIFIED that a Petition for the Involuntary Termination of Parental Rights of the above name [sic] children, a copy of which is attached hereto, has been filed in the above named Court.

YOU ARE HEREBY NOTIFIED AND COMMANDED TO APPEAR before the Judge of the Warrick Superior Court 1, One County Square, #300-A, Boonville, IN 47601 – 812-897-6140 for a(n) **Initial Hearing on June 3, 2022 at 9:00 AM** on the petition for termination of parental rights.

YOU ARE FURTHER NOTIFIED that if the allegations of the petition are found to be true and/or you fail to appear at the hearings, the Court may terminate the parent-child relationship; and if the Court terminates the parent-child relationship, you will lose all parental rights, powers, privileges, immunities, duties, [and] obligations including any rights to custody, control, visitation, or support of the child; and if the Court terminates your parent-child relationship, it will be permanently terminated, and thereafter you may not contest an adoption or other placement of said children, and

YOU ARE ENTITLED TO REPRESENTATION BY AN ATTORNEY, provided by the State if necessary, throughout these proceedings to terminate the parent-child relationship.

(Id.) (emphasis in original).

[5] On June 3, 2022, the trial court held an initial hearing⁴ on the termination petitions. Neither Mother nor Attorney Smith attended. The trial court did not appoint counsel for Mother. The trial court set a “default hearing” for June 21, 2022. (App. Vol. II at 10.) The Chronological Case Summary for JT-86 indicated Mother received notice of the hearing on June 14, 2022, but the text of that notice is not in the record.

[6] On June 21, 2022, the trial court held a hearing on the termination petitions. DCS appeared with counsel, but neither Mother nor Attorney Smith appeared. Family Case Manager Tricia Howard (“FCM Howard”) told the court she received a text message from Stepfather.

In the text he said, they just realized that they had court today. And they’re in the middle of moving and, um, his mother does not have gas to get them here. And I said, please have [Mother] call me and he said, um, she’s too upset and her anxiety’s through the roof and she’d just have to call me later and ask me if I could get a continuance and I said well, I cannot request that.

(Tr. Vol. II at 5) (errors in original). The trial court then stated:

So there was communication between [Stepfather] and the [Family Case Manager] regarding [Mother] but nothing directly from [Mother] to [Family Case Manager] and there was – there was plenty of time and plenty of notice to prepare, uh, to – for them to arrange transportation to be here today. Um. I’ve heard a number of excuses secondhand, you know, moving, gas, um,

⁴ Father consented to the termination of his parental rights sometime between May 12, 2022, and the June 3, 2022, hearing.

and just being anxious and upset, so I would otherwise allow – show that there’s proper notice, and otherwise allow the hearing to go forward today.

(*Id.*) (errors in original).

- [7] The trial court then held the hearing without Mother and without appointing counsel to represent Mother. The trial court granted DCS’s petition to involuntarily terminate Mother’s parental rights to Children at the end of the hearing and entered corresponding orders on June 24, 2022. On July 20, 2022, an entry in the Chronological Case Summary for JT-86 indicates “Court Reporter receives an email from Sherry Smith advising that she was contacted by Mother, who she does not represent in this cause, that she would like to appeal and will need appointed counsel.” (App. Vol. II at 11.)

Discussion and Decision

- [8] “The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution.” *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. A trial court must subordinate the interests of the parents to those of the children, however, when evaluating the circumstances surrounding a termination. *In re K.S., D.S., & B.G.*, 750 N.E.2d 832, 837 (Ind. Ct. App. 2001). *In re K.S.*, 750 N.E.2d at 837. The right to raise one’s own children should not be terminated solely because there is a better home available for the children, *id.*, but parental rights may be terminated when a parent is unable or unwilling to meet parental

responsibilities. *Id.* at 836. We review termination of parental rights with great deference. *Id.* However, when the challenge to the trial court’s judgment is one related to the constitutionality of that decision, we review the trial court’s judgment de novo. *In re Adoption of K. W.*, 21 N.E.3d 96, 97 (Ind. Ct. App. 2014).

[9] Mother argues the trial court violated her right to due process when it held the termination hearing without first appointing her counsel in the matter. Due process is essentially “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). “Although due process has never been precisely defined, the phrase embodies a requirement of ‘fundamental fairness.’” *E.P. v. Marion Cnty. Office of Family & Children*, 653 N.E.2d 1026, 1031 (Ind. Ct. App. 1995) (quoting *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 26, 101 S. Ct. 2153 (1981)). “When the State seeks to terminate the parent-child relation, it must do so in a manner that meets the requirements of due process.” *In re C.G.*, 958 N.E.2d 910, 917 (Ind. 2011). Furthermore, “if the State imparts a due process right, then it must give that right.” *Id.*

[10] In an action seeking to involuntarily terminate a parent’s right to their children, the parent 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[.]” Ind. Code § 31-32-2-3(b). Pursuant to Indiana Code section 31-32-2-5, a “parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship.” The trial court must

appoint counsel “at the initial hearing” in a termination of parental rights case if the parent “does not have an attorney who may represent the parent without a conflict of interest” and “the parent has not lawfully waived the parent’s right to counsel under IC 31-32-5[.]” Ind. Code 31-32-4-3. A parent waives their right to counsel in a termination of parental rights case “if the parent does so knowingly and voluntarily.” Ind. Code § 31-32-5-5. From the record before us, we cannot conclude Mother did so herein.

[11] The trial court appointed Attorney Smith to represent Mother during the CHINS proceedings. On May 6, 2022, at what would ultimately be the last hearing of the CHINS proceedings, the trial court set a status hearing on the CHINS case for June 3, 2022 – a date Attorney Smith indicated during the hearing that she was unavailable to attend. It is unclear why a trial court would set a CHINS status hearing⁵ on a date when Mother’s appointed counsel in the CHINS proceeding is unavailable, *see* Ind. Code of Judicial Conduct Rule 2.9 (prohibiting ex parte communication) & Ind. R. of Pro. Conduct 4.2 (prohibiting communication with person represented by counsel), and when it was evident DCS intended to file petitions to terminate Mother’s parental rights.

[12] DCS filed petitions to terminate Mother’s rights to Children less than a week later, on May 12, 2022. The trial court set an initial hearing on the termination

⁵ The record indicates Attorney Smith received notice of the June 3, 2022, status hearing, and we presume she informed Mother thereof.

matter for June 3, 2022 -- the same day it had scheduled the CHINS status hearing and on which Attorney Smith was unavailable. On May 13, 2022, the trial court sent Mother a document entitled “**TPR SUMMONS AND NOTICE OF HEARING AND NOTICE OF POSSIBLE DEFAULT JUDGMENT**” (App. Vol. II at 70) (emphasis in original), which put her on notice not only of the upcoming June 3, 2022, hearing, but also that she was “entitled to representation by an attorney provided by the State if necessary, throughout these proceedings to terminate the parent-child relationship.” (*Id.*) (original formatting omitted). Based thereon, Mother knew she was *entitled* to representation by counsel in the termination proceedings. However, that notice does not inform Mother that Attorney Smith would no longer be her counsel as DCS’s proceedings regarding her children continued or that Mother needed to request new counsel. Nor have we found any indication elsewhere in the record that Attorney Smith, the trial court, or DCS staff⁶ informed Mother that Attorney Smith would not be her counsel in the TPR proceedings. Instead, it appears Mother believed Attorney Smith was her counsel during the termination proceedings, because she contacted Attorney Smith after the trial

⁶ On the day of the termination hearing, Stepfather contacted FCM Howard to indicate Mother would be unable to attend the hearing. He asked FCM Howard to request a continuance. When indicating she was unable to do so, it does not appear that FCM Howard explained to Stepfather that Mother or her attorney must request the continuance or that Mother did not have counsel. *Cf. Termination of Parent-Child Relationship of X.S. v. Indiana Dept. of Child Servs.*, 117 N.E.3d 601, 608 (Ind. Ct. App. 2018) (in a termination of parental rights case where father argued his due process rights were violated when the trial court did not appoint counsel for him, this court affirmed the termination of his parental rights and determined father made a knowing and voluntary waiver of his right to counsel based, in part, on the FCM’s conversation with father indicating the process by which father could request counsel).

court terminated her parental rights to request appointment of appellate counsel to challenge the trial court's ruling.

- [13] While the State's interest in Children's welfare and need for permanency are significant, *see In re C.C.*, 788 N.E.2d 847, 852 (Ind. Ct. App. 2003) ("the State's *parens patriae* interest in protecting the welfare of a child is also significant"), *trans. denied*, they are not more important than Mother's right to counsel. The record before us contains no evidence to support a determination that Mother knowingly and voluntarily waived her right to counsel in the termination proceedings. Based thereon, we hold the trial court violated Mother's right to due process when it did not appoint counsel to represent her with respect to the State's petition to involuntarily terminate her parental rights to Children.

Conclusion

- [14] The record before us contains no evidence to suggest Mother knowingly and voluntarily waived her right to counsel during the termination proceeds and thus the trial court violated Mother's right to due process by conducting the termination hearing without first appointing counsel for Mother. Therefore, we reverse the trial court's involuntary termination of Mother's parental rights to Children and remand for further proceedings not inconsistent with this opinion.
- [15] Reversed and remanded.

Crone, J., and Weissmann, J., concur.