

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

6/15/12

In **In Re H.K.**, 971 N.E.2d 100 (Ind. Ct. App. 2012), the Court remanded the termination proceeding with instructions that the trial court conduct a hearing to determine whether the statutory notice requirements of IC 31-35-2-6.5 were met and whether, if the notice requirements were not met, Mother's due process rights were violated. Knox County Office of the Indiana Department of Child Services (KCDCS) filed petitions to terminate Mother's parental rights to her three children on May 9, 2011. During a case conference on May 12, 2011, Mother was personally served with copies of the involuntary termination petitions, summons, and order setting an initial hearing for all three termination cases for June 1, 2011. The initial hearing was held on June 1, 2011. Mother failed to appear but was represented by counsel. Mother also had not visited the children since May 17, 2011, and had ceased all communications with the KCDCS case manager and service providers. The trial court scheduled an evidentiary hearing on the termination petitions for August 29, 2011, and assigned a new attorney to represent Mother. Approximately three weeks before the termination hearing, Mother's attorney filed a Notice to the Court indicating she had made three unsuccessful attempts to locate Mother.

The hearing on the termination petitions was held on August 29, 2011, and Mother failed to appear. At the beginning of the termination hearing, Mother's attorney moved to continue the hearing, arguing that KCDCS had failed to provide Mother with proper notice of the hearing. Mother's attorney told the court that she had finally spoken with Mother earlier that same morning and that Mother, who had been residing in Florida, indicated she "was unaware of the proceedings today" and "had never received any paperwork regarding the termination or the termination proceedings." KCDCS objected to the requested continuance and emphasized that the trial court's records confirmed that Mother was "personally served with the Petition in these matters on May 12, 2011." The KCDCS attorney argued that: (1) efforts had been made to locate Mother, including mailing notice of the termination hearing to Mother's last known address; (2) the family case manager had finally located Mother on Friday; (3) testimony would show that after receiving personal service on May 12, Mother was part of further conferences at KCDCS where the termination was discussed. The trial court denied the requested continuance and proceeded with the termination hearing. At the hearing, the family case manager testified that: (1) there were repeated periods of time throughout the CHINS and termination cases during which KCDCS was unable to locate or contact Mother despite the dispositional order directing Mother to maintain regular contact with KCDCS and to inform KCDCS, within five days, of any

changes in address or telephone number; (2) Mother had not contacted KCDCS or any of her service providers since she attended a case conference on May 20, 2011; (3) personal service of the termination petition and summons pertaining to the initial hearing in June 2011 was achieved on Mother. The case manager did not testify as to whether KCDCS ever provided Mother with notice of the August 2011 evidentiary hearing, nor was other testimony offered or documentary evidence submitted to show Mother was ever provided with notice of the August 2011 termination hearing. At the conclusion of the hearing, the trial court found that notice had been provided to all persons required by statute in the most effective means under the circumstances, and that, although Mother informed her attorney that she was unaware of the termination proceedings, documents indicating personal service and testimony from the case manager indicated otherwise. Later that same day, the trial court entered its written judgment terminating Mother's parental rights. Mother appealed.

Concluding that the record was not clear as to whether KCDCS sent proper notice of the August 2011 termination hearing to Mother, the Court remanded the case with instructions that the trial court conduct a hearing to determine: (1) whether KCDCS complied with the statutory notice mandates of Indiana Code section 31-35-2-6.5 by properly notifying Mother of the August 29, 2011, termination hearing and; (2) if the notice requirements of Indiana Code 31-34-2-6.5 were not met, whether this procedural irregularity violated Mother's due process rights under the facts of this case. *Id.* at 103-04. Mother's sole argument on appeal is that she is entitled to reversal because KCDCS failed to provide her with proper notice of the August 2011 termination hearing. The Court noted that, "presumably due to the significance of the interests at stake" the legislature has enacted IC 31-35-2-6.5, an additional notice requirement in involuntary termination proceedings. *Id.* at 102-03. The Court observed that IC 31-35-2-6.5 provides, in relevant part, that at least ten days before a hearing on a termination petition or motion, the person or entity who filed the petition to terminate the parent-child relationship shall send notice to the child's parent. *Id.* Quoting *In Re T.W.*, 831 N.E.2d 1242, 1246 (Ind. Ct. App. 2005), the Court noted that "[c]ompliance with the statutory procedure of the juvenile code is mandatory to effect termination of parental rights." *H.K.* at 103. The Court observed that failure to comply with statutory notice is thus "a defense that must be asserted." *H.K.* at 103, quoting *In Re T.W.*, 831 N.E.2d at 1246. The Court said that, once placed in issue, KCDCS bears the burden of complying with the statute. *H.K.* at 103. The Court noted that, although KCDCS entered into evidence copies of the termination petitions and summonses pertaining to the June 2011 initial hearing that were mailed to Mother's last known address, the record on appeal is devoid of any evidence showing KCDCS likewise attempted to serve Mother with notice of the August 2011 termination hearing. *Id.* at 103. The Court observed that the family case manager never testified that notice of the August 2011 termination hearing was mailed to Mother's last known address, and the trial court's explanation for denying Mother's motion to continue the termination hearing seemed to focus on the notice to Mother of the June 2011 initial hearing rather than the August 2011 evidentiary hearing. *Id.* The Court opined that, although IC 31-35-2-6.5 does not require compliance with Indiana Trial Rule 4, which governs service of process and incorporates a jurisdictional component, KCDCS was

nevertheless required by IC 31-35-2-6.5 to send notice of the termination hearing to Mother's last known address at least ten days before the hearing. Id.