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ATTORNEY FOR APPELLANT:

PATRICIA CARESS MCMATH
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

KAREN BULLINGTON
Indiana Department of Child Services
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF W.M., MINOR CHILD, AND HIS MOTHER, H.M.,	)	
H.M. (Mother),	)	
Appellant-Respondent,	)	
vs.	)	No. 49A05-0907-JV-404
MARION COUNTY DEPARTMENT OF CHILD SERVICES AND CHILD ADVOCATES, INC.,	)	
Appellees-Petitioners.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Larry E. Bradley, Magistrate
Cause No. 49D09-0901-JT-1161

February 22, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Respondent H.M. ("Mother") appeals the involuntary termination of her parental rights to her child, W.M., claiming the juvenile court abused its discretion and denied Mother procedural due process when it denied her attorney's request for a continuance and proceeded with the termination hearing in Mother's absence. Concluding Mother's procedural due process rights were not violated, we affirm.

FACTS AND PROCEDURAL HISTORY

Mother is the biological mother of W.M., born on June 2, 2007.[1] The facts most favorable to the judgment reveal that on or about July 23, 2007, the local Marion County office of the Indiana Department of Child Services ("MCDCS") received a report that the Indianapolis Metropolitan Police Department had requested assistance in the removal of then six-week-old W.M. from the family home. Removal was necessary because Mother was being arrested on charges of criminal recklessness and neglect of a dependent and was being taken to Wishard Hospital for immediate mental health detention. MCDCS investigating case worker Jessica Price arrived on the scene and spoke with Mother, police officers, and several witnesses, including the biological father and paternal grandmother.

During the ensuing investigation, Mother, who was intoxicated, told Price she was "overwhelmed," "stressed out," and was suffering from postpartum depression, anxiety, and panic attacks. Ex. Vol. 1, p. 12. Mother also disclosed she had consumed a pint of

[1] W.M.'s biological father, D.C., voluntarily relinquished his parental rights to W.M. in March 2009 and does not participate in this appeal. Consequently, we limit our recitation of the facts solely to those facts pertinent to Mother's appeal.

vodka that day, was the only person caring for W.M., and had a four-year-old child who was previously removed from her care by MCDCS due to her addiction to alcohol. W.M.'s biological father, who had not yet established paternity of W.M., admitted to Price that he, too, had a history of substance abuse. The biological father also admitted he was aware of Mother's addiction to alcohol but had nevertheless left W.M. in Mother's care without taking any steps to ensure the child's safety. Based on this investigation, Price took W.M. into immediate protective custody.

On July 25, 2007, MCDCS filed a petition alleging W.M. was a child in need of services ("CHINS"). Upon notification of Mother's release from incarceration in November 2007, the juvenile court appointed Mother counsel, and a fact-finding hearing on the CHINS petition was eventually held in February 2008. On April 4, 2008, W.M. was adjudicated a CHINS.

Following a dispositional hearing on April 22, 2008, the juvenile court issued an order formally removing W.M. from Mother's care. The court also incorporated a parent participation decree in its dispositional order directing Mother to participate in a variety of services in order to achieve reunification with W.M. Specifically, Mother was ordered to, among other things, (1) obtain and maintain a stable source of income and suitable housing, (2) undergo a comprehensive family profile/parenting assessment and parenting classes, (3) participate in a drug and alcohol assessment, substance abuse treatment program, and random drug screens, and (4) exercise regular visitation with W.M.

Mother was referred for home-based services in April 2008 and was initially compliant. Mother relapsed, however, in May 2008, and was discharged from services

because she failed to contact any service providers for approximately one month. On June 5, 2008, Mother contacted MCDCS family case manager Amanda Klene. Mother told Klene she was currently intoxicated, had been drinking alcohol since Memorial Day, and asked Klene for help. Klene took Mother to the Salvation Army for inpatient treatment, but Mother left the program three days later and again ceased all communication with MCDCS.

In September 2008, Mother contacted MCDCS. Mother informed Klene she had been arrested and incarcerated on driving under the influence charges shortly after leaving the Salvation Army program in June, but that she had since been released and was currently on house arrest at Beacon House.[2] Klene again made referrals for services for Mother for home-based counseling, parenting classes, and visitation privileges with W.M.

Mother began participating in home-based services and visitation with W.M. in October 2008. In November 2008, Mother left Beacon House but continued to visit with W.M. Following a permanency hearing in January 15, 2009, the juvenile court issued an order approving MCDCS's request for a change in the permanency plan from reunification to termination and adoption. The court, however, also recognized Mother's participation in visitation and home-based counseling and therefore authorized continued services including increased parenting time with W.M. from two hours to four hours a week. The court's order further directed Mother to attend all of W.M.'s medical and therapy appointments.

[2] Beacon House is an alcohol, drug, and weapon-free therapeutic community for adults in early recovery from drug and alcohol addictions.

Mother attended two medical appointments with W.M. immediately following the permanency hearing that same day, but she failed to attend any additional appointments. Nor did Mother attend any of W.M.'s weekly occupational therapy appointments. In addition, on February 4, 2009, the morning of her first scheduled four-hour visit with W.M., Mother called Klene and cancelled the visit. Mother never attempted to visit with W.M. again. Mother also stopped participating in all services and failed to attend several court proceedings, including a facilitation hearing on February 23, 2009, and a pre-trial hearing on April 1, 2009.

On February 12, 2009, Mother e-mailed Klene a letter indicating she would like to sign "adoption consents." Tr. p. 62. Apart from this letter and three additional e-mail letters to MCDCS or the juvenile court that also expressed Mother's desire that W.M. be adopted by his current foster family, Mother did not communicate any further with MCDCS.

A fact-finding hearing on the involuntary termination petition was eventually held on June 2, 2009. Mother was notified of the termination hearing by certified mail in April 2009, but failed to appear. At the commencement of the termination hearing, counsel for Mother made an oral motion to continue the hearing in order to determine why Mother failed to appear. In so doing, counsel informed the court she had communicated with Mother the day before via e-mail and that Mother had indicated she would be present for the hearing. The juvenile court denied counsel's motion and proceeded with the termination hearing in Mother's absence.

During the termination hearing, MCDCS presented evidence concerning Mother's

failure to complete court-ordered services, long-standing history of alcohol abuse, prior involvement with MCDCS, and current inability to demonstrate an ability to provide W.M. with a safe and stable home environment. At the conclusion of the hearing, the juvenile court took the matter under advisement. On June 5, 2009, the court issued an order terminating Mother's parental rights to W.M. This appeal ensued.

DISCUSSION AND DECISION

Mother does not challenge the sufficiency of the evidence supporting the juvenile court's judgment. Rather, Mother's sole allegation on appeal is that the juvenile court violated her constitutional right to procedural due process when it denied her attorney's motion to continue and proceeded with the termination hearing in her absence. In support of her contention, Mother claims that given her "indecision about whether to consent to adoption or fight for her parental rights, justice demanded that [she] be given the opportunity to be present [at the termination hearing]." Appellant's Br. p. 4. Mother further claims that had the juvenile court granted her attorney's request for a continuance to determine why she was not present, such a decision "would not have resulted in much of a delay." *Id.* Mother therefore contends the juvenile court committed reversible error by proceeding in her absence.

At the outset, we acknowledge that the decision whether to grant or to deny a non-statutory motion to continue rests within the sound discretion of the juvenile court. *Rowlett v. Vanderburgh County Office of Family & Children*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), *trans. denied*. Discretion is a privilege afforded a juvenile court to act in accord with what is fair and equitable in each circumstance. *J.M. v. Marion County*

Office of Family & Children, 802 N.E.2d 40, 43 (Ind. Ct. App. 2004), *trans. denied*. A decision on a motion for continuance will be reversed only upon a showing of an abuse of discretion and prejudice resulting from such an abuse. *Id.* Furthermore, although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the juvenile court's. *Id*. at 44.

Regarding the process due a parent in a termination proceeding, we have previously explained that in addition to various statutory protections,[3] 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." *In re B.J.*, 879 N.E.2d 7, 16 (Ind. Ct. App. 2008), *trans. denied*. Thus, when the State seeks to terminate a parent-child relationship, it must do so in a manner that meets the requirements of due process. Although due process has never been precisely defined, the phrase embodies a requirement of "fundamental fairness." *In re J.T.*, 740 N.E.2d 1261, 1264 (Ind. Ct. App. 2000), *trans. denied*.

The nature of the 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." *In re C.C.*, 788 N.E.2d 847, 852 (Ind. Ct. App. 2003), *trans. denied*. Thus, we must first identify the precise nature of the private interest threatened by the State before we can properly

[3] *See, e.g.*, Ind. Code § 31-35-2-6.5(e) (providing parents shall have notice of termination hearing and opportunity to be heard and make recommendations) and Ind. Code § 31-32-2-3(b) (providing parent, guardian, or custodian right to cross-examination witnesses and introduce evidence during termination proceeding).

evaluate the adequacy of the State's process. *Id*.

The private interests implicated in this case are substantial. In particular, the underlying proceedings involve Mother's interest in the care, custody, and control of her child, which has been repeatedly recognized as one of the most valued relationships in our society. *Id*. Furthermore, it is well settled that the right to raise one's child is an "essential, basic right that is more precious than property rights." *Id*. Mother's interest in the accuracy and fairness of the termination hearing is therefore "a commanding one." *J.T.*, 740 N.E.2d at 1264.

The second factor requires an assessment of the risk of error created by the challenged procedure; namely, proceeding with the termination hearing without Mother's physical presence. *Id*. Although Indiana Code section 31-35-2-6.5(e) states that a juvenile court shall provide a party with an "opportunity to be heard ... at the hearing," this statutory provision does not create a constitutional right for Mother to be physically present at the termination hearing. *See In re E.E.*, 853 N.E.2d 1037, 1044 (Ind. Ct. App. 2006) (stating that parent does not have a constitutional right to be physically present during termination hearing), *trans. denied*. Here, Mother was zealously represented by counsel, who was available to introduce evidence and cross-examine witnesses in defense of the involuntary termination action. Furthermore, when questioned by the court, counsel for Mother acknowledged she had previously "represented [Mother] in the CHINS matter," had "knowledge of what's been happening," and had communicated with Mother via e-mail the day before the hearing. Tr. p. 4. Under these circumstances, we have recognized that the risk of an inaccurate result decreases significantly. *See E.E.*,

853 N.E.2d at 1044.

Also significant, Mother fails to allege any specific prejudice other than her unsubstantiated assertion that the facts in the present case "show a greater risk of error and injustice even though Mother was represented by counsel because Mother's counsel was expecting Mother to attend the hearing and had no idea why she was not there," and thus before making the decision to terminate the parent-child relationship, it was "imperative for the juvenile court to determine whether Mother really did want to allow her rights to be terminated or whether she was being pressured by [MCDCS] to give up her efforts to be reunified with W.M." Appellant's Br. pp. 6-7. We observe, however, that Mother's counsel admits she was "prepared to challenge [MCDCS's] case" at the time of the termination hearing. *Id.* at 8. In addition, Mother fails to explain how she was prejudiced merely because her attorney had "no idea" why Mother was not present at the termination hearing. For all these reasons, we conclude that the risk of error caused by the juvenile court's denial of Mother's counsel's motion to continue the termination hearing was minimal.

The final factor to consider is the countervailing government interest. The State's *parens patriae* interest in protecting the welfare of a child is significant. "Although the State does not gain when it separates children from the custody of fit parents, the State has a compelling interest in protecting the welfare of the child by intervening in the parent-child relationship when parental neglect, abuse, or abandonment are at issue." *Tillotson v. Clay County Dep't of Family and Children*, 777 N.E.2d 741, 745 (Ind. Ct. App. 2002), *trans. denied* (quotation omitted). In the present case, W.M. was removed

from Mother's care in July 2007 when he was only six weeks old due, in large part, to Mother's arrest for criminal recklessness and neglect of a dependent. At the time of the termination hearing in June 2009, approximately two years had passed and W.M. had spent virtually his entire life as a ward of the State. In addition, Mother had failed to complete virtually all of the court-ordered services, had neglected to visit with W.M. since January 2009, and had failed to complete a substance abuse treatment program, making it impossible for the juvenile to predict when or if Mother would ever be able to provide W.M. with a safe, stable, and drug-free home environment.

This court has previously observed that there is a cost in delaying the adjudication of termination cases in that they impose a strain upon the children involved and exact "an intangible cost to their lives." *E.E.*, 853 N.E.2d at 1043. Although we recognize that continuances may certainly be necessary to ensure the protection of a parent's due process rights, courts must also be cognizant of the strain these delays place on a child. *C.C.*, 788 N.E.2d at 852. After balancing the substantial interest of Mother with that of the State, and in light of the minimal risk of error created by the challenged procedure, we conclude that the juvenile court did not violate Mother's constitutional right to due process of law when it denied her attorney's motion to continue the termination hearing and proceeded with the hearing in Mother's absence.

The judgment of the juvenile court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.