Termination of Parental Rights

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In Re A.C., 770 N.E.2d 947 (Ind. Ct. App. 2002)

In **In Re A.C.**, 770 N.E.2d 947 (Ind. Ct. App. 2002), the Court affirmed the trial court's order terminating the father's parental rights to his child. In reaching its determination, the Court held that father had received adequate notice of the termination of parental rights hearing and that the Marion County Office of Family and Children had laid a sufficient foundation to admit the letter it had sent to the father.

MCOFC filed a petition to terminate the father's parental rights, serving father by publication. The hearing date on the petition was continued when the trial court concluded that father had not been given adequate notice. MCOFC then sent the father a letter notifying him of the new termination trial date. The letter was sent to the last address that the father had provided. The father did not appear at the termination trial, and his attorney objected when the trial court conducted the hearing in his absence. After considering the evidence, the trial court ordered the father's parental rights terminated. The father appealed.

MCOFC complied with the service requirement of the Indiana Trial Rules when it provided the father notice of the termination proceeding through publication. The father argued that the notice he was given regarding the termination of parental rights hearing did not comply with the statutory requirements. The Court first noted that a termination of parental rights proceeding is an in rem proceeding and is governed by the Indiana Rules of Procedure. In Re A.C. at 949 (quoting Abell v. Clark County Dept. of Public Welfare, 407 N.E.2d 1209, 1210 (Ind. Ct. App. 1980)). Indiana Trial Rule 4.9 allows service of summons to be made by publication pursuant to T.R. 4.13. That rule, in turn, provides that service by publication can be had after submission of a request and praecipe for summons in addition to supporting affidavits stating that a diligent search has been made and that the defendant cannot be found, has concealed his whereabouts, or has left the state. Id. at 949. The trial rule lists six separate elements that must be included in the notice, and the notice itself must be published three times at least seven, but not more than fourteen, days apart in a newspaper in that county. Id. In this case, MCOFC complied with the statute for serving notice through publication. It published service to the father informing him that an action had been filed to terminate his parental rights and that if he failed to appear and answer the allegations in the petition, a default judgment could be entered against him. Id. The notice contained the court name and cause number, the title of the action, and the name and address of MCOFC's attorney. It appeared once in each of three consecutive weeks in a Marion County newspaper. Thus, MCOFC complied with the service requirements of the Indiana Trial Rules.

The father was not entitled to service of process regarding the statutory notice of the termination hearing under I.C. 31-35-2-6.5(b) Because of the important interests involved in termination proceedings, the Indiana legislature enacted an additional statutory notice requirement. I.C. 31-35-2-6.5(b) requires MCOFC to send notice of the termination hearing at least ten days prior to the hearing date to a number of interested persons, including the

parents. The father argued that under Harris v. Delaware County Div. of Family and Children Servs., 732 N.E.2d 248 (Ind. Ct. App. 2000), he was entitled to service of process regarding the statutory notice of the termination hearing. The Court disagreed. Harris was factually distinguishable because in that case the father received notice of hearing date on the termination petition. When the hearing date was continued, father never received notice, and it was on that basis that the case was reversed. The Court noted that service of process has a constitutional dimension and is a prerequisite to jurisdiction. Id. at 950. The additional notice of the hearing required under I.C. 31-35-2-6.5 is a statutory procedural requirement and does not rise to a constitutional dimension. Id. The statute provides that the petitioner shall "send notice." It does not provide for service of process. Id. Trial Rules 4 to 4.17 govern service of process. Trial Rule 5 governs service of subsequent papers and pleadings. Trial Rule 5(B)(2) specifically authorizes service by mail. MCOFC served the notice of the hearing upon the father's attorney and sent notice to the father at his last known address. Thus, both the statute and the trial rules were satisfied. To the extent that Harris seems to require service of process for the fact finding hearing, the Court declined to follow it. Id. To impose such requirements, said the Court, would allow parents who are entitled to notice to frustrate the process by failing to provide the county OFC a correct address, thereby adding expense and delay in termination proceedings where safeguards already exist to protect a parent's due process rights. Id.

There was a sufficient foundation laid to admit MCOFC's ten day notice letter to the father. The father contended that the trial court erred in admitting MCOFC's ten day notice letter because MCOFC had failed to lay a sufficient foundation. The Court stated that it reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. Id. (quoting Steuben County v. Family Dev. Ltd., 753 N.E.2d 693, 696 (Ind. Ct. App. 2001)). The Court will reverse only when the decision is clearly against the logic and effect of the facts and the circumstances. Id. at 950, 951. To establish a proper foundation for the admission of exhibits, there must be a reasonable probability that the exhibit is what it purports to be and that its condition is substantially unchanged as to any material feature. Id. at 951 (quoting Cohen v. State, 714 N.E.2d 1168, 1174 (Ind. Ct. App. 1999)). Absolute proof of authenticity is not necessary. Id. A proper foundation is laid if a witness is able to identify the item, and the item is relevant to the disposition of the case. Id. In this instance, the case manager testified that the paralegal prepared the notice letter to the father as part of her duties as an MCOFC paralegal and that a copy of the letter was in the case manager's case file. The Court held that the trial court could properly conclude that there was a reasonable probability the letter was what it purported to be – a ten day notification letter from MCOFC to father. Id. The trial court did not abuse its discretion in finding that MCOFC had laid a sufficient evidentiary foundation.

MCOFC's ten day notice letter to the father was not inadmissible hearsay. Father argued that the letter itself was inadmissible hearsay. The Court noted that a statement is not hearsay if it is offered for another purpose – that is, for one other than to prove the truth of the matter asserted. Id. In this case, the Court held that the notice letter was not hearsay because it was not offered to prove the truth of the matter asserted – that is, to prove there would be a court hearing on a certain date. The letter was offered for the nonhearsay purpose of establishing

that MCOFC sent a notification letter to the father. The trial court did not err in admitting the letter over counsel's hearsay objection. The letter constituted evidence that MCOFC had complied with the notice requirements found in I.C. 31-35-2-6.5(b).