

Children's Law Center of Indiana



Termination of Parental Rights (TPR)

11/30/09

In **K.S. v. Marion County Dept. Child Services**, 917 N.E.2d 158 (Ind. Ct. App. 2009), the Court reversed and remanded with instructions the trial court's order that terminated Mother's parental rights. On April 3, 2007, Marion County Department of Child Services (MCDCS) filed a CHINS petition which, among other things, alleged that Mother had caused various physical injuries to the child, including biting the child, and that the child's siblings were likewise abused. On August 22, Mother and MCDCS submitted an Agreed Entry, in which Mother stipulated that MCDCS would be able to prove the CHINS petition allegations by a preponderance of the evidence. Mother agreed to maintain contact with the family case manager, notify the family case manager of changes of address, phone number, or other significant changes and actively participate in and successfully complete services within six months. The trial court adopted the Agreed Entry as a dispositional order on August 22, 2007. On August 6, 2008, MCDCS filed its petition for involuntary termination of the parent-child relationship. The court held an initial hearing on September 15, at which Mother appeared with her recently-appointed counsel. Mother received actual notice of a pretrial hearing to be held on October 31. Mother and her attorney appeared at the October 31 pretrial, and Mother was given actual notice of a December 1, 2008 trial date. Mother failed to appear on December 1 and her attorney informed the court that Mother was working out adoption consents and had moved out of state. The court scheduled four additional hearings, but Mother failed to appear. Mother's attorney moved for a continuance of the fourth trial setting because the attorney needed additional time to prepare. The court granted Mother's attorney's request for continuance to March 16, 2009, despite the objections of the MCDCS and the Guardian ad Litem. At the beginning of the hearing scheduled on March 16, Mother's attorney moved to withdraw her appearance, stating that: (1) the attorney had emailed Mother requesting information about Mother's intentions in terms of being present and participating in the hearing; (2) the attorney had explained in the email that the attorney would not be able to adequately represent Mother's interests if Mother did not appear and/or at least communicate with the attorney; (3) the attorney had heard nothing back from Mother. The court granted the Motion to Withdraw and entered findings of fact and conclusions thereon terminating Mother's parental rights on March 19, 2009.

The trial court abused its discretion when it granted Mother's attorney's oral Motion to Withdraw her appearance at the commencement of the March 16 termination hearing in violation of Marion Circuit and Superior Court Civil Rule LR49-TR3.1-201, the local rule. *Id.* at 165. The Court agreed with Mother's first claim, the trial court abused its discretion under local court rules when it permitted Mother's attorney to withdraw. The Court declined to discuss Mother's second claim of ineffective assistance of counsel. The Court cited D.A. v. Monroe County Dept. of Child Services, 869 N.E.2d 501 (Ind. Ct. App. 2007), in which the Court held that the Monroe Circuit Court rules required Father's attorney to inform Father of the intent to

withdraw appearance prior to filing that motion with the court, which Father's attorney did not do. The Court noted that in D.A. Father was deprived of counsel without notice, which violated Father's statutory right to counsel despite Father's failure to meet with his attorney or appear at the termination pretrial conference. D.A., 869 N.E.2d at 509.

The Court looked to the Marion County local rule for withdrawal of appearance, noting that the attorney must give both her client and the court timely, written notice of the intention to withdraw and must provide the court with her client's last known address. The attorney's written letter to her client must expressly inform the client: (1) "that failure to secure new counsel may result in dismissal...or a default judgment;" and (2) "other pertinent information such as a trial setting date." K.S. at 163. The Court quoted the last sentence of the local rule which provides that "[t]he Court will not grant a request for withdrawal of appearance unless the same has been filed with the Court at least ten days prior to the trial date, except for good cause shown." Id. The Court interpreted the last sentence to mean that the "good cause" exception applies only when counsel fails to timely file her written request with the court at least ten days prior to the trial date. Id. at 164. The Court opined that the other requirements imposed on the attorney, namely that the attorney expressly inform her client of the intent to withdraw and of the risk of dismissal or default the client is facing by the attorney's decision to withdraw, must still be satisfied to comply with the local rule. Id. The Court noted that the attorney's statement to Mother as reported to the trial court: (1) focused on the difficulty the attorney would have in representing Mother if Mother failed to appear and participate in the hearing; (2) did not demonstrate that Mother was expressly informed in writing of the attorney's intention to withdraw her appearance; and (3) did not indicate that Mother was informed in writing of the potential risks Mother would face if her attorney withdrew. Id. The Court opined that a trial court may set aside its own rule if the court assures itself that it is in the interests of justice to do so, that the substantive rights of the parties are not prejudiced, and that the rule is not mandatory; however, nothing in the record suggested that the trial court intended to set aside the local rule when it granted Mother's attorney's request to withdraw. Id. The Court noted that: (1) parental rights are of a Constitutional dimension; (2) in Indiana, parents involved in termination proceedings have a statutory right to counsel; (3) the local rule's requirement that a withdrawing attorney expressly inform her client in writing of the intent to withdraw protects that statutory interest; (4) the requirement that the withdrawing attorney inform her client of the risks inherent in that decision comports with the "informed consent" that often accompanies attorney action. See Ind. Professional Conduct Rule 1.0(e). Id. at 165.

The Court vacated the termination order and stated that, on remand, Mother's attorney may seek to withdraw her appearance, provided that her motion to withdraw complies with the local rule. The Court stated that the trial court may reinstate the termination order if Mother's attorney complies with the local rule and Mother again fails to appear in person or take the necessary steps to obtain new counsel within a reasonable time. Id.