

Colorado Court of Appeals 2 East 14 th Avenue, Denver, CO 80203	
Parties: Children: A.B. _____ [Use initials only, C.R.S. § 19-1-109(1)] & Concerning: C.D. _____ [Use initials only, C.R.S. § 19-1-109(1)] Appellant / Respondent: C.D. _____	↑ Court Use Only ↑
Filed by: Name: C.D. _____ <i>Note to Parents - only use your initials.</i> Address: 9999 Ninth Street, Denver, CO 80219 _____ Phone 702-123-4567 _____ Fax: _____ Email: name.lastname@email.com _____ Bar Number: _____ (For lawyers)	District/Juvenile Court Case Number: 21JV1 _____ Division: 1 _____ Courtroom: 100 _____ Court of Appeals Case Number: 21CA1999 _____
Opening Brief	

1. Certificate of Compliance

I certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 3.4(f)(1)(B), 28, and 32. Including:

Word Limits: My brief has 2,562 words, which is not more than the 7,500 word limit.

Standard of Review:

I discuss which Standard of Review should be used to evaluate that issue.

Preservation:

I discuss if that issue was preserved for appeal. I cite to the page in the Record on Appeal where I raised this issue before the Juvenile Court and I cite to where the Juvenile Court decided that issue.

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C.D.

Signature of the Appellant

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Sample

4. **Certificate of Compliance: Indian Child Welfare Act (ICWA)**

The juvenile court inquired about the Indian Child Welfare Act (“ICWA”) during the initial hearing on January 1, 2021. TR 01/01/21 p. 4:4-10. Appellant C.D. (“Mother”) asserted that she had American Indian heritage — specifically, Mother stated she believed her paternal grandmother and grandfather were members of one of the Cherokee tribes. TR 01/01/21 p. 4:13-20. Mother claimed she did not know about her own registration status. TR 01/01/21 p. 5:8-10. Father E.F. (“Father”) stated at a separate hearing held on February 1, 2021, that he did not have American Indian heritage. TR 02/01/21 p. 16:1-4. Father also submitted a written “Declaration of Non-Indian Heritage” form. CF p. 134.

On March 1, 2021, Mother’s trial counsel told the juvenile court that counsel had not found any information to support Mother’s assertion that she had American Indian heritage. TR 03/01/21 p. 10:11-16. Mother maintained that she may have Cherokee heritage, but she did not submit a written “ICWA packet.” TR 03/01/21 p. 11:12-14. Notices were sent to all federally-recognized Cherokee tribes, and responses were received from all but one tribe. CF p. 220-60. The juvenile court found that responses received from the tribes had not shown that Mother or her paternal grandparents were tribal members.

TR 03/01/21 p. 15:12-20, CF p. 266. The juvenile court concluded by order dated March 15, 2021, that ICWA did not apply to the proceedings. CF p. 266-68.

Upon review of the record, Mother does not raise any claim that the juvenile court failed to comply with ICWA.

5. Issues on Appeal

I. The juvenile court erred in terminating Mother's parental rights because the Department failed to timely notify her of the motion to terminate parental rights filed on June 1, 2021, and of the termination hearing held on September 1, 2021.

6. Statement of the Case

I. Nature of Case

This is a dependency and neglect case that resulted in termination of Mother's and Father's parental rights. Mother seeks reversal of the juvenile court's October 1, 2021, order terminating the parent-child relationship between her and A.B.

II. Procedural History

The Denver County Human Services Department (“Department”) filed a petition in dependency and neglect on January 1, 2021. CF p. 1-4. The petition alleged that Mother and Father had substance abuse issues and that a neighbor had seen A.B., at the time six years old, outside the home, without supervision, multiple times in the last week. CF p. 2. The Department took custody of A.B. and placed her in a foster home. CF p. 50.

On March 1, 2021, Mother entered a “no fault” admission to the petition and the court adjudicated the child dependent and neglected. CF p. 134. On May 1, 2021, the juvenile court adopted the Department’s proposed treatment plan for Mother. TR 05/01/21 p. 10:13-18. Mother’s treatment plan required her, as relevant here, to cooperate with the Department, address mental health and substance abuse issues, and participate in parenting time with A.B. CF p. 283.

On May 1, 2021, Mother’s trial counsel filed a motion to withdraw from the representation, because trial counsel, a member of the United States Armed Forces, was called to serve Active Duty in a foreign country for an unspecified duration. CF p. 312-13. The juvenile court granted the motion to withdraw on May 28, 2021, without appointing substitute counsel to which Mother was entitled. CF p. 321.

On June 1, 2021, while Mother was still not represented by counsel, the Department filed a motion to terminate Mother's and Father's parental rights. CF p. 433-35. Notice of the motion to terminate was not served on Mother, but only on withdrawn trial counsel. TR 09/01/21 p. 19:12-16; CF p. 678.

On June 8, 2021, the juvenile court appointed new trial counsel for Mother. CF p. 445. New trial counsel was never sent notice of the termination motion. TR 09/01/21 p. 19:12-16; CF p. 678.

The juvenile court set the termination hearing for September 1, 2021. TR 07/01/21 p. 12:13-14, CF 456. After reviewing the electronic file in this case, new trial counsel contacted withdrawn counsel's office, and since withdrawn counsel had already left the country, her administrative assistant — who retained access to the file — notified new trial counsel on August 20, 2021, of the termination motion and the termination hearing set for less than two weeks later. TR 09/01/21 p. 20:1-8, 21:8-20; CF p. 678-79.

At the termination hearing, Mother's counsel told the court that notice of the motion to terminate had not been provided to Mother or to trial counsel while trial counsel represented her. TR 09/01/21 p. 19:12-16, 20:1-8, 21:8-20.

The juvenile court concluded that Mother received sufficient notice of the termination motion and hearing. After hearing evidence, the court granted

the Department's motion to terminate Mother's parental rights. TR 09/01/21 p. 28:13-19; CF p. 675-80. This appeal concerns that termination order.

7. **Argument Summary**

The juvenile court erred in terminating Mother's parental rights because the Department failed to timely notify her of the motion to terminate parental rights filed on June 1, 2021, and of the termination hearing held on September 1, 2021. The Department never served Mother or her trial counsel, while trial counsel represented her, with the motion to terminate, or with notice of the hearing. Mother learned of the motion to terminate and the termination hearing only by contacting the offices of withdrawn counsel. And she learned of the motion and hearing less than two weeks before the hearing was held, leaving her with too little time to prepare for the hearing — indeed, depriving her of her constitutional right to due process of law.

The Department's failure to properly serve Mother or her current trial counsel with notice of the termination hearing violated C.R.C.P. 5 and the Colorado Supreme Court's decision in *People in Interest of M.M.*, 726 P.2d 1108, 1115-17 (Colo. 1986) (holding former rule C.R.C.P. 5(d) required service on respondent parent within forty-eight hours of filing of the motion to terminate parental rights). Moreover, unlike *M.M.*, in the circumstances here, the juvenile

court's error was not harmless, but was prejudicial — it denied Mother her substantial rights and requires reversal of the termination order.

8. **Argument**

I. The juvenile court erred in terminating Mother's parental rights because the Department failed to timely notify her of the motion to terminate parental rights filed on June 1, 2021, and of the termination hearing held on September 1, 2021.

A. **Standard of Review:**

Whether a juvenile court erred in terminating parental rights without proper notice is reviewed under a de novo standard. *See People in Interest of R.J.B.*, 2021 COA 4, ¶ 26 (applying de novo review to a procedural due process claim); *see also People in Interest of A.B.-A.*, 2019 COA 125, ¶ 49 (reviewing the constitutional sufficiency of service by publication de novo).

B. **Preservation:**

Trial counsel for Mother preserved this issue for appellate review by raising it during opening statement and in closing argument of the termination hearing. TR 09/01/21 p. 19:12-16, 20:1-8, 21:8-20.

C. Discussion and Argument:

i. Legal Authority

Because a parent has a fundamental right to the companionship, care, custody, and management of his or her child, a parent's rights must be protected with fundamentally fair procedures when a permanent termination of parental rights is sought. *In re J.M.A.*, 240 P.3d 547, 549-50 (Colo. App. 2010). Thus, when termination is sought, due process requires that the parent be provided with adequate notice of the termination hearing and an opportunity to protect his or her interests at the hearing itself. *Id.* at 550.

Notice must be reasonably calculated to apprise parents of the pendency of an action and afford them an opportunity to present objections. *A.B.-A.*, ¶ 50.

Moreover, to the extent a parent has *actual* notice of the proceeding through their communication with another person, such notice may *not* cure the court's error in failing to observe that formal service requirements were met. *Id.* at ¶ 63.

Turning to applicable rules, the service requirements of C.R.C.P. 5 apply to a motion for termination of parental rights. *People in Interest of*

M.M., 726 P.2d 1108, 1116-17 (Colo. 1986). It is indisputable that in these circumstances, C.R.C.P. 5(a) required that the Department serve Mother with the motion to terminate her parental rights. The rule provides, “Except as otherwise provided in these rules, . . . every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice . . . shall be served upon each of the parties.”

There is also no doubt that although section 19-3-602, C.R.S. 2021 — the statute governing motions for termination of parental rights in Colorado juvenile courts — does not contain a notice provision, Colorado law requires that a juvenile court provide a parent with notice of a motion to terminate their parental rights, and of any hearing to terminate such rights. *See M.M.*, 726 P.2d at 1115 (noting that even where a statute “contains no express requirement that a parent be served with a termination motion or be otherwise notified of its filing, due process requires that a parent be provided with adequate notice of a termination hearing and an opportunity to protect her interests at the hearing itself”).

An error in a civil case is harmless if it did not affect a substantial right of a party. *People in Interest of R.D.*, 2012 COA 35, ¶ 25. An error affects a substantial right only if it can be said with fair assurance that the error substantially influenced the outcome of the case or impaired the basic fairness of the trial itself. *Id.*

ii. Discussion

Applying the law to the facts of this case, it is evident that the juvenile court erred in terminating Mother's parental rights when she lacked sufficient notice of the motion to terminate her parental rights and of the termination hearing. When the Department failed to timely notify Mother of the motion to terminate parental rights filed on June 1, 2021, and of the termination hearing held on September 1, 2021, her substantial rights were affected. Indeed, her constitutional right to due process of law was denied because she was deprived of an adequate opportunity to protect her own interests at the termination hearing.

Accordingly, for the reasons stated below, the juvenile court's termination order must be set aside.

First, here the Department *never* served Mother with a copy of the motion to terminate her parental rights. TR 09/01/21 p. 19:12-16, 20:1-

8, 21:8-20. This failure to meet the formal requirements for service in a dependency and neglect action constituted a violation of C.R.C.P. 5(a) and of the Colorado Supreme Court's dictate in *M.M.*, 726 P.2d at 1115-17. To uphold the juvenile court's order terminating Mother's parental rights when this violation obviously occurred and was never remedied would flout Mother's constitutional rights and depart from Colorado law.

Second, as a division of this court stated in *A.B.-A.*, ¶ 63, any actual notice imputed to Mother or her newly-appointed counsel — after they went out of their way to contact the offices of withdrawn counsel to discover that termination had been requested and a hearing set — may not cure the juvenile court's error in failing to observe that formal service requirements were met. In *A.B.-A.*, the child's father was living in Iran and was not served with notice that the Department had moved to terminate his parental rights. *Id.* at ¶ 59. Although a caseworker informed father of the motion to terminate and of the termination hearing, this court held that father's actual notice thereof did not cure the juvenile court's error in proceeding with termination despite failing to formally provide notice to father. *Id.* at ¶¶ 57-64.

This case is like *A.B.-A*. Without proper notice of the motion to terminate and of the termination hearing, the juvenile court could not simply infer that Mother had been provided with an adequate opportunity to prepare for the termination hearing because she was made aware of the motion to terminate by withdrawn counsel's administrative assistant. The Department and the juvenile court failed to discharge their duties under Colorado law and the United States Constitution.

Finally, the juvenile's court decision to proceed with termination despite the Department's failure to properly serve Mother was not harmless error. Unlike the parent not served with the motion to terminate in *M.M.*, 726 P.2d at 1117, Mother did not obtain actual notice of the motion to terminate and the termination hearing four months prior to the hearing, nor was she served with the motion to terminate twenty-two days prior to the hearing. TR 09/01/21 p. 19:12-16, 20:1-8, 21:8-20. Instead, her substantial rights were vitiated — she was not informed of the hearing until twelve days before it was held, and she was never served with the termination motion. TR 09/01/21 p. 19:12-16, 20:1-8, 21:8-20.

9. Conclusion

For the reasons stated above, Mother respectfully requests that this court reverse the juvenile court’s order terminating her parental rights and remand the case for further proceedings.

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Dated: March 1, 2022 _____