Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

JAN 14 2009

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-337

JANUARY TERM, 2009

In re D.M., Juvenile	}	APPEALED FROM:
	}	
	}	
	}	Franklin Family Court
	}	
	}	
	}	DOCKET NO. 30-2-07 Frjv
		Trial Judge: Howard E. VanBenthuysen

In the above-entitled cause, the Clerk will enter:

Mother appeals the termination of her parental rights (TPR) with respect to her son, D.M., arguing that the family court's termination order must be reversed because the court did not directly notify her of the scheduled termination hearing, as required by In re M.T., 2006 VT 114, 180 Vt. 643, and V.R.F.P. 3(a). We agree, and therefore reverse the judgment and remand the matter for a new termination hearing.

D.M was born in September 2006. Allegations of the child's mistreatment came to the attention of the Department for Children and Families (DCF) in November 2006, and CHINS (child in need of care or supervision) proceedings commenced in February 2007. In May 2007, mother admitted that D.M. was CHINS because of her recent incarceration and her substance-abuse problems. Following the disposition hearing, custody of the child was placed with DCF, and the disposition plan contained concurrent goals of adoption or reunification with mother. Mother failed to follow through with the case plan goals, however, and in February 2008, DCF filed a termination petition.

In April and May 2008, mother attended status conferences during which voluntary relinquishment of parental rights was discussed. Ultimately, however, the parties agreed that the matter should be scheduled for a contested termination hearing. In late May 2008, the court scheduled the hearing for July 15, sending notice of the hearing to counsel of record, but not directly to the parents. Neither parent appeared at the hearing on July 15. Upon the court's inquiry, mother's attorney indicated that mother was aware of the hearing, but then equivocated when asked whether she had told mother of the specific time and date of the hearing. Counsel for the State indicated that mother had been made aware of the hearing through a DCF case worker. Periodically, throughout the hearing, the court had the court officer check the hallways to see if either parent had appeared. The court also offered to declare a recess to allow the

parents' attorneys to call the parents, but they declined the offer. The hearing proceeded with testimony from two DCF caseworkers and the foster parents. Following the hearing, the court issued an order terminating mother's parental rights after examining the relevant statutory criteria.

On appeal, mother argues that the termination order must be reversed and the matter remanded for a new hearing because the court did not provide notice of the hearing directly to the parents as required by our case law and rules. We agree. In M.T., 2006 VT 114, ¶¶ 10-11, we held that substantial compliance with our juvenile statutory notice provisions requires, at minimum, direct notice of a scheduled termination hearing from the court to the parents, in addition to notice to the attorneys. We concluded that, in light of the family court's "awesome power" to sever familial relationships, "our concern, and apparently the concern of the Legislature, is that parents faced with the ominous prospect of permanently losing their children are entitled to direct notice from the court of a pending petition and scheduled hearing concerning the termination of their parental rights." Id., ¶ 11 (quotation omitted). In so ruling, we acknowledged that both DCF and the mother's attorney most likely had informed the mother of the termination hearing, but concluded that only direct notice from the court could provide sufficient notice under the statute to apprise parents of the gravity of the situation. Id., ¶ 10.

The State does not dispute that the court failed to give notice to mother of the scheduled hearing. However, in an attempt to distinguish M.T., the State notes that we stated there that we could not presume that notice from an opposing party or an attorney with whom the parent was feuding could sufficiently convey the gravity of the situation. Id., ¶ 12. According to the State, the instant case is distinguishable because mother was not feuding with her attorney, and her attorney assiduously defended her rights at the termination hearing. We conclude that M.T. is controlling in this instance. In M.T., we cited the feuding between the mother and her attorney to demonstrate the wisdom of a policy requiring direct notice of a termination hearing to parents, but we certainly did not condition our notice requirement on those specific facts. To the contrary, we emphasized that reversal of a termination order is the appropriate remedy when a violation of that requirement occurs. Id.

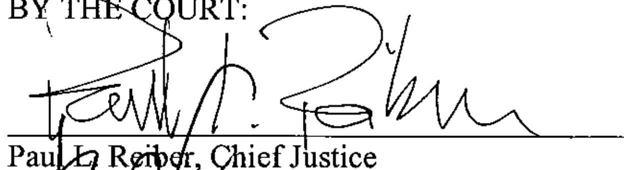
Nor is the State's argument aided by two recent cases in which we concluded that M.T. was not controlling. In the first case, In re J.L., 2007 VT 32, 181 Vt. 615, the family court had mailed direct notice to the father's last known address and to the father's attorney, and the father had called the court on the day of the hearing to participate in the hearing but later hung up. At the close of the evidence that day, the court granted the request of the father's counsel to keep the record open for seven days to give the father the opportunity to present further evidence, but no further evidence was presented. Based on these facts, the family court concluded that the father chose not to participate in the hearing. On appeal, the father claimed a lack of proper notice, but we declined to apply M.T. because: (1) the trial court had sent direct notice to the father; (2) the father did not receive direct notice from the court because of his own failure to keep the court apprised of his whereabouts; (3) the father learned of the hearing from his attorney and initially participated in the hearing by telephone, but then hung up; and (4) the father was given an opportunity to present evidence, but did not do so. J.L., 2007 VT 32, ¶¶ 13,14. In contrast, in the instant case, the court never provided direct notice to mother of the hearing, and mother never participated in the hearing.

The State fares no better with respect to the second case, In re S.W., 2008 VT 38, 949 A.2d 442. In that case, the mother had attended the first six days of a seven-day termination hearing, but did not attend the last day, even though the family court provided direct notice of the hearing to her and her attorney. At the termination hearing, a court clerk testified that two notices had been sent to the mother's last known address and had not been returned as undeliverable. The clerk also testified regarding attempts to reach the mother by telephone. Further, the family court stated that it would give the mother the opportunity to reopen the final day of hearing if she could provide an adequate reason for not participating in the hearing. Not surprisingly, under those circumstances, we did not find M.T. to be controlling. S.W., 2008 VT 38, ¶ 12. Here, in contrast, M.T. is controlling because the court failed to provide direct notice of the hearing to mother.

The State also argues that we should affirm the termination order because mother has not demonstrated prejudice by articulating: (1) how the trial court's failure to send her notice resulted in her not attending the termination hearing; or (2) how her absence impacted the court's judgment. We decline to affirm the family court's judgment based on this reasoning, which, if accepted, would effectively eviscerate our holding in M.T. In M.T., we construed our juvenile statutes to give parents facing termination petitions the right to direct notice from the court of scheduled termination hearings to apprise the parents of the gravity of the situation before them. The court's failure to provide them with this right cannot be rectified by speculating as to why the parents did not participate in the hearing or by requiring the parents to try to recreate what might have been had they been provided with the required notice.

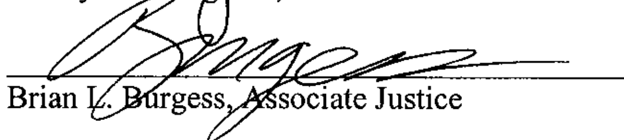
Reversed and remanded for a new termination hearing.

BY THE COURT:



Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice