

Children's Law Center of Indiana



Termination of Parental Rights (TPR)

06/27/2008

In ***In Re L.B.***, 889 N.E.2d 326 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination of Father's parental rights. Father is the biological father of the two oldest children of Mother who had three additional children. Father and Mother were never married, but lived together on and off for about seventeen years. Father financially supported and helped to raise all five children as if they were his own. On July 21, 2004, prior to the birth of Mother's fifth child, the four children were taken into temporary protective custody due to an incident of domestic violence between Mother and Father, which occurred in the children's presence. Two days later Marion County Department of Child Services (MCDCS) filed a petition alleging all four children were CHINS citing the incident of domestic violence and the youngest child's severely decayed teeth. After the initial hearing held on the same day at which Father did not appear, the trial court found the children were CHINS and issued an order directing that the children to remain wards of MCDCS. At the September 15, 2004 CHINS fact-finding hearing, Father requested a public defender, and the trial court denied the request. Thereafter the court formally removed the children from the care and custody of Mother and reset the fact-finding hearing as to Father for November 3, 2004. On November 3, 2004, the trial court proceeded to disposition as to Father, ordered the children removed from Father's care and custody, and ordered Father to participate in a number of services to achieve reunification with his children. Father initially complied with some, but not all, of the court-ordered services, but subsequently quit attending the required Intensive Outpatient Program (IOP) and refused to submit to subsequent random drug screens despite multiple referrals. Father's visitation with the children was inconsistent. When he did visit them, he was often observed falling asleep and speaking negatively regarding the foster parents. Father's visitation was suspended because of his inconsistent attendance and a October 16, 2006 incident where he became enraged and was observed yelling and screaming in the presence of the children before abruptly leaving the visitation early. Prior to June 30, 2005, MCDCS filed a petition to terminate Father's parental rights to his two children, but on December 5, 2006, pursuant to a joint motion of both parents, the termination petition was dismissed for failure to comply with the notice provision of IC 31-35-2-6.5. Two months later, MCDCS filed a second petition for the involuntary termination of Father's parental rights to his two children. Following a four-day consolidated fact-finding hearing at which Father appeared and was represented by counsel, the trial court, on September 28, 2007, issued its judgment terminating Father's parental rights to his two children.

The trial court properly determined that the second petition for the termination of Father's paternal rights to the children was not barred by the doctrine of res judicata because the first petition, which was dismissed without prejudice due to a procedural error, did not finally determine the underlying issues on the merits. *Id.* at 333-34, 341-42.

Waiver notwithstanding, the trial court did not abuse its discretion when it denied Father’s request for counsel, inasmuch as Father failed to demonstrate, and the Court did not see, how the result in his termination case would have been different if counsel had been appointed during the CHINS proceeding. *Id.* at 342. Father acknowledged that the U.S. Constitution “does not require the appointment of counsel in every parental termination proceeding,” but contended that he was denied due process of law when the juvenile court denied his request for the appointment of counsel during the CHINS proceedings, inasmuch as “the complexity of the proceedings and the issues of whether Father had completed services or should be ordered to do additional services ... were too complex for Father to argue without the representation of an attorney skilled in CHINS representation...” However, because Father failed to raise this argument during the CHINS proceedings or at the termination hearing where he was represented by counsel, this constitutional claim was waived on appeal. Waiver notwithstanding, the Court chose to address the contention on its merits. *Id.* at 335.

The Court noted: (1) Indiana has chosen to provide counsel in termination proceedings to all parents who are indigent (IC 31-32-4-1); (2) IC 31-32-4-3(b) states that a court “may appoint counsel to represent any person in any other proceeding;” (3) thus, although any parent participating in a CHINS proceeding may be represented by counsel and parents must be given an opportunity to secure counsel if desired, there is no absolute statutory right to court-appointed counsel in every CHINS proceeding; and (4) appointment of counsel in a CHINS proceeding is a matter left to the sound discretion of the trial court (IC 31-32-4-3). The Court cited *In Re M.M.*, 733 N.E.2d 6, 11 for the following principles: (1) whether a trial court abuses its discretion in declining to appoint counsel in a CHINS proceeding depends on the “unique facts and circumstances of each case;” (2) “If lack of counsel is likely to lead to particularly damaging uncontested allegations and if such allegations be deemed established and not subject to subsequent challenge, those allegations might virtually assure a subsequent termination decision;” and (3) in such situations the trial court “might well abuse its discretion by failing to appoint counsel for an indigent parent.” Here, according to the Court, on appeal, Father failed to point to any specific unchallenged allegations in the CHINS petition that were particularly damaging and as such assured the subsequent termination decision; rather, it was the evidence of what occurred after the CHINS adjudication, specifically, Father’s untreated substance abuse problem, that eventually led to the termination of Father’s parental rights. *L.B.* at 336.

The record shows that MCDCS proved by clear and convincing evidence all the statutory elements required for the termination of Father’s parental rights to the children. *Id.* at 342. Father conceded the children had been removed from his care, pursuant to a dispositional decree, for at least six months, but asserted that MCDCS failed to establish the remaining elements required for termination contained in IC 31-35-2-4-(b)(2). The Court held that the trial court’s determination that the reasons for the children’s continued placement outside Father’s care would not be remedied was supported by clear and convincing evidence. The Court opined that, when proving this element, the trial court must judge a parent’s fitness to care for the children at the time of the termination hearing, taking into consideration evidence of changed conditions; and must also evaluate the parent’s habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the children. Father asserted that he had demonstrated his willingness to parent his children by completing services prior to the termination hearing. However, the Court agreed with MCDCS’ counter that it had proved there was a reasonable probability that Father’s “substance abuse problem, the reason for the

children's continued placement outside the home, would not be remedied." The Court acknowledged that Father initially participated in and successfully completed several of the court-ordered services, including a parenting assessment and classes, anger management classes, and a drug and alcohol assessment, but, observed that Father was no longer in compliance with court-ordered services at the time of the hearing in that Father (1) had failed to maintain weekly contact with the case manager; (2) failed to pay child support for the duration of the CHINS case; (3) was unsuccessfully discharged from the Intensive Outpatient Program (IOP) and thereafter refused to participate in subsequent IOP despite multiple referrals and his being informed by the case manager that he needed to complete an IOP and submit to random drug screens in order to achieve reunification with his children; and (4) admitted during the termination hearing that he was continuing to use marijuana. Id. at 337-38.

Regarding Father's assertion that the trial court erred when it found the termination of his parental rights was in the children's best interests, Father waived this issue on appeal by failing to provide any cogent argument or citation to authority to support his allegation. Waiver notwithstanding, the Court addressed this contention and held that, although Father may have established he had a sincere desire to be reunited with his children, record evidence was sufficient to support the trial court's determination that termination of Father's parental rights was in the children's best interests. This evidence included the testimony of the GAL and the case manager, evidence of Father's current drug use, Father's failure to complete court-ordered services, and the fact that the children were happy, bonded with the foster parents, and doing well in their pre-adoptive foster homes. In this regard, (1) the GAL testified that she believed it was in the children's best interests to proceed with termination given the time that had elapsed and lack of participation in services by the parents, and that she had visited with all the children in their current placements and agreed with MCDCS' permanency plan for the children to be adopted by their current foster parents; and (2) the current case manager testified that termination was in the children's best interests, that the children were doing very well in their placements and were bonded, and that he could not recommend returning the children to Father because of his lack of participation in services and continued drug use. Id. at 339-41.

The Court held that it could not conclude that the plan set forth by MCDCS for the adoption of the children by their current foster parents was unsatisfactory. The Court noted the testimony of the case manager that the Father's children were in therapeutic foster care together, and that all the children were doing very well in their current placements. Id. at 341.