

Children's Law Center of Indiana



NOTE: Indiana Supreme Court granted transfer in about April, 2009.

Termination of Parental Rights (TPR)

10/31/2008

In **In Re Termination Parent-Child Rel. of M.B.**, 896 N.E.2d 1 (Ind. Ct. App. 2008), the Court affirmed the trial court's denial of Mother's motion to set aside its order for the voluntary termination of her parent-child relationship with her children. The two children were born March 29, 2000 and June 23, 2002. The Father is deceased. On March 19 2007, Howard County DCS (HCDCS) filed a petition for the involuntary termination of Mother's parental rights to her two children. At the initial termination hearing, Mother denied the allegations of the petition. Immediately prior to the termination fact-finding hearing scheduled for June 4, 2007, Mother, after consulting with her attorney, executed a voluntary relinquishment of parental rights form for each child, attached to each of which was an addendum, drafted by her attorney, entitled "Post Adoption Privileges," and stating: "The parent, [Mother], consents to voluntarily relinquish her parental rights and consent (sic) to adoption is subject to the court granting post-adoption privileges and the adoptive parents consenting to post-adoption contact by and between themselves and [the children] pursuant to I.C. 31-19-16-2." The consent forms and attached addendums were submitted to the trial court at the start of the June 4 hearing. The trial court reviewed the proffered consent forms and properly advised Mother of her constitutional and other legal rights, as well as the consequences of her voluntary consent pursuant to IC 31-35-1-8 and -12 and then asked Mother's attorney to describe for the record his consultation with Mother regarding her decision to voluntarily consent to termination and to explain how the "reservation of post-adoption visitation" would work. Mother's attorney then explained, among other things, how he had explained Mother's rights to her and the judge reiterated to Mother that the reservation of post-adoption privileges were subject to a court determining that it is in the child's best interest for the visitation to occur. Mother indicated that she understood and that no one had "offered her anything of value, made any threats to her or anyone else, or forced her to do anything against her will to get her to agree to voluntarily relinquish her parental rights." The trial court accepted Mother's consent to voluntarily terminate her parental rights and, after the hearing, it issued an order terminating Mother's parental rights. Mother was permitted to continue twice a month visitation with both children who remained wards of HCDCS. On about June 15, 2007, the children were placed in a new, pre-adoptive foster home with foster parents who were unaware of Mother's visitation privileges. At a CHINS periodic review hearing held September 10, 2007, of which Mother was not notified, HCDCS recommended that visitation between Mother and the children be terminated based on reports from the children's therapist, adoption caseworker, and foster parents that the children were emotional, upset, and exhibited negative behaviors including bedwetting, following their visits with Mother. The trial court determined visitation between Mother and the children was no longer in the children's best interests and ordered Mother's visitation privileges terminated. On February 5, 2008, Mother filed a motion to set aside the order for voluntary termination pursuant to Trial Rule 60(B),

arguing that the trial court's June 2007 voluntary termination order should be set aside for "fraud and/or misrepresentation of the [HCDCS] as visitation has been terminated and the potential adoptive parents are apparently unwilling to allow post[]adoption privileges." Mother further claimed (1) that her relinquishment of parental rights was not freely and voluntarily given because she was "induced to enter the agreement by the false promises of the [HCDCS]" and (2) that her consent "imposed a contractual obligation upon the Court and the [HCDCS] to allow visitation with her children" which contract should now be deemed void and terminated because the Court and the HCDCS "failed to abide by the terms of the contract[.]" Following a February 28, 2008 hearing on the motion, the trial court entered its order denying it on April 14, 2008.

Mother appealed, framing the issue as a direct appeal of the June 2007 voluntary termination order, claiming her consent to the termination of her parental rights was obtained through fraud and that she was denied due process of law when she was not notified of the post-termination review hearing after which the trial court terminated her visitation privileges. The Court opined that the proper issue for review was not the validity of the trial court's termination order, but instead whether the trial court properly denied Mother's motion to set aside under Indiana Trial Rule 60. The Court, however, decided to address, "sua sponte, what appears to be an issue of first impression, that is, whether Indiana's termination statutes permit a parent to sign a voluntary consent form for the termination of his or her parental rights while reserving the right to post-adoption visitation privileges." *Id.* at 6.

Mother's addendum not only violates IC 31-35-6-4(a)(1) which requires the complete and permanent termination of all parental rights, including the privilege of visitation, once termination of parental rights is ordered, but the addendum also constitutes an improper use of IC 31-19-16-2, a statute providing for post-adoption visitation privileges, in an attempt to "bootstrap" otherwise impermissible conditions into a termination order.

Id. at 7. The Court observed, (1) IC 31-35-6-4(a)(1) clearly and unambiguously provides that if the trial court terminates the parent-child relationship, "all *rights*, powers, privileges, immunities, duties, and obligations, *including any rights to custody, control, parenting time*, or support, pertaining to the relationship are permanently terminated," *Id.* at 6 (emphasis supplied by the Court); (2) Mother's addendum contravenes this statute; and (3) the specific language of the addendum attempts to sidestep the clear and unambiguous provision of IC 31-35-6-4(a)(1) requiring the complete and permanent termination of all parental rights. The Court also opined that Mother's attempt to use IC 31-19-16-2, a statute providing for post-adoption visitation privileges, to avoid the permanent termination of her right to visit with the children is also contrary to Indiana law in that (1) IC 31-19-16-1 provides that a court entering an adoption decree may grant post-adoption contact privileges under IC 31-19-16-2 to a birth parent who has previously voluntarily relinquished her parental rights "at the time an adoption decree is entered," and not as Mother would have done, prior to, or as a condition precedent to, a parent's voluntary consent to termination; (2) IC 31-19-16-2 requires pre-conditions including that consent from each adoptive parent be given and that a written, post-adoption contract between the birthparents and adoptive parents be filed with the court; and (3) these pre-conditions can never be satisfied at the time of termination because adoption cannot occur until after the termination of all parental rights of the natural parent. *Id.* at 6-7.

The Court concluded that, given the plain and unambiguous language of IC 31-35-6-4(a)(1), coupled with Indiana's strong public policy to protect the emotional well-being of

children whose parents have been either unable or unwilling to provide for their basic needs over a prolonged period of time, Mother's addendums to the voluntary consent forms are void ab initio and thus unenforceable as a matter of law. *Id.* at 15. The Court observed that (1) because of the important due process rights involved in termination proceedings, contract law principles, although helpful, are not necessarily determinative in cases involving consent forms for the voluntary termination of parental rights; (2) because voluntary consent forms are contracts, the principles of contract law can provide guidance under the facts of the case; (3) the term *void ab initio* literally means "void from the beginning" and denotes an "act or action that never had any legal existence at all because of some infirmity in the action or process; (4) in general, the law declares that a contract made in contravention of a statute is void and unenforceable, however, if a contract contains an illegal provision that can be eliminated without frustrating the basic purpose of the contract, the court will enforce the remainder of the contract; (5) a contract will not automatically be held void merely because it violates a statute; and (6) a court may consider other facts such as the subject matter of the contract, the strength of the public policy underlying the statute, and the likelihood that the court's decision in voiding the contract will actually further that public policy. *Id.* at 6-7 (citations omitted). Therefore, the Court considered whether public policy favored its conclusion that Mother's addendum is void because it violates Indiana's termination statutes, and, after discussion of public policy concerns, the Court concluded that finding the addendum in this case void as a matter of law would further the strong public policy underlying Indiana's termination statutes in protecting children's emotional well-being and in avoiding prolonged uncertainty in the lives of the involved children. *Id.* at 7-8.

The Court concluded that, inasmuch as the issue of potential post-adoption visitation was collateral to the paramount issue of whether Mother voluntarily consented to the termination of her parental rights, severing the addendum did not frustrate the basic purpose of the remainder of the agreement, even though the addendum for post-adoption visitation was presumably an important component of the contract, at least from Mother's perspective. The remaining consent form is, therefore, enforceable by the trial court. *Id.* at 8-9. The Court next turned to consideration of whether its conclusion that the addendum is void, renders the entire voluntary consent contract void. The Court opined: (1) a single instrument executed by the same parties may contain separate and independent contracts; (2) the failure of a distinct part of a contract does not void valid, severable provisions; and (3) thus, if a contract contains an illegal provision that can be eliminated without frustrating the basic purpose of the contract, the court will enforce the remainder of the contract. *Id.* at 8 (citations omitted). The Court noted that, here, (1) Mother made no claim that her consent to termination was given unknowingly or unintentionally; (2) a thorough review of the record confirms that Mother freely and voluntarily consented to the relinquishment of her parental rights, even though future visitation with her children was not guaranteed; (3) Mother informed the trial court that she wished to voluntarily terminate her parental rights; (4) Mother's attorney informed the trial court he had advised Mother that if she voluntarily relinquished her parental rights she "could" be entitled to post-adoption contact but that, if the trial court, or any other court, determined that visitation was no longer in the children's best interests, she would "not be entitled to further visitation;" and (5) the trial court subsequently advised Mother of her constitutional and other legal rights as well as the consequences of her consent to termination, pursuant to Indiana's voluntary termination statutes. *Id.* at 9.

The Court concluded that, given that Mother failed to meet her burden of establishing among other things, that HCDCS committed fraud, misrepresentation, or misconduct in order to obtain relief under Trial Rule 60(B)(3), the trial court did not abuse its discretion in denying Mother’s motion to set aside its order for voluntary termination of her parental rights to the children. *Id.* at 15-16. The Court finally addressed the Mother’s allegation that the trial court erred in denying her motion to set aside its order terminating her parental rights because her consent was obtained by fraud on the part of HCDCS. The Court stated that, in accordance with Outback Steakhouse of Florida, Inc. v. Markley, 856 N.E.2d 65, 73 (Ind. 2006), here, in order for Mother to obtain relief under Trial Rule 60(B)(3), she must show: (1) that her voluntary consent to termination of her parental rights was obtained through fraud, negligent misrepresentation, or misconduct on the part of HCDCS; (2) that said fraud, misrepresentation, or misconduct prevented Mother from fully and fairly presenting her case at the hearing; and (3) that Mother made a prima-facie showing of a meritorious defense to HCDCS’s petition for the involuntary termination of her parental rights. *M.B.* at 10. The Court reviewed the trial court’s special findings and conclusions, analyzed the elements of fraud and the contents of the record, and found that, (1) there is absolutely no evidence in the record indicating HCDCS committed fraud, or engaged in any misconduct or misrepresentation in an attempt to induce Mother to voluntarily relinquish her parental rights to the children; (2) Mother failed to show that the alleged fraud by HCDCS prevented her from fully and fairly presenting her case at trial; and (3) no evidence was offered by Mother of a meritorious claim or defense, either at the February hearing or in her brief to the Court, demonstrating that if a hearing on the termination of her parental rights was tried on the merits, a different result would have been reached, i.e. Mother’s parental rights would not have been terminated. *Id.* at 9-15.

NOTE: The Court specifically stated that, despite its ultimate conclusion under the particular facts of this case, it has serious concerns regarding the actions of the trial court, attorneys and HCDCS in approving a post-termination visitation plan like the one here, and “trial courts are cautioned to refrain from approving post-termination agreements such as these in the future as they are contrary to Indiana law and are likely, under a different set of circumstances, to provide false hope to parents facing termination of their parental rights.” *Id.* at 16.