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Termination of Parental Rights (TPR)

4/27/04

In **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874 (Ind. App. Ct. 2004), the Court affirmed the trial court's judgment which involuntarily terminated the father's rights to his two children. The two children, ages six months and two years, were removed from the home of the natural father and mother when a search by the county sheriff's department found "drugs, methamphetamines, and precursors for making it." The father and mother were arrested. The home was in total disarray and filthy, and the floors were weak and unstable. There were animals, including a rabbit, loose in the house. Eight days later, the Department of Family and Children (DFC) filed a CHINS Petition, on which a dispositional hearing was held less than two months later. Pursuant to the hearing, the children were adjudicated CHINS. In December 2002, the trial court held a formal six-month review of the dispositional decree with a permanency hearing conducted in July 2003. In May 2003, DFC filed a petition to terminate the parental rights of both the father and mother. Following a September 2003 hearing on the termination petition, the trial court ordered the termination of the father's parent-child relationship with the two children. Throughout the entire CHINS and termination proceedings, the father was incarcerated. In January 2003, he pled guilty to three drug-related felonies and to neglect of a dependent, a Class D felony. He received a cumulative sentence of eight years with two years probation and home detention following his release.

The father appealed the involuntary termination of the parent-child relationship with the two children. He claimed that DFC had failed to comply with statutory requirements in the CHINS proceeding, thereby violating his due process rights in the involuntary termination proceeding, and that the evidence was insufficient to sustain the trial court's determination to terminate his parent-child relationship with the two children.

Father waived his due process constitutional challenges because he raised them for the first time on appeal. Father asserted the judgment should be reversed due to the following alleged procedural irregularities: (1) father failed to receive notice on the CHINS proceedings; (2) DFC failed to negotiate with him prior to filing the case plans; and (3) the trial court failed to secure his presence during the CHINS hearings. DFC argued that the father raised these arguments for the first time on appeal. The Court noted that, despite the constitutional nature of the father's claim, it is well established that the Court may consider a party's constitutional claim waived when it is raised for the first time on appeal. McBride v. Monroe County Office of Family and Children, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003). Even though father alleged statutory violations during the CHINS proceedings, he failed to provide the Court with the appropriate record of that hearing. Further, although the trial court only appointed counsel to represent the father

after the CHINS proceedings, father's counsel never objected *in limine* to the CHINS proceedings because of failure to comply with statutory provisions. Therefore, the Court agreed that these issues were waived on appeal. Id. at 877-878.

Waiver notwithstanding, the father failed to demonstrate procedural irregularities with regard to the CHINS proceedings. The Court distinguished A.P v. Porter County Office of Family and Children, 734 N.E.2d 1007, 1112 (Ind. Ct. App. 2000) which was relied on by the father. In A.P., on appeal, the court analyzed seven substantial irregularities that, when taken together, required reversal of the trial court's termination decision as a violation of due process, but none of which, standing alone, would have resulted in a due process violation. Id. at 1117. Here, the Court found "not a single procedural deficiency." S.P.H., at 878.

Contrary to the father's claim that he did not receive notice on the CHINS proceedings, the record before the Court clearly disclosed that the trial court served father with the CHINS petition and notices of the review hearings. Additionally, father admitted in his brief that service of the CHINS petition was made on him via U.S. mail. Id.

The father also alleged that DFC failed to negotiate with him prior to filing the case plans and noted particularly the absence of his signature on the case plans. IC 31-34-15-1 provides that "a case plan is required for each child in need of services who is under the supervision of the county." IC 31-34-15-2 provides that "[t]he county office of family and children, after negotiating with the child's parent, guardian, or custodian, shall complete a child's case plan..." The statute is not all-inclusive; it requires negotiation with the parent, or the guardian, or the child's custodian. DFC negotiated the case plan with the mother, the non-incarcerated parent, prior to submitting it to the trial court for approval. Additionally, the statute does not require that the case plan be signed by the parent. The father was provided with copies of both case plans and, thus, was put on notice. Id. at 878-879.

Lastly, the father complained that the trial court failed to secure his presence during the CHINS hearings. The decision whether to permit an incarcerated person to attend such a hearing rests within the sound discretion of the trial court. See J.T. v. Marion County Office of Family and Children, 740 N.E.2d 1261, 1265 (Ind. Ct. App. 2000). Here, the father never filed a motion to transport for the CHINS hearings, so the trial court did not have to reach this decision. S.P.H., at 879.

Trial court properly concluded that the conditions that resulted in the children's removal would not be remedied. The father asserted that DFC failed to prove that the conditions resulting in the removal of the children would not be remedied. In this regard, he argued that the trial court's findings were clearly erroneous because his incarceration was not a sufficient basis for terminating his parental rights, and that he provided a satisfactory arrangement with the children's paternal aunt to provide professional care and guidance for his children.

To determine whether conditions are likely to be remedied, the trial court must examine the father's fitness to care for the children as of the time of the termination hearing and

take into account any evidence of changed conditions, as well as evaluate the father's patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. Matter of A.N.J., 690 N.E.2d 716, 720 (Ind. Ct. App. 1997). It is the trial court's prerogative to conclude that the father might be drug free while in prison, but that based on his pattern of conduct it will not last once he is released and the probability will be high that the situation will once more become as it was before he was incarcerated. Odom v. Allen County Dept. of Public Welfare, 582 N.E.2d 393, 396 (Ind. Ct. App. 1991). Based on the father's blatant denial that there were drugs in the house, the Court agreed with the trial court that the possibility of recurring drug abuse was substantial. S.P.H., at 881.

With regard to placement of the children with the paternal aunt, the Court noted the testimony of the DFC case manager as to the potential inability of the paternal aunt to control the drug-using mother's access to the children, and that placement with the paternal aunt would expose the children again to the environment they needed to escape. The Court agreed with DFC's determination that there was no guarantee that the paternal aunt would be able to provide the children with a safe and stable home. Id. at 881-882.

The trial court's termination of father's parent-child relationship with his two children was supported by sufficient evidence. The father also argued on appeal that DFC failed to establish that continuation of his parent-child relationship with the children posed a threat to the children's well-being. The Court noted that where, as here, the trial court specifically found, based on sufficient record evidence, that there was a reasonable probability that the conditions which resulted in the removal of the children would not be remedied, it was not necessary for the DFC to prove or for the trial court to find that the continuation of the parent-child relationship posed a threat to the children. A.N.J., at 721 n. 2. The trial court did, however, make findings of fact from which it concluded that there was a reasonable probability that continuation of the father's parent-child relationship posed a threat to the children's well-being: (1) the children have made significant progress and improvement in behavior since being placed in foster care; (2) the children have been in foster care for over fifteen months; (3) the father will not be released from incarceration for another two or three years; and (4) the DFC had investigated placement with family members but, in conjunction with opinions of the children's counselors, has not found any such placements suitable. S.P.H., at 882. The DFC case manager testified that: (1) the children needed a sense of permanency and a stable place to live; (2) they had done well in their foster home; (3) she was concerned about the father's lengthy incarceration, and failure to seek services; and (4) she believed it to be in the best interests of the children to terminate father's parental rights. Id. at 883.

The Court also noted that assuming the father were released in two or three years, he would have missed a significant part of the children's developmental years and he would not be able to provide financially for the children during that time. Additionally, upon father's eventual release from prison, there would be no guarantee that he would be able to care for his children or would ever get custody of them. The Court, therefore, concluded that the needs of the children were too substantial to force them to wait while determining if their father would be able to be a parent for them. Id.