



Termination of Parental Rights (TPR)

4/13/2006

In ***In Re Infant Girl W.***, 845 N.E.2d 229 (Ind. Ct. App. 2006), the Court affirmed the judgment of the Marion Probate Court granting adoption and reversed the judgment of the Morgan Juvenile Court and remanded it with instructions to dismiss the CHINS and TPR cases. The child was born September 22, 2004, in Morgan County. Her biological father is unknown and has never registered with Indiana's putative father registry. The child's biological mother decided to have the baby placed for adoption. When the child was two-days old, the OFC placed her with the Parents, a same-sex, unmarried couple, who are licensed foster parents. The child has lived continuously in the Parents' home since that time. The Parents are in their mid-thirties and have lived together in a committed relationship in Indiana for over eleven years. Because the biological mother gave the child up for adoption, the child was adjudicated a CHINS on September 28, 2004, in the Morgan Juvenile Court. Following a hearing in a TPR case to terminate the biological parents' parental rights (and referenced in the Chronological Case Summary in the CHINS case) on November 19, 2004, the Juvenile Court entered an order providing, among other things, that (1) the court defined "couple" as a man and a woman that are married; (2) the court defined "individual" as any person not married and considered persons cohabiting with one another to be individuals; (3) OFC's plan to place the child for adoption with an individual rather than a couple was not a satisfactory plan as required by statute; (4) OFC's plan to place the child with an individual, rather than a couple, as they had in every other case where the child was not hard to place, was not in the child's best interest; and (5) OFC was ordered to develop a satisfactory plan for care and treatment that included a plan to adopt this non-hard to place child with a couple, rather than an individual. The Juvenile Court decided not to disturb the child's foster care placement with the Parents until a licensed pre-adoptive married couple could be found. On March 22, 2005, the Juvenile Court issued a nunc pro tunc dispositional decree in the CHINS case which stated that the permanency plan for the child was adoption.

On January 28, 2005, the Parents filed a joint petition for adoption in the Marion Probate Court, acknowledging that the child was a ward of OFC. The biological mother consented to the adoption in writing, and on April 21, 2005, the Probate Court held a hearing on the Parents' petition for adoption. At the hearing, (1) the necessary evidence was submitted; (2) OFC, while objecting to the adoption and withholding its consent solely because it believed it was compelled to do so by the Juvenile Court's November 19 order, told the Probate Court that the only objection it would have was that "our court" would not allow "us" to use these two people as our satisfactory plan of care and treatment; (3) no other objections were raised to the adoption; and (4) no one offered any other evidence against the adoption. The Marion Probate Court granted the joint adoption the same day, issuing a four-page

written decree (1) finding, among other things that the adoption was in the child's best interests; (2) deeming the unknown father to have irrevocably consented to the adoption as a matter of law because of his failure to register as a putative father; (3) terminating the parental rights of the child's biological mother and the putative father; and (4) applying I.C. 31-19-9-8(a)(10), to find that the reasons for OFC's refusal to consent to the adoption were not in the child's best interests and, consequently, that the agency's consent was not required.

On April 21, 2005, OFC informed the Morgan Juvenile Court that the joint petition for adoption had been granted that day over OFC's objection and that First Steps had evaluated the child and determined that her development was "age appropriate" and she no longer needed ongoing services. During an April 26, 2005 hearing the Juvenile Court accepted the adoption decree into evidence, granted the Parents' motion to intervene in the CHINS case, and denied the Parents' motion to dismiss the CHINS case. On May 10, 2005, OFC filed a motion to correct error in the adoption case, in which it alleged several errors for the first time and it offered no affidavits in support of its motion. The Probate Court denied OFC's motion on May 16, 2005. At the conclusion of a May 11, 2005 hearing, the Juvenile Court orally explained that it did not recognize the authority of the Marion Probate Court to do anything "on this case." On May 17, 2005, the Juvenile Court entered a written order adopting three rulings recommended by OFC: (1) the child shall remain a CHINS under the placement and care of OFC; (2) the child shall be placed with the pre-adoptive family OFC had located and trained for this purpose; and (3) the child's biological mother shall provide the court with information of relatives willing to care for the child. The Juvenile Court granted the Parents' motion to enjoin enforcement of these orders pending interlocutory appeal of its April 26 and May 17 orders which it certified for interlocutory review on June 3, 2005.

OFC appealed the adoption case, arguing that the Marion Probate Court erred in granting the joint adoption petition of the Parents because the Morgan Juvenile Court opposed it and because Indiana law limits adoption to married couples and to individuals. The Parents appealed the CHINS case, arguing that the Morgan Juvenile Court erred in refusing to dismiss the CHINS action and in voiding the Probate Court's adoption decree.

OFC is a party to the adoption case and has standing to appeal the Probate Court's ruling. *Id.* at 238. The Court noted that OFC was entitled to receive notice of the pending adoption, was heavily involved in the adoption procedure as the child's legal guardian, and in the normal course, OFC's consent to the adoption would have been required because it was responsible for the child's care and placement. *Id.*

OFC waived its argument that comity prevented the Probate Court from exercising jurisdiction over this case, inasmuch as it failed to raise a timely and specific objection regarding the Probate Court's jurisdiction on those grounds or to file a 12(B)(8) motion to dismiss. *Id.* at 239. **Waiver notwithstanding, however, there was not a sufficient identity of parties between the CHINS case and the adoption case to invoke comity; moreover, TPR, CHINS, and adoption cases have divergent subject matter and remedies.** *Id.* at 240. The Court generally described comity. "When an action is pending before a court of competent jurisdiction, other courts must defer to that court's extant authority over the case." *Thacker v. Bartlett*, 785 N.E.2d 621, 625 (Ind. Ct. App. 2003).

Comity comes into play only where there is precise or substantially similar identity of parties, subject matter, and remedies in the competing actions. *Id.* Whether the outcome of one competing action will affect the adjudication of the other is also examined. Davidson v. Perron, 716 N.E.2d 29, 35 (Ind. Ct. App. 1999). Trial Rule 12(B)(8) implements this principle by permitting dismissal of an action on the ground that the same action is pending in another Indiana Court. *Id.* The Court noted that (1) OFC never filed a T.R. 12(B)(8) motion to dismiss; (2) OFC only objected to the adoption based on the ground that its hands were tied because of the Juvenile Court's November 19 order; and (3) in its motion to correct error, filed after the Parents' petition had already been granted, OFC objected for the first time based on the pending CHINS and TPR cases, though it never invoked comity in that motion. *Id.* at 238-39.

In its discussion of OFC's comity argument, notwithstanding waiver, the Court examined the nature of the three proceedings at issue – the adoption, CHINS, and TPR cases. Juvenile courts have exclusive jurisdiction over CHINS cases in which they facilitate services, care, and custody of a CHINS, but they do not create or rescind permanent family ties. I.C. 31-30-1-1. Probate and juvenile courts have concurrent original jurisdiction over TPR cases in which they determine whether to terminate the parent-child relationship involving a CHINS. I.C. 31-35-2-3. Probate courts have exclusive jurisdiction over all adoption matters; as a result of the adoption, the adopted child becomes the legal child of the adoptive parent. I.C. 31-19-1-2. Thus, juvenile courts have no authority to create permanent parent-child ties through adoption or to rule on any other adoption matters. The Court noted that, here, the OFC was involved in all the cases, but the Parents were not. The Court also agreed with the Parents that it was highly unlikely that they would have been permitted to intervene in the TPR action to pursue issues related to their own prospective adoption. *Id.* at 239-40.

The mere fact that there were pending CHINS and TPR proceedings did not in any way divest the Probate Court of its exclusive jurisdiction over the Adoption Case, inasmuch as the consent statute enabled OFC, as the child's legal guardian and as petitioner in the TPR Case, to voice its concerns and opinions about the Parents' petition to adopt. *Id.* at 241. The Court noted that the consent statute, I.C. 31-19-9-1, disentangles the ostensible jurisdictional knot created by the concurrent jurisdiction of probate and juvenile courts over a TPR proceeding. Pursuant to the consent statute, although a probate court retains exclusive jurisdiction over an adoption case, OFC – which, during the pendency of a TPR proceeding, is the child's legal guardian – must be given an opportunity to consent to the adoption. I.C. 31-19-9-1(a)(3). If OFC refuses to consent to the adoption, the probate court must determine whether OFC was acting in the best interests of the child in withholding its consent. I.C. 31-19-9-8(a)(10). The Court also described and distinguished Matter of Adoption of T.B., 622 N.E.2d 691, (Ind. Ct. App. 2003), which was relied upon by the Parents and described and took exception to the rationale of Adoption of E.B., 733 N.E.2d 4 (Ind. Ct. App. 2003), which was relied upon by the OFC. *Id.* at 240-41.

There is nothing in I.C. 31-19-2-2 of the Indiana Adoption Act that limits the Parents' right to adopt the child. *Id.* at 242. The Court observed: (1) the cardinal rule of statutory construction is that if a statute is unambiguous, then a court cannot interpret it and must apply its plain and clear meaning; and (2) it is a well-settled rule of statutory construction that words

used in their singular also include their plural. The Probate Court agreed with the Parents' argument that the statutory language permitting "a resident of Indiana" to file for adoption did not limit it to a singular resident, but rather included the plural – "residents" – as well. The Court noted that the State was not arguing that married couples – necessarily constituting more than one resident – may not adopt, and held that, upon examining the statute regarding adoption by married couples, it was apparent that the General Assembly intended "a resident of Indiana" to include the plural. Id.

Under the Indiana Adoption Act, an unmarried couple may file a joint petition to adopt a minor. Id. at 243. OFC argued that I.C. 31-19-2-4, which puts rules in place regarding adoption by married couples, shows that two individuals may join in a single petition only if they are married. However, OFC pointed to no statutory language explicitly in support of that conclusion. The Court observed that the purpose of requiring married persons to petition jointly for adoption is specific to the marital relationship and its attendant legal obligations, and, thus, it does not follow, and there is nothing in the Adoption Act which suggests that, in placing this requirement upon a married couple, the legislature was simultaneously denying an unmarried couple the right to petition jointly. Further, the Court noted that, while it may be true that the General Assembly has spoken regarding second-parent adoption as the dissent argues, there is simply nothing in the Adoption Act suggesting that it intends to preclude all unmarried couples from adopting. The Court held that, contrary to the dissent's argument, the supposed connection between the legislature's 2005 pronouncement regarding second-parent adoption and the ability of an unmarried couple to file a joint petition to adopt is tenuous at best, and far from sufficient to glean a legislative intent to bar the practice altogether. Id. at 242-44.

The Probate Court properly granted the Parents' petition for adoption, despite OFC's refusal to consent. Id. at 244-45. Noting that one of the bases for the Juvenile Court's November 19 order was its understanding of Morgan County policy as providing that non-hard-to-place children must be adopted by a married couple, the Court cited supporting cases and held that the Juvenile Court, as well as all local courts, must base its decisions on state law, and must also ensure that local practice complies with state law. The Court observed that (1) all involved parties believed the Parents' adoption of the child was in the child's best interest; (2) the Juvenile Court observed that no question had been raised about the Parents' fitness or ability to care for the child or about the love that they have for the child; (3) OFC made it clear that the only reason it was withholding consent to the adoption was because it felt bound to do so by the Juvenile Court's November 19 order; and (4) by all accounts, including OFC's, this is a loving, supportive, happy home where the child had been thriving since she was two days old. Id.

The Juvenile Court was statutorily required to dismiss the CHINS case and, thus, erred in refusing to dismiss the CHINS petition. Id. at 245. The Court noted (1) the definition of a CHINS at I.C. 31-34-1-1; (2) the provision of I.C. 31-34-21-11 which states "[w]hen the juvenile court finds that the objectives of the dispositional decree have been met, the court shall discharge the child and the child's parent/guardian or custodian;" (3) here, the dispositional goal for the child in the CHINS case was adoption; (4) at the time the Parents filed their motion to dismiss the CHINS action, the child had been adopted and, thus, the

dispositional goal had been met; and (5) after the adoption, the child no longer met the statutory standard for a CHINS, inasmuch as there was universal agreement that the child had been well cared for by the Parents since she was two days old. Id.

The Juvenile Court erred in treating the Probate Court's adoption decree as void and refusing to honor it in the CHINS case. Id. at 246. The Court noted with supporting citations that (1) a final judgment of a court with subject matter and personal jurisdiction over the parties, even if irregular, is not void and not impeachable collaterally; (2) probate courts have subject matter jurisdiction over all adoptions, and another court may not treat their orders as void simply because their actions are called into question; (3) there has never been any suggestion that the Marian Probate Court did not have personal jurisdiction over these parties; and (4) the proper remedy was timely objection and direct appeal by litigants in the Adoption Action, not treating the adoption decree as void in the CHINS case. Id.

The Court summarily affirmed the Probate Court's termination of the parental rights of the child's biological mother and father. Id.

Judge Najam dissented with opinion. He stated that the Adoption Act neither authorizes nor permits a joint petition for adoption by unmarried petitioners. He would hold that Indiana law does not allow an unmarried couple, regardless of their gender or sexual orientation, to file a joint petition to adopt a minor child. Id. at 247-50.