



Termination of Parental Rights (TPR)

12/20/2005

In **Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind. 2005), the Court reversed the trial court's judgment terminating the parent-child relationship of Father. In 841 N.E.2d 185 (Ind. Sept. 28, 2005), the Court had previously granted transfer and vacated the Court of Appeals' affirming memorandum opinion, 826 N.E.2d 165 (Ind. Ct. App. 2005). In June 2001, a son was born out of wedlock to Mother and Father. Because child tested positive for cocaine Lake County OFC assumed jurisdiction over Child and, five days later allowed Child to be released from the hospital to foster parents. OFC filed a CHINS petition and, in October 2001, after a hearing at which Father but not Mother appeared, the trial court entered an order granting the CHINS petition which included a case plan for reunification. Even before the entry of the case plan, Father was regularly visiting with Child. The visits were supervised initially but sometime in 2002, OFC permitted Father to exercise unsupervised weekend visits. Father was living with his own parents in Illinois and Child spent every weekend with his father, grandparents, and other relatives. Father also complied with other requirements of the case plan, including submitting to psychological evaluations, random drug screens, and successfully completing parenting classes. In October 2002, the OFC initiated a referral through the Interstate Compact on the Placement of Children (ICPC) requesting Illinois to "study the home of [Father] for possible placement of 1-year-old [Child]," which resulted in the Illinois investigator completing a home study that "d[id] not approve the placement of [Child] with his father." The study cited Father's history of arrests and convictions between 1994 and 2000, some of which involved controlled substances, and concluded that Father needed to distance himself further from his past behavior before Illinois could allow Child to live with him there. In October 2002, before the home study was complete, the OFC filed a petition to terminate the parental rights of both Mother and Father. After a hearing conducted in August 2004, at which Father but not Mother appeared, the trial court entered an order granting the petition. Father appealed and the Court of Appeals affirmed the trial court's judgment. Father then requested transfer to the Indiana Supreme Court.

Several of the trial court's findings were either misleading or unsupported by the evidence. And those findings supported by the evidence did not support the trial court's judgment. As a result, the trial court's conclusion that there is reasonable probability that the continuation of the parent-child relationship with Father poses a threat to Child's well being has not been demonstrated by clear and convincing evidence and thus is clearly erroneous. *Id.* at 153. The Court found dispositive Father's issue of whether the OFC had presented clear and convincing evidence that the continuation of the parent-child relationship with Father posed a threat to the Child's well-being. The trial court's termination order focused on the effect of the Mother's conduct on

Child. The findings regarding Father stated, among other things, that he was the father as determined by DNA testing, Father had had regular contact with the child, and Father was employed and trying to obtain his GED. The Court found misleading the trial court's findings that Father had made efforts to comply with the case plan for reunification and that he was not providing financial support for Child. It also found that there was simply nothing in the record to support the trial court's finding that Father was not providing emotional support for Child. The Court then opined that, given its resolution of these trial court findings, the conclusion to terminate Father's parental rights could only be based on the remaining two findings: "Father has made some effort but has yet to establish himself as independent or to obtain his own residence," and "father has extensive criminal convictions for drugs and cannot obtain approval from the State of Illinois to allow child to be placed with him." Id. at 148-50.

The Court held that to say that Father merely made "efforts" to comply with the case plan for reunification was not supported by the record. The Court reviewed the plan and, citing to specific record evidence, found that Father was in full compliance with it. Among other things, the Court noted that (1) the witness who had served as case manager for more than a year testified that Father was "one hundred percent compliant;" (2) the case manager who had replaced her testified that Father had completed his counseling and visited with Child on a regular basis; (3) the evidence showed that Father had completed therapy; and (4) five random drug tests Father was required to take produced negative results. Id. at 148-49.

The finding that Father was not providing financial support for Child was found by the Court to be misleading. The Court cited to Father's testimony that he provided money to the foster parents as well as his own parents to help pay for his son's daycare which testimony was in conflict with the case manager's testimony that to her knowledge Father had never contributed financially to Child in any form. Noting that it was bound by the trial court's finding that Father was not providing financial support, the Court held that absent some indication that Father was directed to provide financial support to Child, "he cannot now be criticized for not doing that which he was never asked to do." Id. at 149.

The Court held that the evidence did not support the trial court's finding that Father did not provide emotional support for Child and that the record showed "an interaction between father and son that is loving, caring, and happy." The Court noted that none of the witnesses were specifically asked about the emotional support Father was or was not providing to Child and that the record evidence presented a different picture. In this regard, the Court set forth excerpts from the supervising agency's reports of the Father's visitations during the time supervision was required. Id. at 149-50.

Father's housing does not support a reasonable inference that Father's living arrangements and his alleged lack of independence pose or have ever posed a threat to the well-being of his child. Id. at 151. The Court opined that the trial court's finding that Father has neither established himself as independent nor obtained his own residence provided little guidance concerning whether these facts demonstrated that Child's well-being would be threatened by Father's custody. The Court reviewed the evidence regarding Father's living arrangements over the relevant period and found that the trial

court's findings revealed no causal connection between Father's living arrangements and any adverse impact those arrangements might have on Child. Noting that the trial court had not concluded that Father was unable or unwilling to provide Child with an adequate home or that the homes of his relatives where he had lived were unsuitable for Child, the Court stated "the trial court's criticism was that Father did not have 'his own residence.'" Id. at 150-51.

Because Child was born testing positive for cocaine in his system, Father's drug related criminal history cannot be taken lightly. In fact the trial court must consider a parent's habitual pattern of conduct to determine whether there is a substantial probability of future neglect or deprivation. J.K.C. v. Fountain County Dep't of Pub. Welfare, 470 N.E.2d 88, 92 (Ind. Ct. App. 1984). At the same time, a trial court should judge a parent's fitness to care for his child as of the time of the termination proceeding, taking into consideration evidence of changed conditions. Id.; Odom v. Allen County Dep't of Pub. Welfare, 582 N.E.2d 393, 395 (Ind. Ct. App. 1991). Bester at 152. Regarding the trial court's finding that, "Father has extensive criminal convictions for drugs and cannot obtain approval from the State of Illinois to allow child to be placed with him," the Court questioned whether the first clause was intended to stand alone as justification for termination of Father's parental rights, or the first clause was relevant only because of its impact on the second. The Court concluded that, in any event, neither possibility justified termination of Father's parental rights. In reviewing the evidence regarding Father's criminal history, the Court noted that, although his criminal history, which included drug related activity, was "extensive," his actual criminal convictions for drugs, two for marijuana possession, were not "extensive." Important to the Court were the facts that, (a) the trial court made no finding Father was or for the past three years had been, involved with illegal drugs, and (b) the record showed that the random drugs tests conducted on Father as part of the case plan were negative. The Court found the record evidence showed that, by the time of the termination proceedings, and apparently for at least three years before then, Father had conducted himself in a manner consistent with assuring that his son would be exposed to a healthy drug free environment and, therefore, the existence of Father's past criminal history did not demonstrate that the continuation of the parent-child relationship between Father and Child posed a threat to Child's well-being. Id. at 152.

The Court discussed the import of the determination of the Illinois authorities that Child could not be placed with Father in Illinois at that time. According to the Court, this determination addressed the placement of the child in Illinois, but was not relevant to the question of whether continuation of the parent-child relationship posed a threat to Child's well-being. The Court observed that the ICPC expressly defines its purpose and policy as facilitating cooperation between states in the placement and monitoring of dependent children. I.C. 12-17-8-1, Art. I. By its terms, the ICPC addresses "placement" and says nothing one way or the other about whether a parent's parental rights should be terminated. Further, according to the Court, the ICPC does not apply to the sending or bringing of a child into a receiving state when it is done by a parent, stepparent, grandparent, adult brother, sister, uncle or aunt who is leaving the child with a relative or non-agency guardian in the receiving state. I.C. 12-17-8-1, Art. VIII. Id. at 153.