

Children's Law Center of Indiana



Termination of Parent-Child Relationship

4/1/10

In ***In Re A.B.***, 924 N.E.2d 666 (Ind. Ct. App. 2010), the Court found that there was sufficient evidence to support the termination of Father's and Mother's parental rights, and affirmed the trial court's judgment. The child was born on February 24, 2008, and tested positive for cocaine. Father was not married to Mother and was the child's alleged father. On February 27, 2008, the Marion county Department of Child Services (DCS) filed a petition alleging the child was a CHINS. Mother originally denied having used cocaine and claimed that she had been exposed to cocaine secondhand through Father's use of it, but later admitted that she had used crack cocaine five days before the child's birth. Mother admitted to the CHINS petition on the day it was filed. The trial court removed the child from Mother's custody and entered a dispositional decree as to Mother. Father did not appear for this CHINS hearing, although it was soon learned that he was living with Mother and was aware of the CHINS proceeding but declined to accept service of process for it. Father did not want to appear in court because he had outstanding arrest warrants. Mother's dispositional decree required her to, among other things, obtain a stable and legal source of income, obtain and maintain suitable housing, undergo and successfully complete homebased counseling, undergo and successfully complete a drug and alcohol abuse assessment, and submit to random drug testing. At first, Mother was cooperative with homebased counseling and random drug testing, but she stopped participating after two months. She never made an appointment to undergo the drug and alcohol abuse assessment. When confronted by a counselor in April 2008 about the results of a drug test, Mother said the cocaine must have gotten into her system when she touched some cocaine Father had left in the house. After attempts to effect personal service on Father failed and service by publication was accomplished, the court defaulted Father at a hearing on June 18, 2008, again finding the child was a CHINS. The trial court's dispositional order as to Father on June 18, 2008, directed that no services be provided to him until he appeared in court and demonstrated "a desire and ability to care for the child." Father first appeared in court at a permanency hearing on September 3, 2008. The trial court appointed a public defender to represent Father and entered a denial on his behalf and set a pretrial. Father failed to appear at the pretrial hearing on October 15, 2008, and moved to Ohio in November 2008. In October 2008, Mother met with the DCS case manager and was re-referred for visitation, random drug screening, and a drug and alcohol abuse assessment. Mother began visitation and random drug screenings but then stopped doing both. She again failed to undergo a drug and alcohol abuse assessment, and was not re-referred for homebased counseling because she did not have a stable residence. On December 30, 2008, DCS filed a petition to terminate Mother's and Father's parental rights to the child. The trial court held a hearing on the

petition on April 7, 2009. As of that date, Father had not seen the child since she was in the hospital after being born. On April 14, 2009, the trial court entered its judgment terminating Mother's and Father's parental rights. Mother and Father filed a joint motion to correct error, which the trial court denied, and then appealed.

The Court observed that, although DCS had the burden of proving the allegations in IC 31-35-2-4 by clear and convincing evidence, clear and convincing evidence need not show that the custody by the parent is wholly inadequate for the child's survival. *Id.* at 670, citing *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 148 (Ind. 2005). It is sufficient to show by clear and convincing evidence that the child's emotional and physical development would be threatened by the parent's custody. *Bester* at 148. *A.B.* at 670.

The Court opined that there is sufficient evidence to support the trial court's findings with respect to terminating Mother's parental rights. *Id.* at 671. Mother challenged the trial court's finding that the conditions that led to the child's removal from her care will not be remedied, noting the lack of documentary evidence that she ever failed any drug test. The Court stated that the sole condition that led to the child's removal was Mother's drug use shortly before the child's birth, leading to the child's positive cocaine test. *Id.* at 670. The Court noted that the trial court found that Mother had "failed to address her substance abuse issues..." *Id.* at 671. The Court could not say this finding is clearly erroneous because: (1) Mother was twice referred to participate in a drug and alcohol abuse assessment, but she failed to follow through both times; (2) Mother twice began submitting to random drug screens but both times she quit participating in them shortly thereafter; (3) there is some indirect evidence that Mother did in fact test positive for cocaine usage after the child was born, when Mother attempted to give an implausible explanation for why there was cocaine in her system. *Id.* The Court opined that this evidence makes it reasonable to reach the conclusion that her drug abuse issue was not remedied. *Id.* The Court stated, "[a] parent whose drug use led to a child's removal cannot be permitted to refuse to submit to drug testing, then later claim the DCS has failed to prove that the drug use has continued. Mother cannot and should not prevail with such a circular and cynical argument." *Id.*

The Court found that there is sufficient evidence to support the trial court's finding that the child was removed from Father's care for at least six months under a dispositional order. *Id.* at 672. Father's sole argument is that DCS failed to prove that the child was removed from his care for at least six months under a dispositional decree (as required by IC 31-35-2-4(A)) because Father claimed the trial court effectively set aside the June 18, 2008, default dispositional order as to him when the court entered a denial on his behalf and set a pretrial at the September 3, 2008, hearing. The Court was not persuaded by Father's argument, stating: (1) the trial court never expressly stated that it was setting aside the June 18, 2008, dispositional order; (2) the Indiana Supreme Court has unequivocally held that Indiana Trial Rule 60, which governs relief from judgments or orders in civil cases, does not permit a trial court to sua sponte set aside a judgment, unless it is merely to correct a clerical mistake as permitted by T.R.60(A);

(3) a judgment can only be set aside by a party filing a motion under T.R.60(B) and after a hearing has been conducted under T.R.60(D); (4) because there is no claim of clerical mistake in the June 18, 2008, dispositional order and Father never filed a motion to set aside that order, the trial court lacked authority to set it aside sua sponte and could not have done so; (5) the Court perceived no basis upon which the dispositional order could have been set aside under T.R.60(B). Id. at 671-72. The Court said, “we cannot permit Father to avoid the impact of the June 18, 2008, default dispositional order, which resulted from Father’s willful neglect of the CHINS proceeding.” Id. at 672.