

Children's Law Center of Indiana



Termination of Parental Rights (TPR)

01/14/2008

In **In Re B.J.**, 879 N.E.2d 7 (Ind. Ct. App. 2008) the Court affirmed the trial court's termination of the parental rights of both Mother and Father. Mother is the biological mother of the three daughters who are the subject of this action, but Father is the biological father of only B.J., the youngest. When B.J. was born on January 26, 2006, she tested positive for cocaine. On February 7, 2006, Marion County Department of Child Services (MCDCS) filed a petition alleging that all three girls were CHINS. Both Father and Mother admitted to the allegations of the CHINS petition and the children were made wards of MCDCS. On March 3, 2006, the trial court entered its disposition order removing the children from Father's and Mother's care and ordered Father and Mother, among other things, to participate in specific services and refrain from use of non-prescription drugs. On January 3, 2007, MCDCS filed a petition for involuntary termination of Father's and Mother's parental rights. The termination hearing was held May 17, 2007, and on May 21, 2007, the trial court entered an order terminating Father's and Mother's parental rights. Father and Mother appealed. Additional facts will be presented in the following discussion of the issues on appeal.

MCDCS did not fail to fulfill its statutory obligation to provide Father with notice of the termination hearing, nor was Father's constitutional right to due process violated when MCDCS sent notice of the termination hearing to Father's last known address pursuant to IC 31-35-2-6.5. *Id.* at 23. The Court noted that (1) Father's official address with the MCDCS was on Meridian Street in Indianapolis, and that is the address to which the notice was timely mailed; (2) Father had not officially notified MCDCS of his new address on Cold Spring Road, but the case manager heard of Father's alleged new address from Father's home-based counselor; (3) when the case manager went to the Cold Spring Road address in order to facilitate a random drug screen, no one answered the door, the blinds were drawn, and she was unable to verify that Father actually resided there; (4) the case manager spoke with Father by telephone one week prior to the termination hearing and specifically informed Father of its date, time and location; and (5) Mother testified that she informed Father of the date of the final termination hearing as well. The Court concluded that by sending notice to Father's last known address on Meridian Street, the MCDCS complied with Indiana Trial Rule 5(B) and, therefore, notice was not defective under IC 31-35-2-6.5 and the trial court did not abuse its discretion in denying Father's counsel's motion to continue the hearing. *Id.* at 15-16.

Father was not denied his constitutional right to due process when the trial court denied his counsel's motion to continue and proceeded with the termination hearing in Father's absence. *Id.* at 17. The Court reviewed the nature of the process due in a termination of parental rights proceeding which turns on the balancing of three factors: (1) the private interests affected by the proceeding, (2) the risk of error created by the State's chosen procedure, and (3) the countervailing governmental interest supporting use of the challenged procedure. The substantial private interests implicated in this case are (1) Father's interest in the care, custody and control of his child, B.J., which has been repeatedly recognized as one of the most valued relationships in our society, and (2) the well settled fact that the right of a parent to raise one's child is an "essential, basic right that is more precious than property rights." *Id.* at 16 (citations omitted). Regarding the second factor, the Court concluded that the risk of error caused by the trial court's denial of Father's counsel's motion to continue was minimal considering that (1) IC 31-35-2-6.5(e) requires the court to provide a party with an opportunity to be heard at the hearing, but does not create a constitutional right for Father to be physically present at the termination hearing; (2) Father was zealously represented by counsel throughout the entire termination hearing; (3) Father's counsel was provided with the opportunity to cross-examine the State's witnesses and introduce evidence in defense of the action; and (4) Father has failed to allege any specific prejudice other than his unsubstantiated assertion that had he been allowed to meaningfully participate, it is likely that termination would not have been ordered. *Id.* at 16-17. As to the final factor, the countervailing government interest, the State's interest in protecting the welfare of B.J., as well as the other children, is significant. In this regard, the Court observed that (1) fourteen months had passed since the children were removed from the care of their parents and made wards of the State; (2) as of the date of the final termination hearing, Father had failed to complete the court-ordered services, which made it impossible for the case manager to predict when or if Father would ever be eligible for reunification with B.J.; and (3) delays in the adjudication of a case impose significant costs upon the functions of government as well as an intangible cost to the lives of the children involved. *Id.* at 17. After balancing the substantial interest of Father with that of the State, and in light of the minimal risk of error created by the challenged procedure, the Court concluded that the trial court did not violate Father's constitutional right to due process of law. *Id.*

MCDCS proved by clear and convincing evidence each element of IC 31-35-2-4(b) with regard to both Father and Mother. Accordingly, the trial court's judgment ordering the involuntary termination of Father's and Mother's parental rights is not clearly erroneous. *Id.* at 23. The Court quoted the requirements of IC 31-35-2-4(b)(2) regarding factors the State must establish by clear and convincing evidence in order for a court to terminate a parent-child relationship. Father and Mother claimed that, of these factors, MCDCS had failed to prove by clear and convincing evidence that there existed a reasonable probability that the conditions that resulted in removal of the children and continued placement outside the family home would not be remedied. The Court stated that (1) a trial court must judge a parent's fitness to care for his child at the time of the termination hearing taking into consideration evidence of changed conditions; (2) a trial court may consider the parent's response to the services offered through DCS; (3) a pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding

that there exists no reasonable probability that the conditions will change; (4) MCDCS is not required to rule out all possibilities of change, but need only establish that there is a reasonable probability that the parent's behavior will not change; and (5) a trial court need not wait until the children are "irreversibly influenced" such that their physical, mental, and social growth is permanently impaired before terminating the parent-child relationship. *Id.* at 18-19, 22 (citations omitted). Here, with regard to the termination of Father's parental rights, Father asserted that he had completed or almost completed each requirement in the trial court's dispositional decree. Father had admitted to the allegations which had prevented initial placement of the children with him: (1) he had failed to establish paternity of B.J.; and (2) he had failed to show an ability or willingness to appropriately parent the children. The Court observed that a review of the record revealed that despite Father's initial compliance and a multitude of services offered to him over the fourteen months, these conditions still had not improved, in that he had failed to complete substance abuse intensive outpatient treatment or home-based counseling, to establish his paternity of B.J., to provide proof of stable housing or of any employment, and to attend the termination hearing. The Court found that this evidence clearly supported the trial court's finding that "Father's ability to parent is unknown at this time" and its ultimate conclusion that "[t]here is a reasonable probability that the conditions that resulted in the removal of the children from [Father] ... will not be remedied." *Id.* at 19. With regard to the termination of Mother's parental rights the Court found that the trial court's ultimate determination that there existed a reasonable probability that the conditions leading to the removal and continued placement of the children outside of mother's care would not be remedied was not clearly erroneous. *Id.* at 22. The Court noted that the evidence most favorable to the trial court's judgment revealed (1) while Mother did successfully complete her parenting assessment and parenting classes, as well as exercise visitation with the children, Mother's visitation had to be suspended for about four months due to her missed visits; (2) Mother failed to obtain mental health treatment for her depression despite multiple reminders from her case manager that such treatment was a condition for reunification; (3) despite at least three separate referrals for intensive outpatient treatment for her substance abuse problem, which was the impetus for MCDCS' initial involvement in the case, Mother failed to complete treatment and was unsuccessfully discharged due to her lack of participation; and (4) Mother also provided only minimal proof of attendance at Narcotics Anonymous and Alcoholics Anonymous meetings. The Court found that the evidence supported the trial court's finding: "There is no indication that Mother will be able to complete services given her history of an inability to do so in the fourteen months since services commenced." *Id.* at 21-22.

Mother challenged the sufficiency of the evidence supporting the trial court's judgment terminating her parental rights. Specifically, she claimed that the trial court's finding that Mother admitted testing positive for cocaine during treatment, was not supported by the evidence, and challenged the findings regarding each element of IC 31-35-2-4(b)(2) except the one requiring that MCDCS have a satisfactory plan of the care and treatment of the children. *Id.* The trial court did improperly state as a finding that Mother admitted testing positive for cocaine during treatment because, upon objection from Mother's counsel, Mother's statement to that effect had been stricken from the record. *Id.* The Court disregarded that finding, but concluded that other specified findings which were all

supported by evidence on the record, provided ample support for the trial court's ultimate conclusion that MCDCS proved by clear and convincing evidence that there was a reasonable probability that the conditions resulting in removal and continued placement of the children outside Mother's care would not be remedied and that termination was in the best interests of the children. Thus, the Court held that because there was evidence sufficient to support the trial court's ultimate findings on the elements necessary to sustain the judgment, the erroneous finding was merely harmless surplusage that did not prejudice Mother and, consequently, was not grounds for reversal. Id. at 20.

Mother asserted that MCDCS failed to prove that the children had been removed from her care for the statutorily-mandated period of time, which she contended was fifteen of the most recent twenty-two (22) months rather than the six-month period under a dispositional decree which is the measure used by the trial court. The Court found that the language of the statute was clear and unambiguous and required that MCDCS prove either of three conditions, two of which are: "removed from the parent for at least six (6) months under a dispositional decree" and "the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen months of the most recent twenty-two (22) months." Id. at 20-21.

Despite Mother's contentions to the contrary, the Court was convinced that the totality of the evidence supported the trial court's conclusion that termination of Mother's parental rights was in the children's best interests. Id. at 23. The Court agreed with Mother's assertion that the right of parents to raise their children should not be terminated solely because there is a better home available for the children. The Court's review of the evidence, however, did not reveal that the trial court's termination of Mother's parental rights was based on who could provide a "better" home for the children, but instead was properly based on the inadequacy of mother's custody. Id. at 22. The Court noted that the evidence most favorable to the trial court's judgment revealed that Mother (1) had not completed court-ordered services; (2) had failed to complete an intensive outpatient program for her substance abuse problem despite three separate referrals; (3) had failed to obtain mental health treatment for her depression; and (4) had failed to complete any home-based counseling. The Court further observed that (1) the record supported the trial court's finding that the children were progressing well and their separate medical and psychological needs were being met; and (2) recognizing that the trial court listened to the testimony of all witnesses, observed their demeanor, and judged their credibility, as a reviewing court, it must give proper deference to the trial court. Id. at 23 (citations omitted).