

# Children's Law Center of Indiana



## Termination of Parent-Child Relationship

5/30/2012

In ***In Re D.K.***, 968 N.E.2d 792 (Ind. Ct. App. 2012), the Court held that there was sufficient evidence to support the termination of Mother's parental rights, as there was evidence that Mother took little to no steps to correct the conditions that led to the removal and placement outside the home of Mother's child, and that the trial court's finding that there was a reasonable probability that the conditions that led to the child's removal would not be remedied was not clearly erroneous. The Court also held that if a trial court takes judicial notice of "other" records from another case, those "other" records must be made part of the trial record, and that if a party on appeal wishes to reference these "other" records, they must be included in an appendix submitted to the Appellate Court, according to Appellate Rules.

The child was born in October 2008 to Mother and Father. Father never financially supported the child, and was incarcerated after the child's birth. In March of 2009, Floyd County DCS removed the child from Mother's care, substantiated a report of neglect, and placed the child in foster care. When DCS came to Mother's residence, Mother was attending a hearing regarding her eviction from her residence, and the child was in the care of an unrelated person, who was asleep. There was also a lack of adequate food and clothing. The child was adjudicated a CHINS in April 2009. As part of the CHINS dispositional order, Mother was required to participate in parenting classes, attend visits with the child, and find a stable job and residence. Mother never completed the parenting classes. Over the next two years, Mother lived in eight different places, with friends, family, and boyfriends. The Court Appointed Special Advocate for the child often had trouble locating Mother because of these frequent changes of residence. Mother's work history over the next two years consisted of one part time job, one seasonal job, and one full time job. Mother left all of these jobs after a relatively short period of time. In August 2009, the child was placed with Mother where she was living at a group home. However, Mother was asked to leave the home in November 2009 for violating the home's rules about having boyfriends spend the night and for possession of alcohol. When Mother lived in Louisville briefly while working a job, DCS offered to help her with an Interstate Compact for Placement of Children to have the child live with her, but Mother declined this aid. In January 2011, the trial court terminated Father's rights, but Mother indicated she was not willing to consent to termination of her parental rights. After this hearing, DCS agreed to reinstate services for Mother; however, Mother cancelled her first scheduled meeting and did not show up at the rescheduled meeting. In March 2011, DCS filed an amended petition to terminate Mother's rights, and a hearing was held in July 2011. Evidence was presented that the child was doing well in his foster placement, that the foster family wished to adopt him, that Mother was

unemployed, that she was moving into a new apartment the next week with help from her father and boyfriend. The trial court terminated Mother's parental rights to the child in September 2011. On appeal, Mother challenged only the finding that the conditions that led to the child's removal and placement outside the home would not be remedied. Mother did not challenge that an insufficient time had passed, or that termination was not in the child's best interests.

**The Court held that if a trial court takes judicial notice of records of another court proceeding in deciding a case, there must be an effort made to include the other records in the record of the proceeding currently in front of the trial court; the Court also determined that if a party to an appeal wishes to use these "other" records in making an argument before the appellate court, it must include those parts in an appendix submitted to the appellate court, as determined by Indiana Appellate Rule 50.** *Id.* at 796-797. The Court noted at the outset of its opinion that there was an evidentiary issue that could have impacted their review of the case. *Id.* at 795. At the beginning of the termination trial, DCS asked the trial court to take judicial notice of the underlying CHINS file, per Indiana Evidence Rule 201(b), and the trial court agreed to do so. *Id.* at 795-796. In its appellate brief, DCS related facts that were based on documents in the CHINS action. *Id.* at 796. However, the Court noted that none of these facts ostensibly relied on by the trial court or referred to by DCS in its appellate brief were actually supported by any evidence introduced at the termination of parental rights hearing, because the underlying CHINS record that the trial court took judicial notice of was not made part of the record upon appeal. *Id.* The Court determined that termination of parental rights cases are similar in nature to post-conviction relief cases in that they both must refer to and heavily rely on records in different but related proceedings. *Id.* In *Graham v. State*, 941 N.E.2d 1091, 1097 (Ind. Ct. App. 2011), *aff'd on reh'g*, 947 N.E.2d 962 (Ind. Ct. App. 2011), a similar problem occurred that occurred in the present case. The post-conviction relief court indicated it was going to take judicial notice of the underlying criminal trial, and it did in fact rely on that record; however, the original trial record was not made a part of the post-conviction relief record on appeal. *D.K.* at 796 (citing *Graham* 941 N.E.2d at 1097). In its original opinion, the Court stated, "[R]egardless of the rules regarding judicial notice, any material relied upon by a trial court in deciding a case should be made a part of the record for appeal purposes." *D.K.* at 796 (citing *Graham* at 941 N.E.2d at 1097 n. 2). On rehearing the *Graham* Court further explained that "if a PCR court purports to take judicial notice of other court records and relies on those records in ruling on a PCR petition, but those records are not made part of the PCR record, it places a substantial burden upon this court on appeal to either track down those records and have them transmitted to this court, or to attempt to decide the case without benefit of those records." *D.K.* at 796 (citing *Graham* 947 N.E.2d at 964-965). Despite the fact it lacked the entire trial court record, the *D.K.* Court felt it could adequately review the arguments in the present case. *D.K.* at 797.

**The Court held that there was clear and convincing evidence that the conditions that led to the child's removal and continued placement outside Mother's care would not be remedied, as over a two year period, Mother never completed any of the recommendations or requirements set forth in the CHINS dispositional order.** *Id.* at 798 When a trial court is deciding whether there is a reasonable probability that the conditions leading to a child's removal will not be remedied, it must judge the parent's fitness to care for the child at the time of termination hearing. *Id.* The trial court must also take into consideration evidence of changed

circumstances. Id. The trial court may consider not only the conditions that led to the child's removal, but also any conditions that resulted in the child's continued placement away from a parent. Id. The trial court may also consider a parent's habits of conduct, as well as prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and instability. Id. Lastly, the trial court can consider any services that DCS offered, and the parent's response to those services. Id. The Court noted that: (1) Mother never completed a parenting class, despite many opportunities. id. at 798-799. (2) Mother failed to maintain a stable residence, and lived in no fewer than eight places over two years, and Mother even testified that she didn't "stay in one place." id. at 798, 799. (3) Mother wasted her opportunity to be reunited with the child in the group home, and instead, chose to violate the group home's rules, resulting in her expulsion from the home. id. (4) Mother continued to display a lack of interest in the child by declining DCS's interstate assistance in getting the child to live with Mother while she was in Louisville. id. at 798. The Court said that Mother's evidence that she had obtained a new apartment and put a down payment on the rent was not, by itself, sufficient evidence to reverse the trial court's judgment. Id. at 799. Since a parent's habitual conduct must be considered in determining whether to terminate parental rights, a last minute change in conditions does not necessarily trump evidence of years of a pattern of behavior. Id. The Court noted that Mother was highly unstable for two years, and this was her habitual pattern; there was no guarantee that her last minute improvement would last any longer than any of her previous living situations, especially given her current unemployment. Id.