

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

8/20/15

In ***In Re K.E.***, 39 N.E.3d 641 (Ind. 2015), the Supreme Court reversed the trial court's order terminating Father's parental rights to his child, K.E. *Id.* at 652. The Court clarified that its holding did not impact K.E.'s CHINS case, and that the orders entered in the underlying CHINS case remained in effect. *Id.* Father, Mother (who was pregnant at the time with K.E.), and K.E.'s older sibling, J.A.E. (J.A.E.) had been found in a home where a methamphetamine lab was discovered. The trial court terminated Mother's and Father's parental rights to J.A.E. Father appealed the termination of his rights to J.A.E., but the Court of Appeals, in a memorandum decision, affirmed the trial court's termination of Father's parental rights to J.A.E. The termination of Father's parental rights to K.E. was the issue in the instant case.

K.E. was born on July 3, 2012, while Father was incarcerated, charged with multiple drug-related criminal offenses. Shortly after K.E.'s birth, Father was convicted and ordered to serve a ten year sentence for dealing in methamphetamine, neglect of a dependent, and maintaining a common nuisance. After Father's convictions, Mother pled guilty to the same offenses, but her entire sentence was suspended to probation. Mother's non-compliance led to multiple petitions to revoke her probation and stints in jail. In November 2012, while Mother was released on conditional bond and awaiting sentencing, four-month-old K.E. was left unattended at an adult party. DCS took K.E. and J.A.E. into custody and placed them in the custody of their paternal Aunt (Aunt). On April 1, 2013, K.E. was adjudicated a CHINS. Father was incarcerated and remained incarcerated as of this Supreme Court opinion. Aunt regularly took K.E. and J.A.E. to visit Father in prison for two to three hours at a time. Father made nightly telephone calls to Aunt so he could talk to K.E. and J.A.E. Father completed twelve programs while incarcerated that related to self-improvement, parenting, and substance abuse. The majority of these programs were completed voluntarily and did not result in sentence reductions. These programs included: (1) the Spiritual Literacy Program: Reading the Sacred in Everyday Life; (2) Community Services (completing over 320 hours); (3) Prevention and Relationship Enhancement Program; (4) Developing a Winning Attitude; (5) Please Understand Me; (6) Financial Planning; (7) Safe People; (8) The Seven Habits of Highly Effective People; (9) Commitment to Change; (10) Responsible Parenting; (11) PLUS Core Values; (12) Houses of Healing. Father also began attending Alcoholics Anonymous and Narcotics Anonymous. Mother continually violated the terms of her conditional bond and probation, did not comply with services offered by DCS, and repeatedly cancelled or failed to attend the scheduled visitation with K.E.

On February 24, 2014, DCS filed a petition to terminate Mother's and Father's parental rights to K.E. A hearing was held in which Father was present by telephone and represented by counsel. At the hearing, the court appointed special advocate and the DCS case manager testified that K.E. should remain in Aunt's care. The case manager believed that termination of both parents' rights was warranted to establish permanency for K.E. The court appointed special advocate felt that a temporary delay in terminating Father's parental rights was merited, conditioned upon Father being approved for a sentence modification. The court appointed special advocate recommended termination of Father's rights if he would not be released until September of 2016. Father was not approved for a sentence modification, and his release date remained September, 2016. Father's current earliest possible release date is March 2016. On June 16, 2014, the trial court entered findings of fact and conclusions of law terminating Father's and Mother's parental rights to K.E. Among the trial court's conclusions were (1) there was a reasonable probability that the conditions that resulted in K.E.'s removal or placement outside of the home would not be remedied; and (2) there was a reasonable probability that the continuation of a parent-child relationship between K.E. and Mother or Father posed a threat to the child's well-being.

Father appealed, but the Court of Appeals affirmed the trial court's termination order in a memorandum decision. The Supreme Court granted transfer, and reversed the trial court's order terminating Father's parental rights, but summarily affirmed the Court of Appeals opinion on the termination of Mother's parental rights. Id. at 645-46.

Given the substantial efforts that Father was making to improve his life by learning to become a better parent, establishing a relationship with K.E., and attending substance abuse classes, the Supreme Court opined that DCS did not prove by clear and convincing evidence that Father could not remedy the conditions for K.E.'s removal. Id. at 649. Citing Bester v. Lake Cnty. Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005), the Supreme Court noted that the relationship between a parent and child is one of the most valued within our culture, but parental rights are not absolute, and the child's best interests must prevail. K.E. at 646. Quoting Rowlett v. Vanderburg Cnty. Office of Family & Children, 841 N.E.2d 615, 623 (Ind. Ct. App. 2006), the Court observed that termination of parental rights is an "extreme measure" and should only be used as a "last resort when all other reasonable efforts to protect the integrity of the national relationship between parent and child have failed." K.E. at 646. The Court noted that IC 31-35-2-4(b)(2)(B) requires DCS to prove by clear and convincing evidence that one of the following is true: (i) there is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or (ii) there is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child. Id. at 646.

Citing In Re E.M., 4 N.E.3d 636, 642-43 (Ind. 2014), the Court said that it first identifies the conditions that led to removal, and secondly determines whether there there is a reasonable probability that those conditions will not be remedied. K.E. at 647. The second step of the Court's analysis requires judgment of the parent's fitness at the time of the termination hearing, taking into consideration evidence of changed conditions. E.M. at 643. K.E. at 647. Quoting In Re E.M., 4 N.E.3d at 643, the Court stated that changed conditions are balanced against habitual patterns of conduct, which may include "criminal history, drug and alcohol abuse, history of

neglect, failure to provide support, and lack of adequate housing and employment”, to determine whether there is a substantial probability of future neglect. K.E. at 647.

The Court observed that the primary condition for K.E.’s removal as to Father was Father’s inability to provide care and supervision for the child due to his incarceration. Id. The trial court’s findings supporting its determination that Father would not remedy the conditions for removal included that Father: (1) had been unable to receive services from DCS due to his incarceration; (2) had a lengthy criminal history; (3) was currently incarcerated for his most recent offenses, was denied a sentence modification, and his current release date was not until September 19, 2016; (4) had no income, no employment, no place of residence suitable for caring for the child, and planned to live with paternal grandfather upon release; (5) had a history of drug and alcohol abuse. Id. The Court found no evidence in the record presented by DCS to contravene Father’s statements that he planned to live with the paternal grandfather and work with him through Vectren. Id. The Court found that Father’s prior unemployment was insufficient to show that he had no future plans for employment. Id. The Court concluded that the trial court’s findings relating to Father’s lack of future employment and having no suitable home for K.E. were clearly erroneous. Id. at 648. The Court found that the remaining factual findings were insufficient to establish by clear and convincing evidence that Father could not remedy the conditions for removal. Id.

The Court said that, although Father’s possible release from prison was still over two years away at the time of the termination hearing, that fact alone was insufficient to demonstrate that the conditions for removal would not be remedied. Id. at 648. The Court has not established a bright-line rule for when release must occur to maintain parental rights. Id. The Court said that the potential release date is only one consideration of many that may be relevant in a given case. Id. The Court does not seek to establish a higher burden upon incarcerated parents based on their possible release dates nor does the Court believe the burden of proof should be reduced mainly because a parent is incarcerated. Id. The Court concluded that, despite Father’s criminal and substance history, his recent improvements at the time of the termination hearing were not balanced against his habitual patterns of conduct. Id. at 649. The Court noted the following evidence in support of this conclusion: (1) Father made substantial efforts to better his life through completing twelve programs during his incarceration; (2) Father testified that he is prepared to be a good father, is done with drug abuse, and would like to receive additional services from DCS upon his release; (3) Father hopes to remain in the lives of K.E. and J.A.E. as much as possible even if Aunt adopts them; (4) Father visits with K.E. and J.A.E. every other week, the DCS case manager testified that he interacts well with K.E., Aunt testified that K.E. has bonded with Father and recognizes him, and Father calls Aunt’s house nightly to speak with K.E. and tell him goodnight; and (5) the court appointed special advocate testified that Father had made “great strides” since he was incarcerated. Id. at 648-49.

The Court was not persuaded that Father’s past criminal history and drug abuse provided clear and convincing evidence that Father currently posed a threat to K.E.’s well-being. Id. at 649. Based upon Father’s recent improvements and the healthy bond he had developed with K.E., the Court could not find sufficient evidence to support the trial court’s conclusion that, at the time of the termination hearing, Father posed a threat to the child’s well-being. Id. The Court acknowledged that DCS recommended termination solely on the grounds that K.E. deserved

permanency. Id. at 649-50. The Court considered the impact of delaying termination on K.E.'s well-being, and found it significant that Aunt, the court appointed special advocate, and the DCS case manager all acknowledged it was unlikely that the child would be harmed by delaying termination. Id. The Court noted evidence that: (1) if Father failed to comply with services and/or relapsed into a life of crime or drug use, K.E. would remain in the loving environment of Aunt's home; (2) Aunt expressed her willingness to adopt K.E. at any time even if the termination was delayed; (3) nothing in the record indicated that Father's plan of living with K.E.'s paternal grandfather would pose a threat to the child. Id. at 650-51. The Court stated that, because of the change in circumstances since the Court of Appeals affirmed the termination of Father's parental rights to J.A.E., the Supreme Court was not persuaded that the same outcome was warranted in K.E.'s case. Id. at 651-52.