

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

2/18/11

In ***In Re M.W.***, 943 N.E.2d 848 (Ind. Ct. App. 2011), the Court reversed the trial court's termination of Father's parental rights. The child was born in April 2006. Father and Mother were not married, but lived together until Father moved out in 2008. DCS became involved with the child and Mother in July 2008 because Mother had been using morphine and the parties entered into an informal adjustment. Mother was on probation for a theft conviction, and in September 2008, Mother was arrested for a probation violation due to drug use. DCS then removed the child from Mother and placed the child in foster care. At the time of the child's removal, Father was traveling outside of the state due to his employment. DCS filed a petition alleging that the child was a CHINS, and Mother agreed that the child was a CHINS. Shortly thereafter, Father was incarcerated on charges of intimidation and false informing for actions he committed prior to the start of the CHINS case. In October 2008, Father was found guilty of Class D felony intimidation and Class B misdemeanor false informing and was sentenced to 365 days in jail with 275 days suspended and 245 days on probation. In December 2008, the trial court in the CHINS case ordered Father to: cooperate with DCS and service providers and follow all recommendations; participate in home based services; complete a psychological evaluation and follow all recommendations; participate in visitation with the child; reimburse DCS for the cost of services; resolve all pending criminal matters; submit to random drug screens; obtain a drug and alcohol assessment and follow all recommendations; participate in a domestic violence class; and establish custody in a court proceeding.

In February 2009, the DCS case manager advised Mother that a petition to terminate her parental rights "could be filed [after] fifteen months if she failed to follow through with the services recommended." In March or April 2009, DCS internally decided to move toward termination of both parents' rights. In late April 2009, DCS filed a permanency plan listing reunification of the child with parents, and in early May 2009 the trial court approved this permanency plan.

On May 18, 2009, DCS filed a petition to terminate Mother's and Father's parental rights. DCS also filed a contempt petition against Mother and Father in May 2009. Regarding Father, the DCS case manager testified that Father had failed to establish court-ordered custody of the child, failed to provide documentation of his mental health evaluation, and failed to show up for

random drug tests. The trial court found Father in contempt and ordered him to strictly comply with court orders.

Father was incarcerated from May until early August 2009, after he was sentenced to serve 180 days for a probation violation. Father contacted DCS immediately upon his release and requested to see the child, but DCS denied his request. At an August 6, 2009, hearing, DCS requested permission to discontinue services, and the trial court granted that request. In September 2009, the trial court held a hearing on DCS's petition to terminate parental rights. Mother and Father appeared at the hearing. At the end of the first day of hearing, the trial court informed DCS that it had "a really serious problem with [DCS] telling these [parents] on a day certain in April that their plan is to reunify them and then without any justifiable reason filing a termination" petition. The trial court noted that, as of that time, DCS had not met its burden of showing by clear and convincing evidence that the parents' rights should be terminated. On October 1, 2009, the parties filed an amendment to the dispositional/parental participation plan (Amended Plan) in which DCS agreed to continue the present termination case with the parents being given one last chance to strictly comply with the orders. The Amended Plan provided that, if the parents failed to strictly comply, DCS would amend its termination petition to include noncompliance and proceed with the involuntary termination. At the time of the Amended Plan, Father was expecting to be sentenced to home detention in his pending criminal case for Class D felony fraud and Class D felony theft, which related to acts committed prior to the start of the CHINS case. In November 2009, Father admitted himself to the hospital for treatment of depression and suicidal thoughts. In January 2010, Father turned himself in on the fraud and theft convictions and was sentenced to one year in the Department of Correction. Father was scheduled to be released from jail on July 8, 2010, and to be on parole until December 2010.

On April 29, 2010, the trial court held another hearing on DCS's petition to terminate parental rights. The DCS case manager testified that the child was attached and bonded with Father, and Father was appropriate during visitations. Father had completed anger management classes, and been evaluated for domestic violence counseling and was not referred to counseling as a result of the evaluation. Father had submitted to random drug screens and never had a positive drug screen result. Father had obtained a drug and alcohol assessment and completed a psychological evaluation and followed recommendations from both. Father was employed for most of the pendency of the CHINS action, but apparently lost his job due to incarceration. When not incarcerated, Father actively sought employment. Before his most recent incarceration, Father was accepted as a student at Ivy Tech. Father visited the child, but missed some visits. The child's therapist reported that the child expressed positive feedback about visits with Father. Father had resolved all pending criminal matters except for completing his sentence for the fraud and theft convictions. Father had completed a paternity affidavit when the child was born, and had recently attempted to file an action to establish paternity and custody of the child. Father completed all requirements of the Amended Plan except that he failed to reimburse DCS for costs, failed to attend all visits, and failed to complete home based counseling. According to the case manager, if Father's parental rights were not terminated, Father still needed to obtain secure

housing and steady employment, and participate in home based counseling. After the termination hearing, the trial court entered findings of fact and conclusions thereon and terminated Father's and Mother's parental rights. Both Father and Mother appealed. Mother's appeal is addressed in a separate opinion at 942 N.E.2d 154 (Ind. Ct. App. 2011).

The Court concluded that, given Father's efforts to comply with the Amended Plan and his release from incarceration soon after the hearing date, the trial court's findings are not supported by clear and convincing evidence. *Id.* at 856. The Court found that the circumstances here are analogous to those in *In Re J.M.*, 908 N.E.2d 191 (Ind. 2009). *M.W.* at 854. The Court noted that: (1) in *J.M.*, parents were incarcerated on methamphetamine-related charges in 2004 and their child was found to be a CHINS; (2) the trial court denied the termination petition after a hearing was held in early 2008; (3) the Guardian ad Litem appealed the trial court's denial of the termination petition; (4) the Indiana Supreme Court affirmed the trial court's denial of the termination petition; (5) in particular, the Supreme Court noted that the father anticipated a release from prison in mid-2008 and that the mother anticipated a release from prison in mid-2009; (6) the Supreme Court noted that parents' "ability to establish a stable and appropriate life upon release can be observed and documented within a relatively quick period of time." *J.M.* at 196. *M.W.* at 855. The Court noted that in this case the trial court focused on Father's incarceration, lack of visitation (some of which resulted from Father's incarceration), lack of employment, and lack of appropriate residence as a basis for termination. *M.W.* at 855. The Court pointed out that one of the requirements of the Amended Plan was for Father to resolve his pending criminal matters, but Father's compliance resulted in short-term incarceration for which he has been penalized. *Id.* The Court opined that, because Father was scheduled to be released so soon after the hearing date, as in *J.M.*, Father's "ability to establish a stable and appropriate life upon release can be observed and determined within a relatively quick period of time." *J.M.* at 196. *M.W.* at 855. The Court acknowledged that Father may be unable to quickly establish a stable life, but observed that Father had made many strides toward completing the requirements of the Amended Plan. *M.W.* at 855. The Court, describing involuntary termination of parental rights as the most extreme sanction a court can impose on a parent, quoted *In Re I.A.*, 934 N.E.2d 1127, 1136 (Ind. 2010), which states that "termination is intended as a last resort, available only when all other reasonable efforts have failed." *M.W.* at 855. The Court is not convinced that all other reasonable efforts have been employed in this case to reunite Father and the child. *Id.* at 855-56.