

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

10/8/13

In ***In Re N.O.***, 996 N.E. 2d 385 (Ind. Ct. App. 2013), the Court reversed the trial court's order which terminated Parents' rights to four of their children, who were ages six, seven, eight, and twelve, years of age at the time of the order. DCS had removed the children and two other siblings from Parents' home in December 2009 because of unsafe home conditions, medical issues, and lack of supervision. The children were placed in foster care. After a fact-finding hearing, the children were adjudicated CHINS on April 13, 2010. The trial court held a dispositional hearing on May 5, 2010, and the children remained in foster care. The chronological case summaries indicate that the dispositional decrees were to be furnished to the trial court by DCS, but the decrees were not filed until February 14, 2011, and were not entered in the court's order book until March 16, 2011. Three months prior to the entry of the dispositional decrees, on December 14, 2010, DCS filed petitions for the involuntary termination of Parents' parental rights to the children, and a hearing on the petitions was held over the course of several days between January and April 2011. On July 13, 2011, the trial court issued an order granting the termination petitions. Parents appealed, and the Court of Appeals reversed the first termination orders because the children had not been removed from the Parents for at least six months under a dispositional decree when the termination petitions were filed. In its memorandum opinion, the Court noted that its conclusion should in no way be construed as a comment upon the sufficiency of the evidence relating to the remaining elements of the termination petition.

On May 16 and 17, 2012, DCS filed its second petitions for termination of Parents' rights. The court appointed counsel for Parents, and held a second termination hearing on October 1, 2012. At the outset of the hearing the court admitted, over the objection of the Parents, the transcript and exhibits from the first termination hearing. The court then admitted another twenty-two exhibits into the record without objection, including documents related to the CHINS proceedings, certified pleadings, certified records from Southwest Behavioral Healthcare for the children, certified records from Easter Seals Rehabilitation Center, and certified dockets of Parents' 2010 criminal convictions for neglect of a dependent as class D felonies. The children's court appointed special advocate, who had been acting in that role for the past three months, testified that the children: (1) were doing very well in their foster placement; (2) have had "ups and downs"; (3) "have slight learning disabilities"; (4) do not want to go home to parents and all want to stay in their current foster home; (5) have not had contact with Parents for quite a long time; and (6) have not had contact with their older sixteen-year-old sister, who is on an extended trial home visit with Parents since February or April 2011. The court appointed special advocate also testified that the foster parents are doing an amazing job keeping up with all the therapy

The Derelle Watson-Duvall Children's Law Center of Indiana - A Program of Kids' Voice of Indiana
9150 Harrison Park Court, Suite C • Indianapolis, IN 46216 • Ph: (317) 558-2870 • Fax (317) 558-2945
Web Site: <http://www.kidsvoicein.org> • Email: info@kidsvoicein.org

appointments, and recommended that the children stay in their current foster placement and be freed for adoption. The family case manager, who had been assigned to the case since February of 2012, testified that: (1) the four children had made improvements in school since living with foster parents; (2) the approval of therapists would be needed before sibling visitation between the children and their sixteen-year-old sister could occur because the children should be able to adjust to their situations without the influence of visiting their sister; (3) the sixteen-year-old sister was doing well enough to stay with Parents, did not have behavior issues at school, was “mature for her age” and was “able to take care of herself”; (4) the sixteen-year-old sister had missed some of her appointments and was behind on her dental appointment and an appointment with a nurse practitioner. Mother’s testimony included, inter alia, that: (1) she, Father, and their sixteen-year-old daughter live in a two bedroom apartment, which they routinely clean; (2) she and Father have discussed moving into a house if the four children were returned to them and were advised by their housing manager that it would not be a problem; (3) she has not worked since 2005, noting several health problems, including fibromyalgia, asthma or COPD, anxiety, knee and back issues, and she plans to seek disability benefits; (4) her sixteen-year-old daughter had attended most of her appointments and three missing appointments were rescheduled and attended; (5) they receive \$1,019 per month from Father’s Social Security Disability and an additional \$88 per month for their sixteen-year-old daughter and are current on all of their bills; (6) she and Father were able to pay \$300 for their sixteen-year-old daughter to participate in band and drama at school; (7) she and Father do not own a vehicle and would need to take the bus to the children’s appointments. Father testified, inter alia, that: (1) he has a degenerative back disease for which he receives disability payments through SSD; (2) he has been receiving therapy and shots and the shots have really helped a lot; (3) their furniture was donated by their church but they also have items in storage, including tables and chairs; (4) their sixteen-year-old daughter has some donated clothing and he and Mother purchased her an outfit for her birthday; (5) if the children were returned to Parents, his monthly SSD payment would increase to be able to care for them; (6) his mother helps them buy groceries and would help with making appointments for the children; (7) his brother and the pastor would help out with looking at prospective houses. On January 8, 2013, the trial court issued its Findings of Fact and Conclusions of Law terminating the Parent-Child Relationship (for the second time), and Parents appealed. The Court revised and restated Parents’ issue as whether the evidence was sufficient to support the termination judgment.

The Court concluded that the trial court committed clear error in terminating Parents’ rights, because DCS relied primarily on the initial termination proceedings which occurred eighteen months before the second termination hearing, Parents presented evidence that their situation had changed significantly, and DCS did not investigate Parents’ current situation. *Id.* at 395-96. The Court noted the following law on termination cases: (1) involuntary termination is the most extreme measure that a court can impose and is designated only as a last resort when all other reasonable efforts have failed; (2) protected parental rights are not absolute and must be subordinated to the children’s interests; (3) the trial court need not wait until a child is irreversibly harmed before terminating the parent-child relationship; (4) in making a determination to terminate parental rights, the court must judge a parent’s fitness to care for the child at the time of the termination hearing, taking into consideration evidence of changed

conditions; (5) the statute does not simply focus on the initial basis for the child's removal, but also those bases resulting in the continued placement outside the home (multiple citations omitted). Id. at 391.

The Court observed that the trial court's findings focused primarily on the evidence presented at the first termination hearing and some of the specific findings contain facts which were *directly contradicted by Parents and not refuted by DCS* at the October 1, 2012 termination hearing (emphasis in opinion). Id. at 392-93. The Court opined that it was error for the trial court to issue its order which did not adequately consider the evidence presented by Parents of their current conditions including Parents' new income and their ability to keep current on their bills and maintain a clean residence. Id. at 395. The Court said that the trial court also failed to consider the lack of evidence presented by DCS to contradict Parents' evidence of their current conditions despite DCS's burden to prove its case by a heightened "clear and convincing" standard. Id.

The Court observed that the statutory requirements that children be removed from their parents for a period of six months under a dispositional decree before a termination petition may be filed (IC 31-35-2-4(b)(2)(A)) are in place for a reason, namely to insure that parents have an adequate opportunity to make the corrections necessary in order to keep their family unit intact. Id. The Court opined that it would be "bad policy" to condone what occurred at the second termination hearing, and it was error for the trial court to base its termination order primarily upon evidence presented at the first termination hearing. Id. The Court found that the lack of a dispositional decree to provide direction to Parents prior to the filing of the first termination petition "taints" the first termination proceedings held between January and April of 2011. Id. at 395 n.8. The Court did not hold that a record of the first termination proceedings was inadmissible at the second termination hearing, but believed that the extent to which the court and DCS relied on the record of the first termination proceeding was "problematic at best." Id. The Court observed that Parents' current living situation is such that it has been deemed adequate for their sixteen-year-old daughter to reside with them. Id. at 393. The Court's review of the record revealed that the crux of DCS's presentation of evidence at the termination hearing was that the four children did not want to leave their foster parents and be returned to Parents' care. Id. at 395. The Court, quoting In Re D.B., 942 N.E. 2d 867, 875 (Ind. Ct. App. 2011), said that, although DCS demonstrated that the children are thriving in a loving pre-adoptive foster home, "a parent's constitutional right to raise his or her own child may not be terminated solely because there is a better home available for the child." N.Q. at 395. The Court remanded for a hearing which fully considers Parents' current circumstances as well as their habitual patterns of conduct to the extent that such patterns exist. Id. at 396.