

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

12/21/16

In **In Re O.G.**, 65 N.E.3d 1080 (Ind. Ct. App. 2016), the Court reversed and remanded the juvenile court's order terminating the parent-child relationship between Parents and their child. *Id.* at 1096. On May 28, 2011, DCS removed the child after receiving a report that the child had been left with a family friend who could not contact Mother. On June 1, 2011, DCS filed a CHINS petition for the child. On June 21, 2011, the juvenile court adjudicated the child to be a CHINS after Mother admitted: (1) she and Father had a history of domestic violence; (2) Father had recently punched Mother in the face and choked her, causing her to lose consciousness; (3) she tested positive for recent marijuana use; and (4) Father had a pending charge for possession of cocaine. The juvenile court entered a dispositional decree, which included ordering Parents to: (1) refrain from the use of illegal drugs or alcohol; (2) complete substance abuse, parenting, and domestic violence assessments; (3) submit to random drug screens; and (4) refrain from acts of domestic violence. In August 2012, the child was returned to Mother's care and custody on a trial basis. After DCS learned that Father had been in the home, DCS removed the child but the juvenile court returned the child to Mother's care. In February 2013, the court entered an order preventing Father from having contact with the child. The child was removed from Mother's care for a second time on May 31, 2013, because Father went to Mother's home, kicked down her door, and attacked her. Mother called the police, as the safety plan required her to do, and Father was arrested. The child was placed in foster care.

Mother consistently visited the child, and there were no indications at the termination trial that any provider who supervised Mother's visits had any concerns. Mother last visited the child on March 29, 2015, but her visits were suspended on March 31, 2015. At the time of the termination trial in January 2016, Mother had not seen the child for nearly a year. Mother also completed a domestic violence assessment and a 26 week domestic violence program. Mother testified that her romantic relationship with Father ended in 2012. In June 2013, DCS referred Mother for a new domestic violence assessment. Mother voluntarily participated in the assessment, and the professional who evaluated her testified there was no evidence of a current violent relationship. In August 2012, Mother participated in a mental health evaluation, was diagnosed with bipolar disorder, and a medication evaluation and continued homebased therapy were recommended. In June 2013, Mother participated in a psychiatric evaluation, was diagnosed with depression and anxiety, and mental health medication was prescribed for her. Mother did not return for her medication checkup. In 2014, after all DCS services had ceased, Mother went to a mental health provider at her own cost, and sought out a psychiatrist on her own for different mental health medication. Mother also participated with homebased therapy. She worked most successfully with therapist Shimura Atkins from March 2014 until February 2015. Mother completed a substance abuse evaluation, and no substance abuse treatment was recommended. Mother also

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participated in random drug screens, and no evidence was presented at the termination hearing that Mother's screens showed the presence of drugs. Mother was incarcerated for about two weeks in June 2014, one month in April 2015, and one month in October 2015. By April 2015, all of Mother's service referrals had been closed. She asked for a new referral for all services, but DCS refused. On May 14, 2015, DCS filed a petition to terminate the parent-child relationship between Parents and the child. In July 2015 and October 2015, Mother asked the juvenile court to order that all services and visits be reinstated, but the court refused to do so. At the time of the termination hearing, which was held for three days in January and February 2016, Mother was employed in a stable job and had just received a promotion and a raise. For sixteen months, she had been living with her mother, who had been an approved DCS placement during the CHINS case.

At the termination hearing, Father testified to the following periods of incarceration hearing: (1) he was incarcerated from the beginning of the CHINS case in June 2011 until the end of 2011; (2) he was incarcerated again at the end of 2012 and was released in July 2013 with GPS monitoring; (3) he cut off the GPS monitoring device and absconded from law enforcement for the next six to seven months; (4) in December 2013, he began a work release program; (5) he was incarcerated in a Department of Correction facility from March 2014 until June 29, 2015; (6) he was arrested in August 2015 for a parole violation and was incarcerated until January 2016. Father participated with homebased therapy, parenting time, and random drug screens, and completed a domestic violence assessment in 2012. All of his services, including visits with the child, were suspended following his 2012 incarceration. During one of his incarcerations, Father completed an anger management program and a parenting class. The DCS case manager never contacted Father, either when he was incarcerated or when he was released. In November 2012, the juvenile court ordered that new service referrals be made for Father, but the case manager did not comply. After his release from incarceration, Father requested that the juvenile court order services and parenting time for him to be reinstated, but the court refused to do so.

The termination hearing was held during three days in January and February 2016. On April 28, 2016, the juvenile court entered an order terminating Parents' rights to their child. Parents appealed.

Finding that the DCS exhibits of Father's Department of Correction (DOC) records and Putnamville Correctional Facility records did not qualify for admission as business records pursuant to Indiana Rules of Evidence 803(6) or 902(11), the Court held the juvenile court erred by admitting the exhibits into evidence. *Id.* at 1087. Father contended that the court should not have admitted the DCS exhibit of his DOC records or the DCS exhibit of his Putnamville Correctional Facility records into evidence. Although DCS argued that Father waived his objection because it was based on hearsay and relevance and did not specifically identify the business records exception to the hearsay rule, the Court found the general hearsay objection was sufficient to preserve Father's argument for appeal. *Id.* Ward v. State, 50 N.E.3d 752, 756 (Ind. 2016). O.G. at 1087. The Court looked to Ind. Evid. R. 803(6), which states that business records are admissible if: (1) the record is made at or near the time by, or from information transmitted by, someone with knowledge; (2) the record was kept in the course of a

regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (3) making the record was a regular practice of that activity; (4) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(9) or (10) or with a statute permitting certification; and (5) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness. Id. The Court also reviewed Rule 902(11), which provides that [u]nless the source of information or the circumstances of preparation indicate a lack of trustworthiness, the original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification under oath of the custodian or another qualified person, is self-authenticating and requires no extrinsic evidence of authenticity to be admissible. Id. The Court noted that for both exhibits, DCS did not offer the testimony of a custodian or other qualified witness; therefore, to be admissible, the records must have been accompanied by a certification which complied with Rule 902. Id. The Court observed that for both exhibits, the affiant of certification was the keeper of DOC records, but the affidavits did not certify that the records were made from information by someone with knowledge, that the records were kept in the course of regular activity of the DOC, or that making the records was a regular practice of that activity. Id. The Court also noted: (1) the affidavit attached to the records of the Putnamville Correctional Facility stated that sixty-four pages were attached, but the affidavit contained only fifty pages; and (2) the records contained many documents that were not readily identifiable as documents prepared by someone at Putnamville with personal knowledge, including a presentence investigation prepared by a probation officer and abstracts of judgment prepared by the trial court. Id.

By agreeing to the admission of evidence of his felonious criminal history, Father invited any alleged error, so the Court declined to address Father’s hearsay objection to the admission of the case manager’s testimony on Father’s criminal history. Id. at 1088. The Court noted the trial court found Father had “opened the door” to his criminal history by asking the case manager about his CPS history. Id. at 1088. The case manager testified that there was a “history of drug offenses and violent offenses,” but Father declined to object, thereby inviting any alleged error. Id.

The Court opined that the juvenile court erred by permitting inadmissible hearsay testimony from the guardian ad litem on the child’s wishes. Id. at 1088. The Court said DCS did not direct the Court’s attention to any authority in rule, statute, or case law that creates an exception to the hearsay rule for guardians ad litem, and the Court could find none. Id.

Finding that Mother showed improvements and progress over the course of the CHINS case, the Court could not say the evidence established that the conditions leading to the child’s removal were unlikely to be remedied. Id. at 1093. The Court identified two general reasons why the child was initially removed from Mother’s care and custody: (1) ongoing domestic violence between Mother and Father; and (2) Mother’s drug use. Id. at 1090. The Court also identified two reasons for the child’s continued placement outside of Mother’s care: (1) concerns regarding Mother’s mental health; and (2) possibly, concerns regarding the stability of Mother’s living situation and employment. Id. On the issue of domestic violence, the Court

noted the following evidence: (1) Mother struggled with breaking free of the domestic violence at the outset of the CHINS case, but completed a twenty-six week domestic violence program and ended her relationship with Father; (2) Mother made significant progress in therapy on her ability to acknowledge the violence in her relationship with Father and its effects on their child; (3) in the *two and one-half years* between the spring of 2013 and the termination trial in January 2016, there was not a scintilla of evidence suggesting that Parents were in a relationship of any kind (emphasis in opinion). Id. at 1091-92. The Court opined that the evidence did not clearly and convincingly support the juvenile court's conclusion that domestic violence, the reason for the child's initial and continued removal from Mother, would not be remedied. Id. at 1092. The Court found it "extraordinarily troubling" to say that a parent who is a victim of domestic violence, and has taken steps to end that relationship, deserves to have her parental rights terminated because the child's other parent assaulted her. Id. at 1091. On the issue of Mother's admitted marijuana use, the second reason for the child's initial removal from Mother, the Court noted evidence that: (1) Mother completed a substance abuse assessment, which recommended no further substance abuse services; and (2) Mother completed a number of random drug screens, and there was no evidence that Mother provided any problematic screens. Id. at 1092. The Court found that no evidence supported a conclusion that Mother's substance abuse would not be remedied. Id.

On the subject of Mother's mental health, which "likely" contributed to the child's continued removal from Mother's care and custody, the Court noted evidence from Mother and her homebased therapist that as of the end of 2014, Mother was complying with mental health recommendations, taking prescribed medication, and showing improvement as a result. Id. The Court also noted that, after her services were suspended by the juvenile court and her request for reinstatement of services was denied, Mother went to a mental health provider on her own, participated in an assessment, and complied with the recommendations, including an anger management class. Id. The Court pointed to the testimony of Mother's homebased therapist that Mother sought out a psychiatrist, her medication was changed, and, as a result, Mother began to better manage her emotions. Id. The Court said the evidence revealed that, in the year leading up to the termination trial, Mother had made significant progress on her mental health, so the evidence was not clear and convincing evidence that Mother's mental health was unlikely to be remedied. Id. at 1093. On the subject of Mother's stability, the Court noted that: (1) Mother had been living with the child's maternal grandmother for the sixteen months leading up to the termination trial; (2) the grandmother had been approved as a placement for the child during the CHINS case, so the people who lived in the home and the home itself met with DCS approval; (3) at the time of the termination hearing, Mother had stable employment, and had recently received a promotion and a raise; (4) the case manager testified that Mother usually maintained employment throughout the CHINS case. Id. The Court noted evidence of Mother's "multiple, relatively brief periods of incarceration during the CHINS case", but observed that Mother had no pending criminal matters at the time of the termination hearing aside from a suspended driver's license, which she was working to have reinstated. Id. The Court found the evidence did not clearly and convincingly support a conclusion that Mother's stability issues were unlikely to be remedied. Id.

The Court did not find clear and convincing evidence that a continuation of the parent-child relationship posed a threat to the child’s well-being. Id. at 1094. The Court noted the following evidence: (1) the case manager testified DCS was not concerned about Mother’s parenting, Mother and the child had a “strong bond”, and Mother is a “loving Mother” to the child; (2) the homebased therapist testified that visits between Mother and the child went well, Mother met all of the child’s needs during the visits, and Mother and the child were bonded; and (3) the guardian ad litem testified that Mother and the child had a “strong relationship.” Id. The Court opined that, although the need for permanency and stability in a child’s life cannot be overstated, that need cannot trump a parent’s fundamental right to parent her child. Id.

The Court found the evidence did not support the juvenile court’s conclusion that Father was unwilling to be a parent to the child, or that termination was in the child’s best interests. Id. at 1096. The Court noted evidence that: (1) the case manager repeatedly failed to contact Father; (2) DCS changed its own internal case plan to reunification with Mother when Parents ended their relationship; (3) the case manager did not keep Father apprised of the CHINS case or notify him about team meetings; and (4) DCS and the juvenile court declined to offer new services to Father. Id. at 1095-96. The Court also noted that Father completed a parenting class while he was on work release, completed an anger management class while incarcerated, had obtained a job the day before the termination hearing, and was living with his grandfather. Id. at 1096. The Court said that, while Father’s own record was “far from sterling”, the evidence established that, when he was not incarcerated, Father made multiple attempts to contact the case manager and engage in services and participated in services available to him. Id. Quoting In Re R.S., 56 N.E.3d 625, 631 (Ind. 2016), the Court observed the Indiana Supreme Court recently reemphasized that “[t]ermination is a last resort, available only when all other reasonable efforts have failed.” O.G. at 1096. The Court opined that in this case, it could not be said that all other reasonable efforts had failed because DCS made an explicit internal decision that it would exercise no effort whatsoever to reunify Father with the child, and followed through with that plan. Id. The Court said that Father deserved a genuine chance to prove that he could parent his child and had a constitutional right to try. Id.