

Children's Law Center of Indiana



Termination of Parental Rights (TPR)

03/31/2008

In ***In Re S.L.H.S.***, 885 N.E.2d 603 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination of the parental rights of Father. In August 2005, the two-year-old child was removed from Mother's care at a time when Father was incarcerated at a work release center and had not had custody of the child for more than a year. The child was placed in foster care on November 1, 2005, where he remained until the termination hearing. Mother informed Elkhart County Department of Child Services (ECDCS) that she belonged to an Indian tribe and the Indiana Child Welfare Act (ICWA) applied. On October 5, 2005, Mother filed a petition for the return of the child claiming she and the child were members of the Northeastern Cherokee Band and that both parents were members of a Tribal Sovereign Nation. Father alleged he was a member of the Muscogee Creek Nation. ECDCS contacted several Indian tribes and the Bureau of Indian Affairs, but was unable to verify the child's, Mother's, or Father's membership in any Indian tribe. The trial court determined that ECDCS had not violated the ICWA. In December 2005, after substantiating a finding of neglect, ECDCS filed a petition alleging the child to be a CHINS. Following a December 15, 2005 hearing at which Mother and Father admitted the allegations of the petition, the trial court adjudicated the child to be a CHINS and entered a dispositional order requiring the parents to complete certain services to achieve reunification. On December 5, 2006, ECDCS filed a petition to terminate both parents' parental rights and notified various tribes and the Bureau of Indian Affairs of the termination proceedings. Testimony and other evidence at the termination hearing showed that, (1) prior to the August 30, 2005 neglect referral, Father had a prior substantiated case of molestation dating from 1992 for molesting his stepdaughter which resulted in a court order to leave the family home and complete treatment which he failed to complete; (2) Father had molested both his biological sister and his niece when she was under the age of ten; (3) Father had five other biological children whom he failed to visit regularly and regarding whom he failed to pay the ordered child support; (4) Father had supervised visitation with his two eldest children; and (5) Father, during a previous divorce case, had asked that his parental rights be terminated regarding two of his older children. On June 7, 2007, following the termination fact-finding hearing, which commenced May 18 and concluded June 4, the trial court entered a judgment terminating both parents' parental rights to the child. The Father appealed.

The trial court properly determined it had jurisdiction to hear the case where the Indian Child Welfare Act (ICWA) did not apply to the underlying proceeding to terminate Father's parental rights because Father had failed to show that the child was an Indian child pursuant to the ICWA. *Id.* at 614. On appeal, relying on the ICWA, 25 U.S.C. §§ 1901-1963 (1982), Father contended that the trial court lacked subject-matter jurisdiction to hear the termination case due to Father's alleged Native American heritage. The Court

observed that (1) the power of state courts to conduct termination proceedings involving children of Indian ancestry may be subject to significant limitations under the ICWA; (2) the party who seeks to invoke a provision of the ICWA has the burden to show that the act applies in the proceeding; (3) the applicability of the ICWA depends on whether the proceedings to be transferred involve an “Indian child” within the definition utilized in 25 U.S.C. § 1903(4) which is “any unmarried person who is under the age of eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;” and (4) in this case, despite Father’s “tremendous efforts through hours of hard work attempting to track down his Native American heritage[,]” and the extensive efforts of ECDCS to track down any possible tribal status for the child or either parent via multiple letters and telephone calls to various Indian organizations, no tribal status for the child or either of his parents had ever been identified. *Id.* at 612-13. In response to Father’s contention that he could have produced such proof if the trial court had not denied his request to open his adoption records to obtain medical information, the Court noted that this asserted denial had been in a different cause, and, by failing to timely appeal the court’s final judgment denying Father’s petition in that cause, Father had waived any allegation of error stemming from that final judgment. *Id.* at 613-14.

The trial court did not abuse its discretion regarding the evidentiary issues raised by Father regarding (1) the court’s sustaining ECDCS’ objection to Father’s testimony concerning a tribal membership identification card which had not been properly authenticated or offered into evidence; or (2) the court’s admission of two State exhibits containing evidence of Father’s past sexual misconduct, which evidence had a sufficient nexus to the underlying termination proceedings and which was relevant in determining the probability of future parenting problems. *Id.* at 615. Regarding the trial court’s refusal to admit Father’s evidence, the Court also noted ECDCS’ additional argument that “even if this card had gone into evidence, the card was from the E-Chota nation which is not a federally recognized Indian tribe, and the ICWA would not have applied to it.” *Id.* at 614. In discussing Father’s contention that the two State exhibits were erroneously admitted, the Court related Father’s argument that the exhibits “had no nexus with the termination proceeding and were likely to have had a prejudicial impact on the judgment.” *Id.* The Court also explained that (1) the two exhibits were a December 30, 1992 statement from Father’s niece to police saying that Father had molested her when she was about five or six years old, and a report filed December 29, 1992 by Father’s former stepdaughter, who was then ten years old, indicating that Father had repeatedly molested her; and (2) both girls had testified during the termination hearing regarding their alleged molestations by Father. The Court cited caselaw indicating that, (1) in addition to evaluating a parent’s fitness to parent at the time of the termination hearing, the trial court must also take into consideration evidence of the parent’s habitual patterns of conduct in determining whether there is a substantial probability of future neglect or deprivation of the child; and (2) evidence of a parent’s prior involvement with DCS, including the filing of previous CHINS petitions and previous termination proceedings, is admissible as proper character evidence and helpful in demonstrating negative habitual patterns of conduct to determine parental fitness and the best interests of the child. *Id.* at 615-16.

The termination of Father’s parental rights was supported by clear and convincing evidence despite Father’s contentions that the evidence was insufficient regarding the

trial court's findings that (1) continuation of the parent-child relationship posed a threat to the child's well-being; (2) termination was in the child's best interests; and (3) ECDCS had a suitable plan for the child's care and treatment. *Id.* at 617-19. The Court held that the evidence supported the trial court's finding that Father's history with his other children indicated a threat to the child's well-being. *Id.* at 616-17. In doing so the Court noted that (1) Father had a history of substantiated sexual abuse with his former step-daughter; (2) his niece testified that he had repeatedly molested her as a child; (3) the case manager testified regarding a substantiated case of medical neglect involving two of Father's children living in Florida; and (4) other evidence revealed that Father had serious psychological issues which, if left untreated, could interfere with his ability to provide a safe home environment for the child, including the testimony of a clinical psychologist who performed two psychological evaluations of Father as well as the case manager's testimony that he felt reunification posed a continuing threat to the child's safety and well being because of Father's "unaddressed sexual molestation issues and those unaddressed psychological issues" and, at the time of the termination hearing, Father had not been involved in counseling other than one or two sessions. The Court also alluded to Father's refusal to admit he had a problem and his failure to complete any of the court-ordered counseling. *Id.* at 617.

The Court also concluded that, based on the totality of the evidence, the trial court's finding that termination was in the child's best interests was supported by clear and convincing evidence. The Court observed that (1) in determining what is in the child's best interests, the trial court is required to look beyond the factors identified by DCS and look to the totality of the evidence and subordinate the interests of the parent to those of the child; (2) termination is proper where the child's emotional and physical development is threatened; and (3) the trial court need not wait until the child is irreversibly harmed such that his physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.* The Court noted that at the time of the termination hearing, (1) Father had failed to complete court-ordered counseling services and sex offender specific treatment, to exercise regular visitation with the child, and to pay court-ordered child support for the child as well as for his other children; (2) Father was unemployed and refused to admit he had any psychological or psychosexual problems; (3) the child had been removed from his parents' home and had been under the care and supervision of ECDCS for half his life; (4) the CASA testified that continuation of the parent-child relationship posed a threat to the child's well-being, that termination of Father's parental rights was in the child's best interest, and that the child needed permanency; and (5) the case manager testified in favor of termination. *Id.* at 618.

According to the Court, the evidence supports the trial court's finding that ECDCS had a satisfactory plan for the care and treatment of the child. The Court held that the plan need not be detailed, so long as it offers a general sense of the direction in which the child will be going after the parent-child relationship is terminated, and, here, ECDCS' plan that the child be adopted was satisfactory. The Court noted that, inasmuch as Father failed to show that the child was an "Indian child," contrary to Father's contention, the trial court was not bound by the ICWA in determining the proper placement of the child. *Id.*