

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

6/21/16

In ***N.C. v. Indiana Dept. of Child Services***, 56 N.E.3d 65 (Ind. Ct. App. 2016), the Court affirmed the trial court's order terminating Father's parental rights. *Id.* at 71. The child was born on February 17, 1999. On January 29, 2007, DCS filed a CHINS petition after the health department condemned Mother's apartment, where there was no food, trash was overflowing, and the child's clothes and body were unclean. The child was removed from the home and placed in foster care after Mother was admitted to a psychiatric facility for her suicidal thoughts. Father could not be located at the time the CHINS petition was filed. Father is deaf and English is not his first language. Father admitted the allegations in the CHINS petition on March 6, 2007, and agreed to participate in a parenting assessment, a psychological evaluation, and a drug and alcohol assessment. Father was incarcerated around the time of the dispositional hearing, but was released on June 3, 2007. Between June and September, 2007, the DCS case manager worked with Father to explain the purpose of the court ordered assessments and coordinated with Deaf Community Services to provide accommodations for him. On September 11, 2007, Father completed a psychological evaluation and was diagnosed with Depressive Disorder, Cognitive Disorder, and Intermittent Explosive Disorder. Based on these diagnoses, DCS recommended supervised visitation, evaluation by a psychiatrist for psychotropic medication, individual counseling, and that Father continue to follow the court's recommendations. Father did not participate in any counseling or any of the recommended services and did not complete the court ordered parenting or drug and alcohol assessments. The trial court found that Father partially completed the parenting assessment, but did not have the communication and cognitive skills to fully complete it.

The trial court ordered the permanency plan to be changed to adoption on June 4, 2008. In September 2008, Father signed a specific consent for the child to be adopted by his foster parents. After the foster parents reported some behavioral issues, the child was enrolled at Damar Services in a residential program in June 2010. The child is diagnosed with autism spectrum, attention deficit and hyperactivity disorders, and depression. The child's foster parents decided they no longer wanted to adopt him. Father contacted DCS and requested visitation with the child. The court ordered supervised visitation based on the recommendation of the child's therapist. Father participated in monthly supervised visits that generally went well. The child transitioned from Damar to a new foster home in July 2012. Father's visits became confusing to the child because Father made unrealistic promises. At a visit on July 1, 2013, Father expressed anger toward the child's foster mother and threatened that he was "coming to get her." After this

visit, the child indicated that he no longer wanted to visit with Father. Father did not schedule any more visits with the child and had not seen the child for two years prior to the termination hearing. Father also did not attend any CHINS review hearings between December 2008 and May 2015.

DCS filed a petition to terminate Father's parental rights on May 19, 2014. The trial court ordered Father to participate in a mental status examination at the request of DCS. Father did not show up for scheduled appointments so the examination did not take place. The trial court held an evidentiary hearing on the termination petition on September 23, 2015. The following evidence was presented: (1) the child, who was sixteen years old at the time of the hearing, indicated that he was doing well in his foster home, loved his foster mother, and wanted her to adopt him; (2) the child's therapist reported that the child has special needs, requires structure and stability, and his behavior has stabilized in his foster home placement; (3) the child's guardian ad litem agreed that the child needs stability, adoption is in his best interests, and the foster mother makes an active effort to meet the child's educational and emotional needs; (4) the guardian ad litem explained that Father had not completed services to effectively meet the child's needs. On September 29, 2015, the trial court entered an order terminating Father's parental rights. Father appealed.

Although Father argued that DCS's failure to accommodate his disability was a defense in the termination proceeding, the Court found the issue was waived. *Id.* at 71. Father argued that DCS was required to provide him accommodations under the Americans with Disabilities Act (ADA) because he is deaf and has cognitive and mental health problems. The Court found that the trial record was devoid of issues raised by Father on the failure of DCS to accommodate his disability. *Id.* at 68. The Court observed that: (1) a party may not raise an issue for the first time on appeal; and (2) a party waives an issue by failing to develop a cogent argument or adequate citation to authority and portions of the record in the appellate brief (multiple citations omitted). *Id.* at 69. Father additionally argued that, even if he waived DCS's alleged violation of the ADA on appeal, the violation constituted fundamental error that deprived him of his constitutional right to parent under the Fourteenth Amendment of the U.S. Constitution. Quoting *S.M. v. Elkhart Cnty. Office of Family and Children*, 706 N.E.2d 596, 600 (Ind. Ct. App. 1999), the Court noted that, to overturn a trial court ruling based on fundamental error, the error must have been "a clearly blatant violation of basic and elementary principals, *and* the harm or potential for harm therefrom must be substantial and appear clearly and prospectively." (Emphasis in *N.C.* opinion.) *N.C.* at 69. The Court opined that Father misapplied the fundamental error doctrine, and stated that Father's argument was more akin to a due process violation. *Id.* at 69 n.8.

Based on the trial court's record, the Court held that DCS reasonably accommodated Father's disability, and could not say that DCS discriminated against Father in violation of the ADA. *Id.* at 70. Waiver notwithstanding, the Court addressed Father's argument that he should be entitled to use DCS's alleged failure to comply with the ADA as a defense to termination of his parental rights. *Id.* at 69. Quoting 42 U.S.C. section 12132, the Court noted that the ADA provides:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

N.C. at 69.

Citing 28 C.F.R. section 35.130(b)(7), the Court observed that the ADA requires that the public entity make “reasonable accommodation” to allow the disabled person to receive the services or to participate in the public entity’s programs. N.C. at 69-70. The Court looked to Stone v. Daviess Cnty. Div. of Children and Family Servs., 656 N.E.2d 824, 830 (Ind. Ct. App. 1995), in which the Court held that, because the provision of services to parents is not required prior to termination of parental rights, the parents’ discrimination claim based on the ADA could not serve as a basis to attack the trial court’s termination order. N.C. at 70. In the N.C. case, the Court noted that: (1) Father was provided an interpreter by DCS through Deaf Community Services; (2) Father expressed no issues with understanding any of the provided interpreters; (3) the DCS family case manager also explained to Father why he was required to complete the court ordered services; (4) Father failed to comply with counseling and a psychiatric visit for medication as recommended by DCS; (5) during the termination hearing, Father denied that he had any cognitive or thinking issues that limited his ability to understand what was occurring. Id. The Court declined to abandon its prior holding in Stone on the application of the ADA to termination of parental rights proceedings. Id. at 71. The Court concluded that Father’s discrimination claim could not serve as a basis to attack the trial court’s termination order. Id.