



Termination

6/18/19

In **In re Ma.H.**, 134 N.E.3d 41 (Ind. 2019), the Indiana Supreme Court found that Father's constitutional rights against self-incrimination were not violated, and that there was sufficient evidence supporting the trial court's decision to terminate Parents' parental rights. The Court of Appeals opinion at **Matter of Ma.H.**, 119 N.E.3d 1076 (Ind. Ct. App. 2019) was vacated.

Mother had two children from a previous marriage, R.W. and S.W. Mother and Father subsequently had six children of their own. In March 2016, DCS received a report that Father had sexually abused his seventeen-year-old stepdaughter, R.W., on multiple occasions. R.W. was not living with Mother and Father at the time, having left home to live with an aunt and uncle a week earlier. When DCS tried to investigate this report, the case manager was denied entry to the home and Mother and Father refused to cooperate. The case manager then interviewed R.W. and removed the other children from the home based on her allegations. The case manager noted at removal that the children were filthy, and the home was "deplorable", "unsanitary", and had structural and safety issues. DCS filed a CHINS petition with regard to all the children, but then dismissed R.W. from the case because she turned eighteen years of age. R.W. testified in June 2016 about the sexual abuse, as well as other allegations of abuse to her sister, S.W. The juvenile court found the remaining seven children to be CHINS, noting the sexual abuse to R.W. as well as the condition of the home. At disposition, the juvenile court ordered Mother and Father to participate in home-based counseling, a parental assessment, random drug screens, and a psychological assessment. Father was also ordered to complete a substance abuse assessment and a sexual offender treatment program. Mother was compliant with all services but refused to admit that Father had abused R.W. Father completed required assessments, but did not complete the ordered therapy, sexual offender or substance abuse programs. Father objected several times during the pending case that he could not complete his treatments because the service providers insisted that he admit to molesting R.W., which he refused to do under the Fifth Amendment. The therapist could not continue services unless Father admitted wrongdoing, which Father refused to do, so Father was unsuccessfully discharged.

The trial court eventually changed the permanency plan to termination in June 2017, with hearings held in November 2017. The trial included the following evidence: (1) R.W. testified and described Father's sexual abuse; (2) R.W. testified that she had told Mother about the abuse twice; (3) Father's failure to complete the sex-offender treatment; (4) Parents' continued denial of the allegations; (5) Parents' failure to develop a safety plan; and (6) the GAL and the CASA's recommendations of termination. The trial court terminated parental rights of Mother and Father in May 2018 with extensive findings which the fact that Father never completed sexual offender treatment, and Mother's refusal to believe that Father had offended. In finding that Father had molested the children, and in response to Father's assertion of his Fifth Amendment rights, the trial court stated: "Should he invoke his Fifth Amendment right; [sic] however, the Court may

also infer what his answer might have been...” As such, the trial court concluded that “termination was in the best interests of Children, that the conditions under which Children were removed would not be remedied, and the continuation of the parent-child relationship posed a threat to Children’s well-being.”

The Court of Appeals reversed the trial court at Matter of Ma.H., 119 N.E.3d 1076 (Ind. Ct. App. 2019), holding that because Father had not yet been convicted of any crimes relating to the facts of this case, forcing him to admit guilt in order to successfully complete treatment implicated his Fifth Amendment rights against self-incrimination, and since there were no other findings beyond Mother’s refusal to admit to the alleged sexual abuse of the child, the termination of Mother’s parental rights must also be reversed. Justice Robb dissented, believing the majority opinion to be too broad and noting that it ignored case law which would allow negative inferences to be drawn in a civil case where a civil litigant asserts Fifth Amendment rights. The Indiana Supreme Court granted transfer.

Father’s constitutional rights against self-incrimination were not violated because in civil proceedings, a court can draw a negative inference from a claim of the Fifth Amendment privilege against self-incrimination. Id. at 47. The Court noted that CHINS and TPR petitions proceedings have the potential to implicate parents in criminal activity, even though CHINS and TPR proceedings are civil in nature. Id. at 46. Consequently, trial courts must be aware of possible criminal and Fifth Amendment implications and safeguard a parent’s constitutional rights. Id. The Court noted the general rule that the Fifth Amendment protects a person from being compelled to answer questions when those answers might be used in a future criminal proceeding. Id. (internal citations omitted). “This means that, in CHINS and TPR proceedings, a court may not compel a parent’s admission to a crime—if the admission could be used against him or her in a subsequent criminal proceeding—under the threat of losing parental rights.” Id. at 46-7 (internal citations omitted). Despite this general prohibition, in civil proceedings, such as in CHINS and TPR proceedings, “a court can draw a negative inference from a claim of the Fifth Amendment privilege against self-incrimination.” Id. at 47 citing Baxter v. Palmigiano, 425 U.S. 308 (1976); Hardiman v. Cozmanoff, 4 N.E.3d 1148 (Ind. 2014). The trial court correctly noted that Father could choose not to answer questions during his treatment, and that the trial court could subsequently choose to infer what Father’s answers might have been. Id. The Court noted further that since Father then voluntarily took a polygraph test, there was no silence from which to draw an adverse inference. Id.

Furthermore, Father’s constitutional rights against self-incrimination were not violated because the trial court’s order did not compel Father to admit to a crime, but instead, required Father to select and complete a course of sex-offender treatment. Id. at 47. The Court opined that the true inquiry was whether “any court action forced Father to choose between losing his parental rights and waiving his right against self-incrimination.” Id. Prior case law indicates that there is a distinction between a court-ordered case plan which requires a parent to admit guilt in order to proceed towards reunification, and a court-ordered case plan which requires meaningful therapy in order to proceed towards reunification. Id. Requiring an admission of guilt via a court-ordered plan is a violation of Fifth Amendment rights. Id. The trial court in the present case simply ordered Father to select and complete a course of sex offender treatment from the options that DCS provided; Father then began a program that ultimately

required him to admit wrongdoing after a polygraphy indicated his was lying about misconduct. Id. While Father's program did require an admission of guilt, the trial court's order did not compel Father to admit to any crime. Id. Father argued that the trial court's order essentially violated his Fifth Amendment rights, even if it did not explicitly violate them. Id. However, the Court noted that there was no evidence that Father sought out a different program with no guilt admission requirement or that he asked DCS for other options. Id. (internal citations omitted). Consequently, the trial court did not violate Father's Fifth Amendment Rights, and the trial court could properly consider evidence of Parent's failure to respond to services addressing the sexual abuse of R.W. Id. at 48.

The Court held that the evidence supported the trial court's findings, and the finding supported the trial court's conclusion, that there was a reasonable probability that a primary reason for the children's removal would not be remedied. Id. at 48. The Court noted the trial court properly identified the removal conditions (and identified one of those conditions as of Father's alleged long-term sexual abuse of R.W.) and then made findings on whether there was a reasonable probability that this removal condition will not be remedied. Id. The trial court specifically found that despite Father's substantiated sex abuse case, he failed to complete sex offender treatment and refused to admit any problems, and the Court determined there was ample evidence to support these findings. Id. The Court noted the following evidence: (1) the extensive testimony and evidence detailing Father's sexual abuse of R.W.; (2) R.W. confusion, fear, and emotional distress; (3) the length of time that Father's molested R.W.; (4) Father failed to complete sex offender treatment; (5) Father expressed resentment towards court-ordered services; (6) Father did not agree that he needed treatment; (7) Father did not feel that he could benefit from treatment or services; and (8) when Father asked what he had done to remedy R.W.'s claims that he molested her, Father said "nothing", indicating he did nothing to remedy a primary reason for removal. Id. at 48-49.

The Court held that the evidence supported the trial court's findings, and the finding supported the trial court's conclusion, that termination was in the children's best interests. Id. at 49. Father argued that termination based on a "sole allegation" of sexual abuse was not in the children's best interests; Mother argued that since she completed all services offered to her, her continued support of Father and her denial of the allegation was insufficient to support a determination that termination was in the children's best interests. Id. The Court characterized these arguments as requests to reweight the evidence. Id. The Court noted the following evidence supporting the trial court's judgment: (1) the children needed permanency, and Parents failed to take the needed steps to address the allegations and have the children returned to their care; (2) Parents failed to address the sexual abuse; (3) Father did not complete treatment and refused to admit any wrongdoing; (4) Mother steadfastly believe Father and did not believe she exposed her children to any danger; (5) testimony from service providers showed clear cause for concern for the children's safety if returned to Parents; (6) Mother did nothing to protect the children when R.W. told her about the sexual abuse; (7) Mother told R.W. to forget it happened; (8) Mother does not believe it happened; (9) a psychologist's testimony that if one child is sexually abused, there is a similar risk to other children in the home; (10) the GAL's concerns about the children safety; and (11) the FCM's concerns about the children's safety. Id. at 49-50. The Court noted that going through the motions of engaging in services was not enough when real changes to address major concerns are not made. Id.