Termination of Parental Rights

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In Everhart v. Scott County Office of Family and Children, 779 N.E.2d 1225 (Ind. Ct. App. 2002)

In Everhart v. Scott County Office of Family and Children, 779 N.E.2d 1225 (Ind. Ct. App. 2002), the Court affirmed the trial court's order terminating the father's parental rights to his two children. In doing so, the Court held that the termination petition was not defective, that any due process deprivation father may have suffered through invocation of his right against self incrimination was harmless, and that the evidence was sufficient to support the termination of the father's parental rights.

The father admitted to law enforcement that he injured his two month old child, resulting in skull fractures and permanent injuries. The father was arrested for child abuse, and the children were adjudicated CHINS and placed with their maternal grandparents, who had already adopted two older children after the mother and father terminated their parental rights to them. During this period, the mother also voluntarily terminated her rights to the two younger children. While incarcerated pending action on the criminal charges, the father had counseling sessions with a social worker. Upon the advice of his attorney, the father did not discuss with the social worker the events surrounding the abuse suffered by his two month old child. Instead, he invoked his Fifth Amendment right against self-incrimination. The father eventually pleaded guilty to Aggravated Battery and Neglect of a Dependent and was sentenced to fourteen years. Following the guilty plea, the OFC filed a petition to involuntarily terminate the father's parental rights. The petition was granted following a hearing. The father appealed.

The termination petition was not defective simply because it did not reference inapplicable factors which might have, under different circumstances, provided a basis to move for dismissal of the petition. Because the petition did not include all the information that the father thought was required under I.C. 31-35-2-4, he asserted that the petition was defective, and therefore, the trial court judgment was void. He specifically challenged the validity of the petition because it did not include any references to the factors listed in I.C. 31-35-2-4.5, which is that section of the statute which delineates the grounds upon which a party must file a motion to dismiss the termination petition. The Court, noted, however, that section 4.5 only applies when a termination petition has been filed because the trial court has determined that "reasonable efforts" for family preservation or reunification with respect to the child are not required or when the child has been placed in the home of a related individual, a licensed foster home family, a child caring institution, or a group home and the child has been in the placement for no less than fifteen of the most recent twenty-two months. Neither of these situations applied in the present case. The petition was filed because the children had been removed from their parents for at least six months under a dispositional decree. Because the petition was filed upon a ground to which section 4.5(d) is not applicable by definition, the grounds for dismissing the petition under section 4.5(d) are also not applicable. To mandate that the petition include a statement that section 4.5(d) did not apply would only be restating the obvious. No due process protection would have been given to the father by making such a statement. Failure to include such a statement, said the Court, does not render the termination petition defective or void.

Insofar as the father was deprived of due process through the OFC's use of his invocation of his right against self-incrimination during his counseling sessions as evidence of deficient parenting, the deprivation was harmless. The father asserted that his due process rights were violated when OFC offered him counseling services, then used the fact that he invoked his Fifth Amendment right against self-incrimination during counseling sessions to prove that he had no interest in his children. The father claimed that he was concerned that any statement made to the social worker involving the acts of abuse would be used against in the criminal proceedings, which had not yet taken place. Upon the advice of his attorney, he did not discuss any information with the social worker relating to the criminal child abuse incidents.

The Court noted that it has previously held that the social worker-client privilege did not apply in termination proceedings. Id. at 1230 (quoting Stone v. Daviess County Div. Of Children and Family Servs., 656 N.E.2d 824 (Ind. Ct. App. 1995)). The father's concern, however, was that the information would be used in a criminal proceeding, not a termination proceeding. The Indiana criminal code lists eight grounds upon which privileged information may be disclosed by a social worker. One of these states that information may be disclosed "if the communication reveals the contemplation or commission of a crime or a serious harmful act." I.C. 25-23.6-6-1(2). This ground would have allowed the social worker to disclose information revealed by the father which would have indicated his guilt in the abuse of his child. Therefore, per the Court, the father's only recourse was to invoke his Fifth Amendment right against self-incrimination, as he did. The question remained, however, as to whether OFC's use of his silence constituted a violation of his due process rights. While acknowledging that the reasoning behind the prohibition of the use of a defendant's silence in a criminal case was different than reasons which might be relied upon in finding a violation of due process in a termination case, the Court stated that the factors relied upon in determining whether a violation of due process is harmless is applicable in both situations. Applying the factors for review from a criminal case to a case involving the involuntary termination of parental rights, the Court stated that it would consider 1.) the use to which the fact of the invocation of the right against self-incrimination is used, 2.) who elected to pursue the line of questioning, 3.) the amount of other evidence supporting the termination of parental rights, and 4.) the intensity and frequency of the reference. Id. at 1231.

OFC offered into evidence the fact that the father's counseling was limited to issues not pertaining to the abuse of the child. OFC's questions on the father's invocation of his Fifth Amendment right were limited. The state's witnesses focused on the father's lack of interest in what would happen to the children and not upon his desire not to discuss the details of the abuse. On the other hand, the Court noted that father's counsel repeatedly asked questions about the limited ability of the social worker to counsel the father on issues that related to the criminal matter, thusly drawing that issue into the forefront of the questioning. The Court found that the lack of being able to communicate with the father about the abuse of the child played only a minor role in the state's decision to file the termination petition. There existed numerous other factors that weighed much more heavily in the decision, including the requirement that the hearing be held because the length of time that the children had been out of the home. These facts, according to the Court, indicate that any due process violation the father may have suffered by mention of his invocation of his right against self-incrimination was harmless.

There was sufficient evidence in the record to allow the trial court to find there was a reasonable probability that the continuation of parent-child relationship posed a threat to the well being of the children. To prevail on an involuntary termination of parental rights petition, the state must prove, among other elements, that "there is a reasonable probability that (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or (ii) the continuation of the parent child relationship poses a threat to the well being of the child." I.C. 31-35-2-4(b)2(B)(i) and (ii).

Addressing the findings that support the court's conclusion that continuation of the parent-child relationship posed a threat to the well being of the children, the father challenged the finding that he abused his child on several occasions by stating that this did not establish a history or pattern of abuse. He also claimed that circumstances put him under a great deal of stress during that time. The Court noted that while two episodes of abuse during a two week period of time do not reveal a long pattern of abuse, they do indicate the existence of uncontrollable, violent conduct. The father admitted he picked the baby up by the head and squeezed the child's head. He also admitted that he threw the baby. Based upon the severity of the abuse and the father's lack of interest in the well being of the children during his incarceration, the Court could not conclude that the trial court was clearly erroneous in finding that the abuse to the children would not change.

The father also contested the trial court's finding that he would be imprisoned for many years and would not able to care for his children. Although sentenced to fourteen years, he asserted that, counting good time and other credits, he could be out in seven years, which is less than the "many years" stated in the trial court's findings. The Court noted, however, that even if he did get out of prison in seven years, he will have missed an important seven years in the life of his children. During that time he would not be able to provide financially for them nor be able to provide for the youngest one's continuing medical needs. Even upon release, the father might not be able to provide for his children or even gain custody of them. The needs of the children, said the

Court, are too substantial to force the children to wait between seven and fourteen years to see if the father would be able to provide for them.

Finally, the father challenged the trial court's finding that at his criminal sentencing he stated he was willing to move out of state for treatment and not see his children again. The father claimed that he only meant he wouldn't be able to see them during the period he was receiving his treatment. However, the trial court was free to infer from his statement that he would give up on his desire to see his children again if he would be allowed to go to Georgia for treatment. The trial court could easily interpret the father's statement as a plea for leniency for his crimes in exchange for leaving the state of Indiana and never coming back.

Because the state proved that continuation of the parent-child relationship posed a threat to the well being of the children, it was not obligated to show proof that there was a reasonable probability that conditions which resulted in the children's removal would not be remedied.