

Children's Law Center of Indiana



Termination of Parental Rights (TPR)

03/20/2008

In ***In Re A.P.***, 882 N.E.2d 799 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination of the parental rights of Father. When the child was born March 16, 2006, both she and her mother tested positive for "cocaine, THC, and other drugs." On March 21, 2006, Marion County Department of Child Services (DCS) filed a petition alleging the child and her two-year-old sister (fathered by another man) to be CHINS. The petition stated Father's whereabouts were unknown and he had not "come forward and demonstrated to DCS the ability or willingness to appropriately parent [his child] at this time." Father appeared at the March 21, 2006 initial hearing which was continued until April 19, 2006 to arrange for a Spanish interpreter for Father. Father did not appear at the April 19 hearing which was continued to May 17, 2006, without additional action because of possible language barriers to Father's having correctly understood what was going on. At the May 17 hearing, Father and the interpreter were present, and Father admitted the CHINS allegations. The trial court ordered Father's parental participation, but Father made an effort to see the child only three times and failed to participate in an outpatient program for his alcohol use or in home-based counseling. In late 2006 or early 2007, Father was deported "due to criminal activity," in that an arrest warrant for battery had been issued for him. On January 24, 2007, DCS filed a petition to terminate Father's parental rights. On March 1, 2007, Father telephoned his case manager and informed her he was living in Mexico, but he did not provide an address. A public defender entered her appearance for Father on March 13, 2007. At a May 1, 2007 facilitation hearing, which Father's brother attended on Father's behalf, the termination hearing was scheduled for June 18, 2007. A notice of the hearing date was mailed to Father's last known address in Mexico. In a May 1, 2007 telephone conversation the case manager informed father of the upcoming trial date and encouraged him to contact his attorney. At some point, Father informed a different case manager that if he returned to the U.S. he would face criminal charges and possible jail time. At the June 18 hearing at which Father failed to appear, Father's brother appeared on Father's behalf and Father's attorney requested a continuance based on her failure to communicate successfully with her client. She explained many problems including (1) when Father called her or left messages, he spoke only Spanish and she did not understand Spanish; (2) she tried to arrange for an interpreter, but was unable to predict when Father was going to call; and (3) the interpreter was able to speak to Father once, but the communication process was difficult and lengthy. Father's attorney also told the trial court about communications she had with the Mexican consulate regarding Father's situation. The trial court denied the continuance request and proceeded with the hearing, at the conclusion of which it terminated Father's parental rights. Father appealed.

The Court declined to reverse based on the alleged faulty notice of the termination hearing by publication inasmuch as (1) Father waived this argument by failing to raise it

at trial; and (2) waiver notwithstanding, although the notice by publication may have been faulty, Father received actual notice of the hearing from the case manager and Father's brother appeared at the hearing on Father's behalf. Id. at 805.

The Court held that, although it would have been equally appropriate and perhaps more desirable for the trial court to have granted the continuance request, the trial court had not abused its discretion in denying the request. Id. at 806. The Court noted that (1) a continuance would have afforded Father's attorney more time to communicate with her client, better understand the underlying factual circumstances, and seek assistance from someone better versed in immigration law; (2) it is always in the best interests of the child involved to reach a resolution as promptly as possible; and (3) everyone involved agreed that it was unlikely Father planned to return to the U.S. and if he did he would face battery charges and possible jail time. According to the Court, it was reasonable for the trial court to conclude that even if Father's attorney had been granted more time to communicate with her client, she would still ultimately have faced the same problem of defending the parental rights of a client who lives in a different country from his child and has no plans to return because, among other things, he allegedly engaged in criminal activity while he was here. Id. at 805-06.

The Court held that Father received a fundamentally fair trial whose facts demonstrated an accurate determination and the overall performance of Father's lawyer was sufficiently effective such that the Court could say with confidence that DCS adequately proved its case in favor of termination. Id. at 808. Regarding Father's contention of ineffective assistance of counsel, the Court pointed out that, "The question is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest." Baker v. Marion County Office of Family and Children, 810 N.E.2d 1035, 1041 (Ind. 2004). Id. at 806. Thus, the Court examined the sufficiency of the evidence supporting the termination of Father's parental rights. Doing so the Court found that the child had been removed from Father for over six months at the time of the termination hearing; that there was a satisfactory plan for her care and treatment – continued placement with and eventual adoption by her mother's cousin who had been caring for the child since she was removed from her parents' care; and that DCS had established that the conditions that resulted in the child's removal from Father would not be remedied and it was in the child's best interests that the parent-child relationship be terminated. The Court noted that between the time of the filing of the CHINS petition and the termination hearing, (1) Father completed some services, but failed to complete others such as an outpatient program for his alcohol use; (2) Father visited the child only three times; (3) Father failed to keep his case manager updated about his address; (4) Father left the country nine months after the child's removal and had not demonstrated his willingness or ability to parent his daughter before that point; (5) there is no evidence that Father plans to return to the U.S.; (6) if Father does return, he may face jail time for pending battery charges; and (7) Father offered no plan for the child's care should his parental rights not be terminated. Id. at 807-08. The Court commended Father's attorney for doing the best she could under extraordinarily difficult circumstances the Court delineated, and when faced with underlying facts that she could not change. Id. at 808.