

Children's Law Center of Indiana



Adoption

01/11/2008

In **In Re Adoption of H.N.P.G.**, 878 N.E.2d 900 (Ind. Ct. App. 2008), the Court affirmed the trial court's denial of Father's motion to contest the adoption of his biological daughter, H.N.P.G., and the trial court's grant of the petition to adopt filed by H.N.P.G.'s Foster Parents. H.N.P.G. was born February 25, 2004, and was immediately placed in foster care because she tested positive for cocaine. She was returned to Mother about one month later, but was again placed in foster care July 31, 2004, because Mother was arrested. Father was incarcerated June 19, 2003, due to his convictions for dealing in methamphetamine and possession of precursors with intent to manufacture. His earliest release date is in 2010, but his anticipated release date is in 2017. Boone County Department of Child Services (BCDCS) first became aware of Father's potential paternity of H.N.P.G. at a CHINS hearing on February 23, 2005, and five days later it filed a petition to terminate the paternal rights of both Mother and Father. Father's paternity was established by paternity testing on December 23, 2005. Mother's parental rights were terminated on April 4, 2006. However, on May 30, 2006, the Boone Circuit Court denied BCDCS's petition to terminate Blake's parental rights. Paternal Grandmother and Step-Grandfather, as well as H.N.P.G.'s Foster Parents, filed petitions to adopt H.N.P.G. in March 2006. The trial court consolidated the adoption cases and granted Father's motion to intervene. Subsequently, Foster Parents filed an amended petition for adoption alleging that Father abandoned and deserted H.N.P.G. and that he was an unfit parent. On August 9, 2006, Father filed a motion contesting the adoption. On February 23, 2007, the trial court issued findings of fact and conclusions of law and concluded, among other things, that Father's consent to Foster Parents' adoption of H.N.P.G. was not required; it would not be in H.N.P.G.'s best interests to grant the adoption petition of Paternal Grandmother and Step-Grandfather; and granting Foster Parents' adoption petition was in H.N.P.G.'s best interests. Father appealed.

A court with probate jurisdiction may adjudicate an adoption matter simultaneously with the juvenile court's adjudication of a CHINS proceeding where, as here, the Department of Child Services does not pursue reunification in the CHINS proceeding. *Id.* at 904, 906. The Court noted that adoption and CHINS proceedings are separate actions which affect different rights: The CHINS petition is directed at helping the child directly by assuring the child receives necessary assistance; while adoption establishes a family unit, severs the child entirely from its own family tree, and engrafts it upon that of another. *Id.* at 904. The legislature expressly gave the juvenile court jurisdiction over CHINS proceedings and the probate court jurisdiction over adoption matters. The power to adjudicate either matter does not divest the other court of its respective jurisdiction. *Id.* The Court distinguished **In Re Adoption of E.B.**, 733 N.E.2d 4 (Ind. Ct. App. 2000), *trans. denied*, in which the appeals court affirmed the probate court's denial of the foster parents' adoption

petition, where the CHINS proceeding was directed at reunifying the father and child, and the foster parents were attempting to adopt the child when the father's parental rights had not been terminated. *Id.* at 5-6. The Court cited to other cases, including *In Re Adoption of J.D.B.*, 867 N.E.2d 252, 256 (Ind. Ct. App. 2007), for its finding that, where DCS does not pursue reunification, the appeals court has concluded that the holding in *E.B.* does not control. *H.N.P.G.* at 904-05. The Court noted that, here, (1) although the petition to terminate Father's rights was denied, the BCDCS does not support the unification of Father and H.N.P.G.; (2) the BCDCS recommended that the court grant Foster Parents' petition to adopt H.N.P.G.; and (3) the goal of the pending CHINS proceedings is entirely consistent with the goal of the adoption proceeding which is to create a new family unit for H.N.P.G. *Id.* at 905.

The trial court acted within its discretion when it admitted Mother's deposition testimony pursuant to Trial Rule 32(A)(3)(c). *Id.* at 906. Father argued that Mother was not unavailable to be a witness and his right to cross-examination was violated by the admission of the Mother's deposition. In response, the Court favorably alluded to (1) the trial court's finding that it had "made a finding that the witness is unavailable due to incarceration and, [] is permitting the deposition to be used for substantive purposes;" and (2) the fact that Father's counsel was present and cross-examined Mother during her deposition. *Id.*

The trial court's conclusion that Father's consent to the adoption was not required is not clearly erroneous. Foster Parents proved that Father is unfit to be a parent and that the adoption was in H.N.P.G.'s best interests. *Id.* at 908. The Court quoted IC 31-19-9-8(a)(11) regarding when adoption consent is not required from a parent. It states that parental consent it is not required if (A) the adoption petitioner "proves by clear and convincing evidence that the parent is unfit to be a parent;" and (B) the best interests of the child would be served "if the court dispensed with the parent's consent." *H.N.P.G.* at 906. The Court referenced the trial court's finding that clear and convincing evidence of the Father's unfitness as a parent had been presented. The finding delineated as factors, Father's (1) poor work history; (2) his expected difficulty finding employment as a convicted felon; (3) his historical inability and difficulty staying off drugs even while incarcerated, and (4) the lack of support he has provided to H.N.P.G., not merely because of his incarceration. In arriving at its holding the Court noted that (1) due to his incarceration, Father has never met or communicated with H.N.P.G.; (2) Father's substantial history of illegal drug use and his drug use since he was a juvenile; (3) Father's current incarceration due to his convictions for dealing in methamphetamine and possession of precursors with intent to manufacture methamphetamine; (4) Father's earliest possible release date is in 2010 and he may not be released until 2017, at which time H.N.P.G. will be about thirteen years old; (5) Father does not challenge the trial court's finding that he has historically been unable to maintain employment, and will likely have a difficult time finding employment and supporting H.N.P.G., (6) it is well-settled law that those who pursue criminal activity run the risk of being denied the opportunity to develop relationships with their children; (7) after Father's release from prison, there is no guarantee he will be able to provide for H.N.P.G. or that he will ever obtain custody of her; (8) H.N.P.G.'s needs are too important to force her to wait until a determination can be made that Father will be able to be a fit parent to her; (9) Father does not challenge the trial court's finding that Foster Parents' adoption is in H.N.P.G.'s best interests; and (10) ample evidence supports the trial court's conclusion that H.N.P.G.'s best interests are served by granting Foster Parents' adoption petition. *Id.* at 906-07.