Termination of the Parent-Child Relationship

6/28/11

In **In Re D.L.**, 952 N.E.2d 209 (Ind. Ct. App. 2011), the Court dismissed Parents' appeal from the trial court's orders that involuntarily terminated their parental rights to their six children. In November 2008, the five youngest children were removed from Parents' home and placed in foster care because of reported domestic violence and drugs in the home. Parents were both arrested at that time. Parents' oldest child had already been placed in residential treatment due to a delinquency case. All six children were adjudicated Children in Need of Services (CHINS), because in addition to Parents' incarceration, there was a history of drug abuse by Mother and prior substantiated abuse or neglect in the home. A dispositional order and parental participation plan were entered. Parents intermittently cooperated with DCS and participated in services following the CHINS determination. The five youngest children remained in foster care and the oldest child remained in residential treatment until he ran away in January of 2010. On March 26, 2010, DCS filed petitions to terminate parental rights as to all six children. At the time of the termination hearing in August 2010, the oldest child's whereabouts were unknown.

The trial court issued an order terminating Parents' rights to the five youngest children on August 20, 2010, and issued an order terminating Parents' rights to the oldest child on August 23, 2010. On August 30, 2010, Mother's trial counsel filed a "Notice of Intent to Appeal and Request for Appointment of Counsel with the trial court. On August 31, 2010, Father's trial counsel filed an identical notice with the trial court. The notices generally advised the trial court that Parents wished to appeal the termination of parental rights and requested appointment of counsel to represent Parents in the appellate process. The trial court appointed appellate counsel for Mother on August 30, 201, and appointed appellate counsel for Father on August 31, 2010. On September 23, 2010, appellate counsel filed a Notice of Appeal with respect to all six cause numbers, requesting assembly of the Clerk's Record and preparation of the transcript. On January 18, 2011, Parents filed a Motion for Permission to File Belated Notice of Appeal in the trial court, noting that the Clerk's Record and Transcript had been completed and their brief was due February 7, 2011. The motion further noted that the September 23, 2010, Notice of Appeal could be construed as late, and requested permission to file a belated notice of appeal. The trial court entered an order finding it had no authority in a civil case to grant such relief, and filed with the Court of Appeals a Notice to Court of Appeals of Untimely Notice of Appeal. On February 7, 2011, Parents submitted their Brief of Appellants and Verified Motion to Preserve Right to Appeal with the Court of Appeals. In that motion, Parents' appellate counsel averred

that he read the Notice of Intent to Appeal filed by trial counsel as a Notice of Appeal and filed a Notice of Appeal immediately upon discovering his misapprehension. The motion requested that the Court allow the Brief of Appellants to be filed and "permit this cause to proceed on the merits just as though the Notice of Appeal had been filed within thirty (30) days of the orders from which [Parents] appeal." The motions panel of the Court granted this motion, the Brief of Appellants was filed, and briefing continued as required by the Indiana Rules of Appellate Procedure.

The Court opined that Parents have forfeited their right to appeal because they did not file a timely Notice of Appeal. Id. at 213. The Court observed that Ind. Appellate Rule 9(A)(1) of the Indiana Rules of Appellate Procedure provides that a party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty days after entry of a final judgment. The Court quoted Bohlander v. Bohlander, 875 N.E.2d 299, 301 (Ind. Ct. App. 2007), *trans. denied*, which states that, "[t]he timely filing of a notice of appeal is a jurisdictional prerequisite, and failure to conform to the applicable time limits results in forfeiture of an appeal." D.L. at 212. The Court said that App. R. 9(F) further states what is required to be included in the Notice of Appeal: a designation of the appealed judgment or order; a designation of the court to which the appeal is taken; direction for the trial court clerk to assemble the Clerk's Record; and a designation of the portions of the Transcript that should be prepared. Id. The Court was not persuaded by Parents' argument that their Notices of Intent to Appeal are "functionally equivalent" to the required Notice of Appeal. Id. The Court said it is clear that the purpose of this pleading was to have counsel appointed who would then file a Notice of Appeal. Id. The Court also said that, other than identifying one of the two termination order issued by the trial court, no part of this pleading fulfills the requirement of a Notice of Appeal as described in Appellate Rule 9. Id. Specifically, the Court observed that: only one of the two final appealable orders issued by the trial court is identified; the court to which the order is to be appealed is not identified; the clerk of the court is not requested to assemble the Clerk's Record; and the court reporter is not requested to transcribe any or all of the hearings conducted. Id. The Court was also not persuaded by Parents' citation to Appellate Rule 9(G) that a Notice of Appeal may be supplemented at a later time. Id. Quoting Appellate Rule 9(G), the Court observed that this Rule provides that any party may file a request with the court reporter "for *additional* portions of the *Transcript*." (Emphasis added.) Id. The Court held that this Rule is limited to supplementing a request for the transcript and does not authorize transforming an entirely different pleading into a notice of appeal through a request for wholesale "supplementation" of the insufficient pleading. Id. at 213.

Parents argued that the Notice of Appeal is akin to the Indiana Tort Claims Act's notice of tort claim requirements at IC 34-13-3. The Court did not agree that the notice of tort claim and notice of appeal are so similar that substantial compliance should be considered sufficient for a notice of appeal as it is for a notice of tort claim. Id. The Court said that compliance with the notice of the Tort Claims Act "is a procedural precedent which the plaintiff must prove and the trial court must determine at trial." Brown v. Alexander, 876 N.E.2d 376, 383 (Ind. Ct. App.

2007), *trans. denied.* D.L. at 213. The Court opined that the Notice of Appeal, however, is jurisdictional. D.L. at 213. The Court said that the Notices of Intent to Appeal filed by Parents do not fulfill the purpose of the notice of appeal requirement—to serve as a mechanism to alert the trial court and the parties of the initiation of an appeal and to trigger action by the trial court clerk and court reporter, setting in motion the filing deadlines imposed by the Appellate Rules. Id. Having determined that the Notices of Intent to Appeal were not "functionally equivalent" to a Notice of Appeal, the Court opined that the filing of the Notices of Intent to Appeal did not, serve to initiate Parents' appeal on the date of filing. Id. The Court observed that the termination orders in this case were issued on August 20 and August 23, 2010; thirty days from these dates was September 20 (the first business day after the thirtieth day, Sunday September 19, 2010) and September 22, 2010, respectively. Id. The Notice of Appeal was filed on September 23, 2010, and was not filed timely. Id.

Recognizing the Constitutional dimensions of a termination case, the Court reviewed the record and found no clear error in the trial court's decision. Id. at 214. The Court commented that the evidence supports the trial court's findings that: (1) there is a reasonable probability both that the conditions that resulted in the removal of the children from Parents' home would not be remedied and continuation of the parent-child relationship poses a threat to the children's well-being; (2) termination is in the children's best interests; and (3) there is a satisfactory plan for the children's care and treatment. Id.