

Children's Law Center of Indiana



Termination of Parent-Child Relationship

11/30/09

In ***In Re M.B.***, 921 N.E.2d 494 (Ind. 2009), the Indiana Supreme Court vacated the Court of Appeals opinion at 896 N.E. 2d 1 and reversed and remanded the trial court's denial of Mother's Ind. Trial Rule 60(B) motion to set aside the voluntary termination order. The Court instructed the trial court to consider any request by the State to terminate Mother's visitation rights at a hearing for which Mother was given notice and an opportunity to be heard and make recommendations, including the right to submit a written statement to the court, represent oral testimony, and cross examine witnesses. Mother's two children had been removed from her care by Howard County Department of Child Services (State) in August, 2002, because Mother had been arrested on drug charges and no suitable family members were available to care for the children. Mother was released from incarceration in October, 2005. The State petitioned for involuntary termination of Mother's parental rights in March, 2007, because Mother had not established suitable housing, had not maintained stable employment, and had not complied with court orders for drug treatment. Mother denied the allegations in the involuntary termination petition, which was set for hearing on June 4, 2007. Before the June 4 hearing, Mother, advised by her counsel, executed a "Voluntary Relinquishment of Parental Rights" form for each child. Attached to each form was an Addendum, captioned "Post Adoption Privileges" drafted by Mother's counsel. The Addendum contained a proviso stipulating that Mother's voluntary relinquishment of her parental rights and her consent to adoption were subject to the court granting post-adoption privileges and the adoptive parents consenting to post-adoption contact by and between themselves and the children pursuant to IC 31-19-16-2. At the hearing, the trial court reviewed the voluntary termination forms and Addendum, advised Mother of the legal consequences of voluntary termination, confirmed that Mother had fully consulted with her counsel, and confirmed that Mother's voluntary termination with the reservation of post-adoption privileges was subject to a court determining that it is in the children's best interest for such visitation to occur. The family case manager agreed that the department believed it was still in the children's best interest to continue visitation. The trial court accepted Mother's voluntary termination and the post-adoption visitation Addendum at the conclusion of the hearing and issued an order that "permanently terminated" all of Mother's "rights, powers, privileges, immunities, duties, and obligations, including the right to consent to adoption."

The children were placed in a new home with prospective adoptive parents on June 15, 2007, but the State did not notify the prospective adoptive parents of Mother's visitation privileges as provided in the Addendum before the placement. About a week after the placement, the case manager notified the prospective adoptive parents that visitation would resume. Mother visited

the children from that time until September, 2007, for two hours every two weeks. On September 10, 2007, a three-month CHINS periodic case review hearing was held. Neither Mother nor her counsel was notified of the hearing. The State recommended that Mother's visitation be terminated based on letters presented by the children's therapists that opined visitation was no longer in the children's best interests because it was impeding the bonding process with the adoptive family. The therapists differed on the question of whether visitation should be phased out over three visits or immediately terminated. The trial court ordered Mother's visitation privileges terminated. On September 12, 2007, when Mother appeared for her regularly scheduled visitation, she was advised for the first time of the trial court's order terminating her visitation privileges and that her visit with the children that day would be her "goodbye visit." On February 5, 2008, Mother filed an Ind. Trial Rule 60(B) motion to set aside the trial court's voluntary termination order, which the trial court denied after a hearing. Mother appealed, contending that (1) the voluntary termination should be set aside because her consent was based on the State's and trial court's fraudulent misrepresentation that she would have continued visitation post termination; and (2) the State violated her due process rights when it failed to notify her of the three-month periodic CHINS review hearing, at which her visitation privileges were terminated in her absence. The Court of Appeals affirmed the trial court's denial of Mother's motion to set aside her voluntary termination. In Re Termination of the Parent-Child Relationship of M.B., 896 N.E.2d 1 (Ind. Ct. App. 2008). The Supreme Court accepted transfer on Mother's petition. Mother sought to restore the status quo ante such that all her parental rights would be restored and any termination proceedings would need to begin anew.

The Court held that, unless all provisions of Indiana's open adoption statutes (IC 31-19-16-1 and 2) are satisfied, the voluntary termination of parental rights may not be conditioned upon post-adoption contact privileges. Id. at 500. The Court stated that IC 31-19-16-1 provides that post-adoption contact privileges may be granted to a birth parent who has voluntarily terminated the parent-child relationship at the time the adoption decree is entered. (emphasis added). Id. In addition IC 31-19-16-2 provides that a court may grant post-adoption privileges if, inter alia, (1) the court determines that the best interests of the child would be served by granting post-adoption contact privileges; (2) each adoptive parent consents to the granting of post-adoption contact privileges; (3) the adoptive parents and the birth parents execute a post-adoption contact agreement and file the agreement with the court; and (4) the agreement is approved by the court. Id. at 498-99. The Court opined that the Addendum impermissibly overrides the authority of an adoption court provided by IC 31-19-16-2 by: (1) requiring the court to grant post-adoption privileges and that the adoptive parents consent to the post-adoption contact; (2) removing the adoption court's statutory authority to find that contact would be in the best interests of the child and that there is a significant emotional attachment between the child and birth parent; (3) overriding the adoptive parents' statutory right to consent to post-adoption contact privileges and the joint responsibility of consenting adoptive parents and the birth parents to execute an agreement and file it with the court; and (4) doing away with the adoption court's statutory authority to give final approval to the parties' agreement. Id. at 499-500.

The Court held that Mother's parental rights were terminated as provided in IC 31-35-1-12(2)(A) & (B) except that she had the right to ongoing periodic visitation with the children unless and until a court were to determine that visitation was no longer in the children's best interest. If a court were to make such a determination, Mother would not be entitled to further visitation. Id. at 501. The Court concluded that the Addendum should be honored after taking into account the following three factors: (1) the State voiced no objection to the visitation provision and acknowledged and complied with it; (2) the trial court's colloquy with Mother expressly referenced the visitation proviso; (3) the visitation proviso was not unconditional. Id.

The Court held that Mother retained an enforceable right as to the visitation proviso, but this did not create any basis for reopening the termination of parental rights proceeding. Id. at 502. The Court noted that IC 31-34-21-4, which governs periodic case review hearings, states that DCS shall provide at least seven (7) days notice to a parent, guardian, or custodian before the periodic case review and that the court shall provide parents, guardians, and custodians, inter alia, an opportunity to be heard and to make recommendations to the court, including the right to submit a written statement, to present oral testimony, and to cross examine any of the witnesses at the hearing. (emphasis added). Id. at 501. While the Court acknowledged the State's position that these provisions are not applicable to a parent whose parental rights have been completely and irrevocably terminated, the Court concluded that Mother did maintain ongoing visitation rights. Id. The Court concluded that Mother was entitled to the relevant statutory protections. Id. The Court was unable to say that failure to accord Mother those statutory review hearing protections was harmless, in light of the information provided at the review hearing that one of the children's therapists did not think that visitation rights should be immediately terminated. Id. at 502. The Court held that Mother's parental rights remain terminated and that she was entitled to no relief in that regard. Id.