Termination of the Parent-Child relationship

2/14/17

In **Matter of A.F.**, 69 N.E.3d 932 (Ind. Ct. App. 2017), the Court affirmed the trial court's order which terminated Father's parental rights to his three daughters (the children). Id. at 979. Father and Mother lived together between 2003 and 2007, and their children were born in 2005, 2006, and 2007. In May 2005, Father was sentenced for domestic battery against Mother. In February 2006, Father was again charged with domestic battery and battery against Mother. In January 2008, DCS removed the children from Father's care and a CHINS proceeding began. In February 2008, Father pled guilty to battery by bodily waste and spent about six weeks in jail and ninety days on work release. The children were returned to Father's care in January 2009. In June 2009, Father was charged with resisting law enforcement and with domestic battery against Mother while the children were in the back bedroom. Father spent about one month in jail. DCS filed a second CHINS petition. In January 2010, Father was arrested for robbery with bodily injury, pled guilty, was sentenced to two years in the Department of Correction, and was incarcerated between August 2010 and the end of 2012. The children's second CHINS case concluded in 2011. In May 2012, DCS filed a third CHINS petition for the children. The petition alleged in part that Father was incarcerated with an earliest expected release date of July 2014. Father admitted that he was incarcerated and was not available to parent his children, and the court found the children to be CHINS. On September 25, 2012, the court entered a dispositional order and a parental participation order requiring Father to contact DCS within forty-eight hours of his release from incarceration to engage in services. Father was released on July 15, 2013, and on July 16 the court authorized supervised parenting time for Father with the children upon positive recommendations from the children's therapist. Father was also ordered to participate in homebased therapy and case management, a parenting assessment, and to follow any recommendations. Father participated in services, but was incarcerated in May 2014 for violating parole after he was charged with operating a vehicle while intoxicated and also tested positive for marijuana. On December 30, 2014, the court ordered the children's permanency plan changed to adoption. Mother signed consents to the children's adoption.

DCS filed a petition for involuntary termination of Father's parental rights on January 15, 2015. The court held an evidentiary hearing on March 7 and 15, 2015. Among the evidence offered was the testimony of a foster mother who had cared for all three children on different occasions. The foster mother testified that: (1) the oldest child was placed with her in 2009, and initially was defiant, would lie and steal, had symptoms of ADHD and RAD (Reactive Attachment Disorder), harmed animals, and had re-attachment disorder; (2) the oldest child exhibited sexualized behavior with the middle child; (3) the children were separated during bath time because of their sexualized behaviors, and she implemented a safety plan whereby the children could not sleep together and could not play with dolls that were unclothed. Ms. Tubbs, a

behavioral clinician who worked with the children from April 2014 until January 2016, testified regarding her concerns about the oldest child's and the middle child's behaviors of lying and stealing, and opined that stability would help all three children's behaviors. The family case manager indicated that adoption was in the children's best interests. Ms. Hood, a therapist who became familiar with the children in 2008 and had been the oldest child's primary outpatient therapist since 2012, also testified at the hearing. Ms. Hood testified that: (1) the Dalton Associates report concluded that the oldest child had reactive attachment disorder due to her instability in attachments and multiple transitions; (2) she had concerns about sexual acting out between the children and it would not be appropriate for them to be in a bedroom together; (3) she observed the oldest child experience emotional upsets, including being sad, confused, and angry before and after visitation with Father; (4) she recommended that visitation between Father and the children not occur due to the risk to the children's emotional stability; (5) she recommended that the children not be reunified with Father; (6) she recommended that the children be adopted to improve their potential for positive emotional health, positive self-image, and positive emotional and behavioral adjustment; (7) she observed a range of emotions expressed by the oldest child, including anger, sadness and memories of domestic violence after the child received a letter from Father in October 2015 which informed the child that he was no longer in prison, loved the children, and wanted to see them. Ms. Hood also testified it would be beneficial for the children to know where they were going very soon because she had seen their emotional turmoil and related behavioral acting out. Ms. Hale, the children's senior therapeutic support specialist, testified that she recommended against parenting time for Father because of his inability to stay out of jail. Ms. Hale also recommended that the oldest child not share a bedroom with her sisters because the child had touched her sisters inappropriately. Ms. Hale also testified that she observed the oldest child dancing suggestively and making sexualized comments and that the children were stripping their dolls, prying the dolls' legs apart, looking at each other when they were undressed, and showing other signs of sexual behavior. The Guardian ad Litem (GAL) testified that: (1) her primary responsibility was to be the voice of the children; (2) she did not recommend that the children be returned to Father; (3) the children had not received consistent parenting by Father and he was not in a position to provide stability for the children; (4) it was in the children's best interests to be adopted. Despite the objections of Father's counsel, the GAL also testified about each child's wishes for future living situations and that there was trauma to the children from being removed from parents, being returned to parents, and being removed again.

Father was released from incarceration in July 2015. On April 11, 2016, the court entered an order terminating Father's parental rights. Father appealed, contending the trial court abused its discretion in admitting evidence. Father asserted the trial court improperly admitted hearsay evidence and unqualified expert testimony.

The Court could not say that the trial court's admission of hearsay testimony from the children's behavioral clinician, the children's senior therapeutic support specialist, and the children's therapist warranted reversal of the termination judgment. Id. at 943. Father argued that the trial erred by admitting testimony from Ms. Tubbs, the children's behavioral clinician, that she received reports from the foster home that the oldest child was lying and

stealing. Father also claimed the court erred by admitting the hearsay testimony of Ms. Hood, the therapist, that Dalton and Associates concluded the oldest child had reactive attachment disorder (RAD) and exhibited sexualized behaviors. The Court noted the evidence from the foster mother, who testified without objection about the oldest child's behavior of lying and stealing, symptoms of ADHD, RAD, and re-attachment disorder, and sexualized behaviors. Id. at 942-43. The Court also noted the therapeutic support specialist Ms. Hale testified that the oldest child danced suggestively and made sexualized comments, and that the children showed other signs of sexual behavior when playing with dolls. Id. at 943. The Court observed that the testimony about which Father complained was cumulative and was admitted without contemporaneous objection. Id. In explanation of its opinion, the Court quoted Anderson v. Scott, 630 N.E.2d 226, 232 (Ind. Ct. App. 1994) (Court observed that "[t]estimony which was cumulative of that evidence about which the [appellants] complain was admitted without objection" was not a basis for reversal arising from the testimony), *trans. denied*; and Homehealth, Inc. v. Northern Ind. Public Serv. Co., 600 N.E.2d 970, 974 (Ind. Ct. App. 1992) (Court found evidence contained in exhibit "was merely cumulative and therefore harmless."). A.F. at 943. The Court found that the admission of Ms. Hale's testimony that the oldest child had touched her sister inappropriately did not warrant reversal, even assuming it was offered for the truth of the matter asserted and not for the basis of Ms. Hale's recommendation that the children should not share a bedroom. Id. at 948.

Under the circumstances of the case, the Court could not say the trial court abused its discretion in admitting the oldest child's statements to her mental health therapist into evidence pursuant to Ind. Evidence Rule 803(4) (Statement Made for Medical Diagnosis or Treatment). Id. at 948. Father asserted that the trial court improperly permitted Ms. Hood, the oldest child's therapist, to testify what the child said to her in response to Father's letter, which was given to the child in October 2015. Father contended that the oldest child did not understand the importance of being truthful with Ms. Hood for treatment purposes. The Court noted that Ms. Hood testified without objection that the oldest child reacted to Father's letter with a range of emotions and was tearful, crying, and sobbing. Id. at 943. The Court looked to Ind. Evidence Rule 803(4), which provides:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: (4) Statement Made for Medical Diagnosis or Treatment. A statement that: (A) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

A.F. at 943. Quoting VanPatten v. State, 986 N.E.3d 255, 260 (Ind. 2013), the Court explained that this hearsay exception is grounded in a "belief that the declarant's self-interest in obtaining proper medical treatment makes such a statement reliable enough for admission at trial—more, simply put, Rule 803(4) reflects the idea that people are unlikely to lie to their doctors because doing so might jeopardize their opportunity to be made well." A.F. at 944. Citing McClain v. State, 675 N.E.2d 329, 331 (Ind. Ct. app. 1996), the Court said that (1) statements made to non-physicians may fall within Rule 803(4) if the statement is made to promote diagnosis or treatment; (2) in cases where there is a proper showing of reliability, a statement to a family therapist may be admissible to the medical diagnosis or treatment hearsay exception; (3) this belief of reliability necessitates a two-step analysis for admission. A.F. at 944. Quoting McClain,

675 N.E.2d at 331, the Court explained the two steps, "[f]irst, 'is the declarant motivated to provide truthful information in order to promote diagnosis and treatment,' and second, 'is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment.'" A.F. at 944. Again quoting McClain, 675 N.E.2d at 331, the Court observed that with respect to the first prong, the declarant's motive to promote treatment or diagnosis, "[t]he declarant must subjectively believe that he was making the statement for the purpose of receiving medical diagnosis or treatment." A.F. at 944. The Court opined that this evidence does not necessarily require testimony from the child-declarant; it may be received in the form of foundational testimony from the medical professional detailing the interaction between him or her and the declarant, how he or she explained his role to the declarant, and an affirmation that the declarant understood that role. McClain, 675 N.E.2d at 331. A.F. at 944. The Court noted the following evidence in support of its determination that the oldest child's statements to Ms. Hood were admissible: (1) testimony that Ms. Hood told the child that therapy was a safe place where the child would receive help with her feelings and where they would work together to solve problems; (2) testimony that Ms. Hood told the child about the importance of being truthful in therapy; (3) the oldest daughter was ten years old when she went over Father's letter with Ms. Hood. Id. at 947-48.

The Court opined the trial court's admission of the GAL's testimony on statements the children made to her about their desires for future placement did not warrant reversal. Id. at 948. The GAL testified that: (1) the oldest child wanted only to be adopted; (2) the middle child wanted to be returned to Mother or to Father, but if this was not possible, she felt loved by her foster parents and wanted to be adopted; and (3) the youngest child would like for Mother and Father to reunite, or to live with Father, her uncle, and grandfather, but if these two options were not possible, she would be happy to be adopted by her foster parents who loved her. Father argued the trial court abused its discretion by allowing the GAL to summarize and testify to what the children had said. Father asserted that there is nothing about the role of the GAL which creates an exception to the hearsay rule prohibiting testimony about out-of-court statements, and that summarizing out-of-court statements is no less hearsay than repeating the statements verbatim. The Court noted that: (1) Father did not object following the trial court's statement that the GAL could summarize but not repeat what the children said verbatim; and (2) two of the children indicated that they would live with Father. Id. The Court opined that under the circumstances and in light of other evidence, including Father's multiple incarcerations, the case manager's recommendation that adoption was in the children's best interests, and the therapist's support for the adoption plan, the Court could not say reversal was warranted. Id.

The Court concluded the trial court did not abuse its discretion when it admitted the GAL's testimony that the children had suffered trauma from being removed from Parents, returned to Parents, and removed again. Id. at 949. Father cited Ind. Evidence Rule 702, which governs the admission of expert testimony, and asserted that: (1) the testimony did not establish the GAL was an expert; and (2) there was no evidence on the scientific principles or reliability of the GAL's testimony about trauma to the children. The Court looked to Ind. Evidence Rule 701, which provides: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; and

(b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue." A.F. at 949 n.3. The Court opined that a lay witness may testify as to opinions or inferences which are rationally based on some combination of the witness's own personal observation, knowledge, and past experience. Id. at 949. The Court noted the GAL's testimony that she had served as a GAL for more than sixteen years, she was assigned as GAL for the children, she had received training on trauma, and she observed the children and spoke to them individually. Id. The Court noted that, when questioned by the GAL's counsel on whether there was trauma to the children from the cycle of removal from parents, living with parents, and subsequent removal from parents, the GAL testified this cycle kept the children "emotionally up and down" because they did not know what would happen next. Id. The Court concluded that the GAL's opinion was rationally based on her personal observation, knowledge, and past experience; thus, the trial court did not abuse its discretion in admitting her testimony that the children suffered trauma. Id.