Termination of the Parent-Child Relationship

2/17/17

In **Matter of Bi.B.**, 69 N.E.3d 464 (Ind. 2017), the Indiana Supreme Court reversed the trial court's order terminating Father's parental rights to his two daughters, and remanded for further proceedings. Id. at 469. Father and Mother lived in Montgomery County with five children. Father and Mother had two daughters, and Mother had three sons from a prior relationship. In April 2014, DCS learned that Parents were using methamphetamine and leaving the children unsupervised in a trash filled house. The children were found to be CHINS. On July 14, 2014, DCS removed the children due to Parents' domestic violence, lack of supervision, and continued methamphetamine use. The trial court entered a modified dispositional order, which required Parents to participate in services, including drug treatment and supervised visitation. On October 9, 2015, DCS petitioned for termination of parental rights. DCS's termination petitions for Father's daughters included the statutory requirement that at least one of the three waiting periods, which are found at IC 31-35-2-4(b)(A)(2), had passed. IC 31-35-2-4(b)(2)(A) states the termination petition must allege that one of the three waiting periods is true. The waiting periods are: (1) the child has been removed from the parent for at least six months under a dispositional decree [IC 31-35-2-4(b)(2)(A)(i)]; (2) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, [IC 31-35-2-4(b)(2)(A)(ii)]; and (3) the child has been removed from the parent and has been under the supervision of DCS for at least fifteen of the most recent twenty-two months, beginning with the date the child is removed from home as a result of the being alleged to be a CHINS or a delinquent [IC 31-35-2-4(b)(2)(A)(iii)]. DCS's termination petitions for Father's daughters incorrectly alleged that the second and third waiting periods [IC 31-35-2-4(b)(2)(A)(ii) and (iii)] applied. The termination petitions DCS filed on Father's daughters did not allege that the first waiting period [IC 31-35-2-4(b)(2)(A)(i)], namely that the child had been removed from the parent for at least six months under a dispositional decree, applied. There had not been a court finding that DCS did not need to make reasonable efforts [IC 31-35-2-4(b)(2)(A)(ii)], and the termination petitions were filed five days short of the fifteen month removal requirement [IC 31-35-2-4(B)(2)(A)(iii)], so the two waiting periods alleged in the termination petitions were not correct. At the evidentiary hearing on the termination petitions, Father argued that DCS failed to allege the only applicable statutory waiting period in its petition, but the trial court granted the termination petitions. The trial court expressly found that DCS proved both the six-month and the fifteen-month waiting periods.

Father and Mother appealed the termination of their rights to their two daughters. The Court of Appeals affirmed the trial court's orders at D.B. v. Ind. Dep't of Child Servs., 61 N.E.3d 364 (Ind. Ct. App. 2016). Only Father sought transfer on the issue that DCS failed to prove one of the waiting periods alleged in its petitions. The Indiana Supreme Court granted transfer.

The Court opined that DCS did not prove the two statutory waiting periods which were alleged in the termination petitions. Id. at 468. Quoting In Re C.G., 954 N.E.2d 910, 916 (Ind. 2011), the Court noted that, although parental rights are not absolute, yielding as they must to a child's best interests, they occupy a "preferred position" among our freedoms. Bi.B. at 467. Quoting In Re R.S., 56 N.E.3d 625, 628 (Ind. 2016), the Court observed that Indiana law has set a "high bar" for the termination of parental rights. Bi.B. at 467. The Court explained that IC 31-35-2-4(b)(2)(A) establishes "a waiting period" which "affords parents the opportunity to reunify with their children" by requiring DCS to wait for one of three time periods before filing an involuntary termination of parental rights petition. Id. at 467. The parties agreed that IC 31-35-2-4(b)(2)(A)(ii) did not apply to the instant case. Id. The Court opined that DCS failed to prove the fifteen-month waiting period had passed. Id. at 468. Father contended that fifteen months must have passed when the petition is filed, but DCS contended that the fifteen months must have passed by the time of the evidentiary hearing on the petitions. The Court opined that, by using the present tense word "is" in IC 31-35-2-4(b)(2)(A), the statute plainly requires that the fifteen months removal allegation be true when the petition is filed. Id. Quoting Platz v. Elkhart Cty. Dep't. of Pub. Welfare, 631 N.E.2d 16, 18 (Ind. Ct. App. 1994), the Court agreed with longstanding precedent which required that the statutory six month basis must be true "at the time the petition was filed."Bi.B. at 468.

The Court also noted that DCS failed to allege the six month waiting period, which applied to the instant case, had passed. Id. at 469. DCS argued that its failure to allege the six month waiting period in its termination petitions was excusable. DCS relied on Ind. Trial Rule 15(B), which states "[w]hen issues not raised by the pleadings are tried by the express or *implied consent* of the parties, they shall be treated in all respects as if they had been raised in the pleadings." (Emphasis in opinion.) Id. at 468. The Court found the statute's requirement to allege an applicable waiting period is absolute because it states the petition *must* allege that one of the waiting periods is true (emphasis in opinion). Id. The Court said: (1) "must" is mandatory language; (2) it leaves no room for good-faith omissions, even when, as in the instant case, the six month basis would apply; (3) Indiana precedent has repeatedly read the statute to demand strict compliance (multiple citations omitted). Id. The Court held that because Father expressly objected in closing argument that "the petition does not allege the six month" basis, there was no consent as provided in T. R. 15(B). Id. at 469.

The Court opined that terminating Father's parental rights despite DCS's failure to allege an applicable statutory waiting period required reversal of the termination judgment. Id. at 469. Father argued that granting the defective termination petitions was reversible error. The Court looked to IC 31-35-2-8(b), which provides, "[i]f the court does not find that the allegations in the petition are true, the court *shall* dismiss the petition." (Emphasis in opinion.) Id. Citing Jackson v. State, 50 N.E. 3d 767. 769 (Ind. 2016), the Court explained that "shall" is mandatory, and the Court cannot engraft qualifying language onto that directive. Bi.B. at 469. The Court said that: (1) a statutory requirement, even one that seems minor or technical, is still a requirement; (2) where that requirement protects the fundamental rights of parents, it takes on particular importance. Id.