



Termination of Parental Rights (TPR)

2/01/2006

In **Rowlett v. Vanderburgh County OFC**, 841 N.E.2d 615 (Ind. Ct. App. 2006), the Court reversed and remanded the trial court's order terminating Father's parental rights to his two children. Father's two children were born out of wedlock in 1999 and 2000. On June 5, 2002, police responded to a report that the children were running around outside unsupervised for more than thirty minutes. OFC investigated the living conditions which were so bad that they took the children into protective custody. As the OFC investigator was leaving the home, Father arrived and asked to speak with the investigator. Father admitted that he had recently been released from jail on drug-related charges and explained that he was trying to establish paternity so he could get custody of the children. The investigator said that the children could not be placed with him until he established paternity and informed him of the date and time of the court hearing concerning the children. The OFC placed the children with their maternal grandmother and step-grandfather. On June 7, 2002, OFC filed separate petitions alleging each of the children to be CHINS and an initial hearing was held. Father did not appear at the initial hearing, but did appear in person at a hearing on June 19, 2002, at which he admitted to the allegations in the CHINS petitions and was granted supervised visitation with the children. On August 26, 2002, Father was arrested and charged with dealing in methamphetamine and possession of precursors with intent to manufacture methamphetamine. On November 26, 2002, in the case regarding which Father had been in jail as referred to above, Father pleaded guilty to possession of methamphetamine as a Class D felony and was sentenced to three years incarceration. Father also pleaded guilty to the possession charge for which he was arrested in August 2002, and, on December 16, 2002, was sentenced to three years incarceration, to be served consecutive to the first sentence. Father was incarcerated from the time of his August 2002 arrest until June 2005. On October 22, 2003, OFC filed to terminate Father's parental rights to the children. Following a couple of status hearings, the dispositional hearing was originally set for January 25, 2005. Apparently upon Father's motion, the January dispositional hearing date was vacated, but the parties appeared at the scheduled time for a pretrial hearing at which Father's counsel informed the court that Father would be released from prison in June 2005 and requested that the dispositional hearing be reset for some time after his release. The trial court denied Father's request and reset the trial for April 12, 2005, six weeks prior to Father's release. On February 28, 2005, Father filed a motion for continuance of the April 12 hearing, which the court denied following a hearing on March 16, 2005. OFC had opposed Father's continuance motion, asserting that the children had been under the supervision of OFC for over two years and the children would benefit from the permanent placement by way of

adoption by the maternal grandmother. The dispositional hearing to terminate Father's parental rights was held as scheduled on April 12, 2005, and the trial court entered orders terminating Father's parental rights on April 21, 2005. Father appealed, arguing that the trial court abused its discretion in denying his motion for continuance of the dispositional hearing date and, in support, asserted that (1) because he was incarcerated he was unable to assist his attorney in preparing his case; and (2) he would be released from prison in June 2005, just six weeks after the scheduled dispositional hearing and that he wanted an opportunity to become established in the community and to participate in services directed at reunifying him with his children.

Under the circumstances, the trial court abused its discretion in denying Father's motion for continuance. It should have granted Father's continuance and reset the dispositional hearing after Father was given a sufficient period following his release from incarceration to demonstrate his willingness and ability to assume parental duties. *Id.* at 619-20. The Court noted that (1) the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court; (2) the Court will reverse the trial court only for an abuse of that discretion; and (3) an abuse of discretion may be found in the denial of a motion for a continuance when the moving party has shown good cause for granting the motion, but, no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial. The Court held that, here, Father showed good cause for granting his motion to continue the dispositional hearing—an opportunity for him to participate in services offered by OFC directed at reunifying him with his children upon his release from prison. The Court acknowledged that Father's incarceration was by his own doing, but noted that Father was set to be released only six weeks after the scheduled dispositional hearing. The Court further held that Father had demonstrated prejudice by the denial of his motion in that (1) his ability to care for his children was assessed as of the date of the hearing he sought to have continued; and (2) at that time Father was incarcerated and had not had the opportunity to participate in services offered by OFC or to demonstrate his fitness as a parent. The result was that his parental rights were forever and unalterably terminated, a result the Court found to be "particularly harsh" where Father, while incarcerated, participated in numerous services and programs, although offered by the correctional facility and not OFC, which would be helpful to him in reaching his goal of reunification with his children. The Court recognized the compulsion to proceed with the termination of parental rights to ensure that children do not spend long periods of their childhoods in foster care or other settings designed to be temporary. However, the Court distinguished the circumstances in this case where the children had been in the care and custody of their maternal grandmother since they were determined to be CHINS nearly three years prior to the dispositional hearing Father sought to continue and OFC's plan for the children was that they be adopted by the maternal grandmother. Thus, according to the Court, continuation of the dispositional hearing until sometime after Father was released would have had little immediate effect upon the children. *Id.* at 619-20.

Given the strides Father made while incarcerated, the OFC did not establish by clear and convincing evidence that the conditions which resulted in the removal of the children would not be remedied or that, at this point in time, termination was in the

best interests of the children. *Id.* at 623-24. The Court explained that (1) in determining whether the conditions that led to the children's removal were likely to be remedied, the trial court must assess the parent's ability to care for the children as of the date of the termination proceeding and take into account any evidence of changed conditions; however, (2) the trial court should also take into account the parent's habitual patterns of conduct as a means of determining the probability of future detrimental behavior, as well as the services offered by the OFC to the parent and the parent's response to those services. The Court noted that, here, OFC (1) presented evidence demonstrating Father's criminal history, substance abuse, unstable housing, unstable employment history, and neglect of his children, most of which occurred prior to the CHINS determinations; (2) argued that there was a reasonable probability that the issues which resulted in the children's removal and continued placement outside the home would continue based upon Father's habitual patterns of conduct prior to his most recent incarceration, including his long history of substance abuse, criminal and drug-related activity, his transient lifestyle, his lack of employment history, as well as past neglect and lack of parenting skills; and (3) asserted that it was in the children's best interests to be placed in a permanent home with the plan being for the maternal grandmother and step-grandfather to adopt them. The Court reviewed the evidence presented by OFC and noted that, while it evinced a pattern of conduct by Father prior to his latest incarceration it did not accurately reflect Father's status and ability to care for his children as of the time of the termination hearing. In this regard, the Court noted (1) Father was incarcerated throughout the entire termination proceedings and for all but two months of the CHINS proceedings; (2) at the time of the termination hearing, Father was incarcerated, but was set to be released six weeks later; (3) because of Father's incarceration, OFC did not communicate with him throughout the CHINS or termination proceedings concerning his reunification with his children; (4) OFC did not, nor was it required to, provide Father with services directed at reuniting him with his children; (5) nevertheless, while incarcerated, Father took steps and made a good-faith effort to better himself as a person and as a parent; (6) while incarcerated, Father was placed in a Therapeutic Community; (7) as of two weeks prior to the termination hearing, Father had participated in nearly 1,100 hours of individual and group services, including services in encounters, anger management and impulse control, parenting skills, domestic violence, self-esteem, self-help, and substance abuse; and (8) Father had earned twelve hours of college credit through Ball State University, maintaining a 2.33 grade point average and was enrolled in an additional eighteen hours. At the termination hearing, according to the Court, Father (1) admitted to his criminal history and prior drug use; (2) stated that he never wanted to use drugs again, that it had ruined his life; (3) testified that he benefited greatly from the services he received in the Therapeutic Community; (4) testified that he intended to continue to take positive steps once he was released from prison with the hope of being reunited with his children; (5) testified that, toward that goal, he had not used drugs while incarcerated and that once released he planned to continue counseling and other services to help him maintain sobriety; (6) testified that he had secured employment doing general construction work for after his release and that he planned to live with his aunt; and (7) testified that he had been accepted at the University of Evansville and planned to take courses in general studies beginning in August. The Court found that, given the positive strides Father had made toward turning his life around, the OFC did not present clear and convincing evidence that there was a reasonable

probability that the conditions which resulted in the children's removal would not be remedied. Id. at 620-22.

The Court also concluded that the record did not support a finding that termination at this point in time was in the best interests of the children. The Court noted that Father had maintained a relationship with his children while incarcerated: (1) Father sent the children letters; (2) the children sent him pictures they had drawn; and (3) he telephoned them and the children were happy to talk to him, telling him that they loved him and asking when he was coming home. To OFC's argument that termination of Father's rights was in the best interests of the children because only then could they be adopted by the maternal grandmother and step-grandfather and be given a permanent home, the Court responded that, despite the importance of a stable environment in the matter of raising children, this in and of itself was not a valid basis for terminating the relationship between the natural parent and the children. The Court held that under the circumstances where the children had been in the maternal grandmother's care for nearly three years and where the plans were that, upon termination of Father's rights, they would continue under her care, there was little harm in extending the CHINS wardship until such time as Father had a chance to prove himself a fit parent for the children. Id. at 622-23.

Chief Judge Kirsch dissented without opinion.