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Termination of Parental Rights (TPR)

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In **Baker v. County Office of Family & Children**, 810 N.E.2d 1035 (Ind. 2004), the Court, which had vacated 768 N.E.2d 1008 (Ind. Ct. App. 2002), affirmed the superior court's termination of parental rights. Due to Mother's cocaine use, the child was hospitalized for three weeks following her birth, then placed in an emergency shelter before being moved into foster care. She never lived with Mother or Father. The Marion County Office of Family and Children (OFC) originally planned to reunite the child with Mother and Father, but petitioned to terminate parental rights twenty months after the child's birth. The trial court terminated their parental rights. On appeal, Mother and Father argued their joint representation by one attorney at their termination hearing created an impermissible conflict of interest. The Court of Appeals, affirming the trial court, held that conflict of interest claims in termination proceedings should be considered and resolved in the same manner as claims of ineffective assistance of counsel in criminal proceedings and that the joint representation did not pose a conflict of interest. Baker, 768 N.E.2d 1008, 1013. Mother and Father appealed, claiming that the trial court did not adequately inquire about their decision to go forward with representation by the same lawyer. They contended that, without an adequate demonstration that they understood the consequences of joint representation, their right to counsel was violated. They argued that this right should be judged by a standard that affords parents a better chance to gain a second trial, than the chance to a second trial which is afforded in criminal proceedings.

Where parents, whose rights were terminated upon trial, claim on appeal that their lawyer underperformed, the Court deems the focus of the inquiry to be whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination. The question is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest. Baker, 810 N.E.2d at 1041. The U.S. Constitution does not require the appointment of counsel in every parental termination proceeding. Id. at 1038. The constitutional assurance of due process calls for counsel where the trial court's assessment of such factors as the complexity of the proceeding and the capacity of the uncounseled parent indicates an appointment is necessary. Lassiter v. Dep't of Social Services, 452 U.S. 18, 27-32 (1981). Rather than

incur the time and money to litigate eligibility for public counsel in each case, Indiana has chosen to provide counsel in termination proceedings to all indigent parents. IC 31-32-4-1 and 31-32-2-5.

The Court concluded that transporting the structure of the criminal law, featuring as it does the opportunity for repeated re-examination of the original court judgment through ineffectiveness claims and post-conviction processes, has the potential for doing serious harm to children whose lives have by definition already been very difficult. *Id.* at 1039. The Court referenced the Court of Appeals' contrary holding in J.T. v. Marion County OFC, 740 N.E.2d 1261, 1265 (Ind. Ct. App. 2000), and discussed four bases for the Court's conclusion: (1) Experience in the criminal law with the present system of direct appeals, post-conviction proceedings, and habeas petitions demonstrates that with rare exception counsel perform capably and thus ensure accurate decisions. The correctness of such decisions is at the heart of the assurance that parties in termination cases will receive due process. Lassiter v. Dep't of Social Services, 452 U.S. 18, 27 (1981). (2) Criminal prosecutions and termination proceedings are substantially different in focus, in that the resolution of a civil juvenile proceeding focuses on the best interests of the child, not on guilt or innocence as in a criminal proceeding. Baker, 810 N.E.2d at 1039. (3) Serial relitigation in criminal cases imposes substantial burden on victims and witnesses, who are typically adults, but in the context of termination cases, extended litigation imposes that burden on the children, the most vulnerable people the system and such cases seek to protect. It is in the children's best interest and overall well being to limit the potential for years of litigation and instability. *Id.* at 1040. (4) The odds of an accurate determination in a termination case are enhanced by the fact of judicial involvement that is much more intensive than it is in the usual criminal case. *Id.* at 1041.

The joint representation of Mother and Father in this case did not result in a conflict of interest which might well produce a procedurally unfair setting. Mother and Father shared the interests of maintaining parental rights over the child, and there was no solid evidence showing that their interests were adverse and hostile. Their attorney questioned and cross-examined both Mother and Father when they testified. At no time did Mother and Father blame each other for the allegations made by OFC. The record did not suggest that either parent stood to gain significantly by separate representation. The record did show that both parents neglected to complete the treatments and services required of them and admitted that they could not be good parents at that time. There was nothing to suggest that representation by a single lawyer led to a fundamentally unfair hearing. *Id.* at 1042.