

Children's Law Center of Indiana



Termination of the Parent-Child Relationship and Court Appointed Special Advocate/Guardian ad Litem

1/25/13

In **D.T. v. Indiana Dept. of Child Services**, 981 N.E.2d 1221 (Ind. Ct. App. 2013), the Court concluded that Father's due process rights had not been violated, and affirmed the trial court's order terminating Father's parental rights to his twenty-month-old child. The child was born on August 11, 2010, when Father was fifteen years old. The Department of Child Services (DCS) filed a CHINS petition when the child was two days old. The child was placed in foster care approximately a week after birth. At the initial CHINS hearing, Father requested and was appointed a public defender. Guardians ad Litem (GALs) were appointed for Mother, who was not a minor, but who had lower cognitive abilities, and for the child. Mother was also represented by an attorney. The child was found to be a CHINS in September 2010. At the dispositional hearing in October 2010, the court ordered, among other things, for Father to: participate in a parenting assessment and complete all recommendations; participate in and complete home-based counseling and complete all recommendations of the counselor; secure stable income; and obtain and maintain suitable housing. The plan at the time of the dispositional hearing was reunification of the child with the parents. At the placement review hearing on January 11, 2011, Father was represented for a portion of the hearing by Mother's attorney, who was standing in for Father's attorney until Mother's attorney noted a conflict of interests and said that he was no longer representing Father. The court noted that Father had refused to participate in services, had stated that he did not want anything to do with the child, and home-based counseling was closed prior to completion due to his lack of participation. The court also noted that paternal grandmother (Grandmother) had not been meeting with home-based services, attending meetings, or following recommendations.

On January 14, 2011, Father admitted to a charge of possession of marijuana, a misdemeanor if committed by an adult. In March 2011, Father's probation officer filed a petition for modification because Father had multiple absences from ordered programs and was disruptive when present. On February 17, 2012, Father was charged with felony confinement with the use of a deadly weapon and felony battery with the use of a deadly weapon and possession of a handgun as a misdemeanor.

In August 2011, the court held a permanency hearing and ordered the plan changed to adoption with a review hearing scheduled and continued services for Father. Father had told the DCS case

manager that he did not want to parent. Father was recently (re)engaged with home-based services but earlier that week he had stated that he did not want to participate in services, and Father had not been communicating with home-based services or returning calls. Father's counsel objected to the permanency plan change and said that Father would like to continue working toward having the child in his home, and the court told Father that he could "rally" and could get the child. On December 13, 2011, the court held a review hearing at which it was noted that Father was not participating in parenting skill services, but was visiting the child. The foster mother who had cared for the child since he was a week old stated that she wanted to adopt him.

An evidentiary hearing was held on the termination petition on February 17, 2012. The case manager testified that: (1) Father had been vocally opposed to services and visitation with the child until well into 2011; (2) Father had been referred to home-based services, parenting skills classes, and to Fathers and Families, an agency directed at young fathers, and each referral had been made at least five times; (3) she could not recommend placement of the child with Father because of lack of progress on goals, and Grandmother, with whom Father resided, had also not completed the information necessary for a waiver to place the child in her home; (4) she had worked with minor parents in the past, and DCS tries to cater to the level of understanding of the minor parent. The foster mother testified that the child: (1) was on a feeding tube for the first five months and had physical therapy and frequent appointments at Riley Children's Hospital to deal with developmental delays; (2) at the time of the hearing was in physical therapy for mobility, about to get leg braces to treat bowlegs, was participating in developmental therapy to address age appropriate behavior, and was participating in occupational therapy to work on his feeding skills due to risk for aspiration; (3) had frequent ear infections, was scheduled to have tubes put in his ears, and his liquids had to be thickened. The foster mother also testified that: (1) when she dropped the child off for visitation with Father and Father's family, she told the intermediary of upcoming appointments and left a note in the diaper bag with information on appointments; (2) neither Father nor Grandmother ever came to any of the child's medical appointments; (3) visitations with Father were often canceled or cut short by Father. Father and Grandmother both testified that the only medical issue they were aware of was that the child needed to have his liquids thickened. The court issued an order terminating the parent-child relationship of Father and Mother to the child on April 24, 2012, and Father appealed.

The Court affirmed the termination order, finding that there was no fundamental error, and that Father's due process rights were not violated when the court failed to appoint a Guardian ad Litem (GAL) for Father. *Id.* at 1226. The Court, citing C.T. v. Marion Cnty. Dept. of Child Servs., 896 N.E.2d 571, 586 (Ind. Ct. App. 2008), *trans. denied*, said that, when the State terminates a parent-child relationship, it must do so in a manner that meets the requirements of due process. *D.T.* at 1224. The Court opined that due process within the context of a termination of a parent-child relationship requires the balancing of three factors: (1) the private interests affected by the proceeding, (2) the risk of error created by the State's chosen procedure, and (3) the countervailing governmental interest supporting use of the challenged procedure. *C.T.* at 586. *D.T.* at 1224. The Court noted that it did not appear that Father raised

the issue of appointment of a GAL at the trial. Id. The Court said that DCS correctly argued that issues not timely raised at the trial level are waived on appeal, but waived issues may be addressed on appeal if they qualify as fundamental error. Id. at 1225. The Court explained that, to qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible, must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. Id.

Father contended that a GAL would have insisted that the obligations imposed on Father be tailored to a minor, and would have understood the importance of the choices made at the initial CHINS hearings. The Court agreed with Father that the participation decree could have been better tailored to a minor parent, and that the language regarding employment and housing were not written with a minor parent in mind. Id. The Court observed that the trial court emphasized Father's failures to meet obligations that *were* appropriate for a minor, and that it was the sum total of Father's lack of participation that largely informed the court's opinion and not choices made at any one hearing (emphasis added by Court). Id.

Father argued that a GAL should have been appointed under IC 31-32-3-11, which states that "[t]he juvenile court may appoint a guardian ad litem or a court appointed special advocate, or both, for the child at any time." The Court opined that IC 31-32-3-11 could have applied to Father, but the wording clearly indicates that appointment of a GAL under this section is discretionary, and the court was not required to appoint a GAL for Father. Id. at 1226. The Court, noting that termination proceedings are civil in nature and therefore governed by the Indiana Rules of Trial Procedure, looked to Ind. Trial Rule 17, which requires that "[i]f an infant or incompetent person is not represented or is not adequately represented, the court shall appoint a guardian ad litem for him." Id. at 1225. The Court observed that, in the present case, Father was represented by counsel at all hearings except for the final half of the January 11, 2011, hearing at which Mother's counsel was sitting in for Father's counsel, and that Grandmother was present at most hearings and was involved in the case. Id. The Court concluded that any risk of error created by not providing Father with a GAL was low. Id.

The Court also noted its disappointment with the overall care that was taken with this case. Id. at 1225. The Court "regretted" that the trial court allowed the January 11, 2011, hearing to continue without Father's counsel present, particularly after Mother's counsel noted a conflict and stated that he could no longer stand in for Father's counsel. Id. The Court observed that the January 1, 2011, hearing was not a hearing at which the plan for permanency changed or where new obligations were imposed on Father, nor was it the trial where evidence regarding termination was heard. Id. at 1226 n.5. The Court did not approve of the trial court's handling of representation on January 11, 2011, but did not find any resulting error in the later termination of Father's parental rights. Id.