

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

12/14/11

In **H.G. v. Indiana Dept. of Child Services**, 959 N.E.2d 272 (Ind. Ct. App. 2011), the Court reversed the trial court's order which terminated the parent-child relationship and remanded the case for further proceedings. A CHINS petition was filed for the three children, then ages twelve, nine, and eight on May 26, 2009. At the time of the filing of the petition, Mother and the oldest child's Father (hereinafter "Father 1") were unavailable to care for the children due to pending criminal charges. The Father of the two youngest children (hereinafter "Father 2") was not employed and had not refilled the two youngest children's ADHD medication. In addition, the petition alleged that the two youngest children had frequently been late or absent from school since Mother had been incarcerated, and that the children appeared to have lost a lot of weight, had dark circles under their eyes, their hair and fingernails were dirty, and the youngest child had been wearing his brother's clothes which were very big for him. Mother admitted that the children were CHINS in June 2009 and Father 1 admitted that the oldest child was a CHINS on July 29, 2009. By July 6, 2009, Mother was in Hamilton County Jail awaiting transfer to Rockville Correctional Center for the burglary she had committed with Father 1. The trial court found the two youngest children to be CHINS after Father 2's factfinding hearing on August 26, 2009. On September 27, 2009, the trial court granted Father 2 supervised step-parent visitation with the oldest child. On October 7, 2009, the trial court entered dispositional orders for the two youngest children and a parental participation order for Father 2. Father 2 was ordered to participate in home-based counseling and comply with any recommendations; remain drug-free and submit to random drug tests; complete a drug assessment and comply with any recommendations; attend all visits; secure stable housing, income, and transportation; attend all his medical appointments; sign any releases requested by DCS; remain in contact with the family case manager; and notify DCS of any change in contact information. Father 2 was granted unsupervised weekend visits with the two youngest children, but DCS filed a motion to suspend the unsupervised visits later in October because Father 2 tested positive for cocaine.

Throughout the CHINS case the children were placed with relatives and in foster care. All three children were placed in the same foster home by March 19, 2010. DCS filed progress reports delineating services offered to Mother, Father 1, and Father 2 on November 16, 2009, February 23, 2010, July 21, 2010, and December 8, 2010. Services offered included visitation for the children with their Mother, Father 1, and Father 2, drug testing and substance abuse treatment for Father 2, and home-based therapy on parenting skills, housing, employment, and medical issues

for Father 2. DCS progress reports noted that Mother and Father 1 were participating in services offered by the Department of Correction, including vocational classes, anger management classes, substance abuse programs, the Inside Out Dads program, and the Purposeful Living Units Serve (PLUS) program. The children's Court Appointed Special Advocate filed reports with the court on August 25, 2009, December 13, 2010, and February 23 and 24, 2011. In her reports the Court Appointed Special Advocate noted the bond between the two youngest children and Father 2, the oldest child's disappointment when an arranged visit with Father 1 did not take place, the children's enjoyment of their visits with Mother, and the oldest child's strong bond with Mother and ambivalence about being adopted.

On June 23, 2010, DCS filed petitions for involuntary termination of Mother's, Father 1's, and Father 2's parental rights to the three children. The termination hearing was held on March 1, 2011; the children were ages fourteen, eleven, and nine at the time. Mother, who was incarcerated for burglary at Rockville Correctional Facility, testified that (1) her earliest release date according to DOC is July 13, 2013; (2) she had completed the Clean Lifestyle is Freedom Forever (CLIFF) program, an eight-month drug rehabilitation program; (3) she earned a six-month time cut and when she receives her credit, her release date will be January 13, 2013; (4) if she gets her GED, her release date will be July 13, 2012; (5) a community transition program could move her release date to January 2012; (6) after release, she will be on probation for four years; (7) she writes to the children every week and has written each child a letter saying that she had made a mistake and was sorry. Father 1, who was incarcerated at Branchville Correctional Facility, testified that: (1) he is incarcerated for burglary, three class C felony convictions for auto theft, and a class B misdemeanor conviction for failing to stop after an auto accident; (2) his earliest release date is December 17, 2013; (3) he is eligible for two six-month credits when he finishes the PLUS Program and a housekeeping apprenticeship program; (4) he believes that he will be released in December 2012 once he has earned all available credits; (5) he plans to live with an aunt when released, and a friend is helping him look for a job; (6) he thought that his visits with the oldest child had improved over time; (7) he had spent "a good portion" of his life and the child's life in prison, and had admitted his mistakes to the child and apologized in court; (8) he had abused hydrocodone, marijuana, and Xanax in the past. Father 2 testified that: (1) he was evicted after the children were removed, and then lived with a cousin and later with his father; (2) he had worked for eight years as a mechanic, but lost that job about six months before the children's removal; (3) since then he had part-time jobs working in landscaping and installing flooring; (4) he had obtained a full-time job as a mechanic about three weeks before the termination hearing; (5) he has had a problem with drugs "[p]retty much all my life" and has been through four or five drug treatment programs; (6) both he and Mother had a strong bond with the children.

The DCS family case manager testified, inter alia, that: (1) if parental rights are terminated and the oldest child does not consent to an adoption, he would remain in foster care until he "age[s] out of the system" at age eighteen; (2) a parents' efforts made while incarcerated would be "acknowledged" but not taken "into [DCS's] final recommendation"; (3) Father 2 had

participated in home-based counseling and drug assessment and complied with the recommendations; (4) she believed termination was in the children's best interest because they need "stability and permanency" and that continuation of the parent-child relationship was a threat to the children's well-being because "no progress" had been made; (5) she acknowledged that the children loved Father 2 "very much" and that termination would "have somewhat of a negative effect on them." The visitation supervisor testified that: (1) Father 2 had difficulty maintaining discipline with the children; (2) she thought Father 2 was trying and had "multiple factors" that are "hurdles for him," such as employment, transportation, health care, and housing; (3) she was not aware of any dangers to the children and she felt that the children have a bond with him. The Court Appointed Special Advocate testified that: (1) the only concern she had regarding Mother and Father 1 was their incarceration; (2) Father 2 had been more motivated in recent months and had been involved with the children's doctor appointments, football games, school events, and 4H activities; (3) the parent-child relationship posed a threat to the children because "they need permanency, stability"; (4) the oldest and youngest children have bonds with their parents; (5) the only person the middle child shows emotion to is Father 2 and termination would be "devastating" to the middle child; (6) it would harm the children if they were separated.

One of the issues which arose at the termination trial was DCS's objection to evidence on the children's placement. DCS argued that the children's placement was relevant only to the CHINS proceeding. Counsel for Father 2 argued that evidence on placement of the children was relevant to whether DCS had a satisfactory plan for the children. The trial court ruled that Father 2's mother could answer questions on the possible placement of the children in her home, and that the trial court would grant DCS's motion to strike testimony on the children's placement if the court's research indicated that DCS's objection should have been sustained. Perhaps misunderstanding the court's ruling, the attorney for Father 2 withdrew his question on placing the children with Father 2's mother. The court took the case under advisement. Ten days later, DCS removed the children from their foster home due to licensing complaints received on February 24, 2011, and March 9, 2011. The foster parents had been listed as the "Adoptive Family" in a progress report filed by DCS on July 21, 2010. The children stated to the family case manager that they were afraid of the foster father's temper, that he cusses and yells a lot, and they would rather be moved to a new foster home than be adopted by the current foster home. The family case manager's report on the reasons for moving the children was attached to DCS's notice of change of placement, which was filed with the court. The parents filed a motion requesting the trial court stay its decision and grant a hearing. DCS objected, again arguing that the children's placement was not relevant to the termination proceedings. The trial court granted DCS's motions and denied the parents' motions. Father 1 moved that the family case manager's report on the removal of the children be made part of the record, and DCS objected to Father 1's motion.

On March 22, 2011, the trial court denied Father 1's motion and issued orders terminating each parent's rights to the children. The court noted that Mother's scheduled release date is July 13,

2013, and Father 1's is December 17, 2013. The court declined to consider the potential time cuts testified to by Mother and Father 1. The court also noted that Mother would be on probation after her release, and that based on her record, she was likely to violate her probation. The court discussed Father 2's drug use and the visitation supervisor's testimony about his difficulty in maintaining discipline. The court noted that both the family case manager and the Court Appointed Special Advocate testified in favor of termination, and that the children's special needs had been met since their removal. All three parents have appealed.

The Court concluded that the evidence does not support the trial court's conclusion that termination is in the children's best interest. *Id.* at 289. The Court found this case to be similar to two cases in which the Indiana Supreme Court held that a child's need for permanency did not justify terminating parental rights: *In Re G.Y.*, 904 N.E.2d 1257 (Ind. 2009) and *In Re J.M.*, 908 N.E.2d 191 (Ind. 2009). *H.G.* at 290. In *G.Y.*, the mother committed dealing in cocaine prior to the child's birth. When the child was about two years old, the mother pled guilty and was sentenced to eight years executed. The child visited the mother, who took a substance abuse education class, a parenting class, and some college courses while incarcerated. By the time of the termination trial, the mother was scheduled to be released in about two years. The Indiana Supreme Court reversed the trial court's termination order, holding that the evidence did not support the trial court's conclusion that the termination was in the child's best interests. *G.Y.*, 904 N.E.2d at 1266. *H.G.* at 290. In *J.M.*, both parents were convicted of attempted dealing in methamphetamine. The trial court denied the termination petition because the parents' release dates would occur soon, the parents had completed many of the required dispositional services while incarcerated, and their ability to establish a stable and appropriate life upon release could be determined within a relatively quick period of time. *J.M.*, 908 N.E.2d at 194. *H.G.* at 290-91. The Court differentiated between this case and *J.M.* because in this case the parents are arguing for reversal of the trial court's orders, whereas *J.M.* affirmed the trial court's orders—an important fact given the Court's deferential standard of review. *H.G.* at 291. The Court said that both *G.Y.* and *J.M.* make it clear that, contrary to DCS's argument, the court is not prohibited from considering the possibility of a parent's early release, nor should it disregard a parent's voluntary efforts while in prison. *Id.* The Court noted that, like the parents in *J.M.* and *G.Y.*, Mother and Father 1 have been cooperative and involved in their child(ren)'s cases, have taken advantage of opportunities for improvement while in prison, have made every effort to obtain an early release, have a bond with their child(ren), and their abilities to parent can be quickly assessed upon release. *H.G.* at 291-92. The Court also noted that neither DCS nor the trial court took into account Father 2's obstacles in finding a full-time job such as health problems, lack of reliable transportation, and a sluggish economy. *Id.* at 292. The Court observed that, now that Father 2 is employed full-time, he has better prospects for finding appropriate housing. *Id.* DCS discounted Father 2's recent employment, citing *Prince v. DCS*, 861 N.E.2d 1223, 1230 (Ind. Ct. App. 2007), for the proposition that rehabilitation must occur "during the CHINS process, *prior* to the filing of the petition for termination." The Court opined that it does not believe that *Prince* requires courts to ignore changed circumstances, particularly when those changed circumstances are not entirely within the parent's control. *H.G.* at 293. The Court also observed that "[a] child's need for stability is of great importance; however, mere

invocation of words like ‘stability’ or ‘permanency’ does not suffice to terminate parental rights.” Id. The Court noted that each parent still has work to do before reunification would be possible, but they have each shown willingness to continue working toward reunification, and they clearly have a bond with the children. Id. The Court opined that the record simply does not show that terminating the parents’ rights will do anything to increase the children’s sense of stability. Id. The Court found there appeared to be little harm in allowing the parents to continue working on reunification, noting the following: (1) no adoptive family has been identified; (2) the children were placed in a new foster home shortly after the termination hearing; (3) the oldest child’s expressed unwillingness to be adopted. Id.

The Court opined that a child’s placement may be relevant in termination cases, especially where, as in this case, DCS relies heavily on a child’s need for permanency. Id. at 294. The Court acknowledged that adoption has been held to be a satisfactory plan even in cases where a potential adoptive family has not been identified, but noted that this case highlights how such a plan is not necessarily in the child’s best interests. Id. The Court said that DCS must prove both that its plan is satisfactory and that termination is in the child’s best interests. Id. The Court observed that “[a]lthough it is true that DCS is not required to *prove* anything concerning the adequacy of the children’s placement, that is not the same as saying that the children’s placement is *never relevant* to the facts that it must prove.” Id.