

Children's Law Center of Indiana



Termination of Parent-Child Relationship

6/6/12

In **In Re D.W.**, 969 N.E.2d 89 (Ind. Ct. App. 2012), the Court concluded that the trial court properly terminated Father's parental rights to his four children, who were seven, six, three, and one year of age at the time of the termination judgment. On August 21, 2009, DCS filed a petition alleging that the three oldest children were Children in Need of Services because Mother had been sleeping in a car with the children, Mother had been leaving the children with various people to care for them, Mother did not have a home or a job, Mother had a substance abuse problem, the oldest child was of school age but not enrolled in school, and Father was incarcerated with his earliest possible release date in September 2009. On October 30, 2009, after Mother and Father admitted to the allegations in the CHINS petition, the trial court found the children to be CHINS and placed them in foster care. On December 4, 2009, the trial court held a dispositional hearing, maintained the children in foster care, and ordered Father to: (1) participate in a parenting and family functioning assessment and follow all recommendations; (2) submit to random drug and alcohol screens as requested with negative results for all substances; (3) participate in home-based services; and (4) receive individual counseling, among other requirements.

On May 28, 2010, Mother gave birth to a fourth child who exhibited signs of drug withdrawal. Mother tested positive for opiates. On July 1, 2010, DCS filed a petition alleging that the fourth child was a CHINS, and placed him in foster care upon his release from the hospital's Neonatal Intensive Care Unit. On July 22, 2010, the trial court found the fourth child to be a CHINS after Mother and Father admitted to the allegations. In its dispositional order, the trial court ordered Father to participate in substantially the same services and programs in which it had ordered him to participate for the three older children's CHINS case. Upon his release from incarceration, Father: (1) completed a substance abuse assessment, but failed to show up for any of the intensive outpatient group sessions that met twice per week; (2) during two years of CHINS proceedings, complied with submitting to random drug screens and tested negative for drugs during only three months; (3) at other times did not call in for drug screens or tested positive for drugs, including heroin, marijuana, alcohol, and opiates; (4) lost his employment due to drugs and remained unemployed; (5) never completed home-based services due to missed appointments; (6) failed to participate in substance abuse therapy; and (7) attended court-ordered counseling only sporadically and did not show motivation. Father also "disappeared" and did not participate in visitation with the children or court-ordered services between January 6, 2011, until the end of March 2011, when the family case manager (FCM) located him through relatives. Father explained to the FCM that he had been depressed during those three months,

living in different places, and using drugs. On September 13, 2011, at the second day of the termination trial, Father admitted that he had still been using drugs around August 4, the first day of the trial. Father testified that he was sober, living with his father, had separated from Mother, and was unemployed. The trial court terminated Father's parental rights, and he appealed.

The Court concluded, as a matter of first impression, that a finding as to one part of IC 31-35-2-4(b)(2)(B)(i) is a finding as to subsection (i) as a whole. *Id.* at 95. The Court noted that, pursuant to IC 31-35-2-4(b)(2)(B), DCS was required to prove by clear and convincing evidence:

- (B) that one of the following [was] true:
 - (i) There [was] reasonable probability that the conditions that resulted in the child[ren]'s removal or the reasons for placement outside the home of the parents [would] not be remedied.
 - (ii) There [was] a reasonable probability that the continuation of the parent-child relationship [posed] a threat to the well-being of the child[ren].
 - (iii) The child[ren] [had], on two (2) separate occasions, been adjudicated [] in need of serves[.]

Id.

Claiming that he did not cause the conditions that resulted in the children's removal because the three oldest children were removed from Mother's custody when Father was incarcerated and the youngest child was removed due to Mother's drug use during pregnancy, Father argued that the trial court erred in terminating his parental rights by concluding that the conditions that resulted in the children's removal from his custody would not be remedied. The Court said the essence of Father's argument is that the requirements of IC 31-35-2-4(b)(2)(B)(i) are disjunctive; namely, a trial court may find that either "[t]here [was] a reasonable probability that the conditions that resulted in the children's removal *or* the reasons for placement outside the home of the parents [would] not be remedied," and a finding of one is independent of a finding of the other (emphasis in opinion). *Id.* at 94. In response to Father's argument, the Court observed that, although Mother's actions caused DCS to file CHINS petitions, the allegations of the petitions also cited Father as a reason for removal. *Id.* The Court noted that the first CHINS petition listed Father's incarceration in support of the CHINS finding, and the second CHINS petition listed Father's two positive tests for heroin in support of the CHINS finding. *Id.* The Court further noted that Father admitted to the allegations at both CHINS hearings, and his admissions were proper bases for the CHINS adjudications. Id.

The Court agreed with Father that the trial court did not provide sufficient findings that the cause for the removal of the three oldest children—Father's incarceration—would not be remedied, as Father was released from incarceration shortly after the start of the CHINS proceedings and has remained free from incarceration since. *Id.* The Court therefore addressed Father's argument that IC 31-35-2-4(b)(2)(B)(i) can be read in the disjunctive and the trial court therefore did not conclude that the conditions that led to the children's continued removal from Father's home would not be remedied. *Id.* The Court relied on the following principles of statutory interpretation: (1) the interpretation of a

statute is a questions of law reserved for the courts; (2) if a statute is unambiguous, the Court must give the statute its clear and plain meaning; (3) if a statute is susceptible to multiple interpretations, the Court must try to ascertain the legislature's intent and interpret the statute so as to accomplish that intent; (4) in ascertaining the legislature's intent, the Court considers the phraseology, nature, and design of the statute, and the consequences that flow from the reasonable alternative interpretations of the statute; and (5) the Court presumes that our legislature intended the statutory language to be applied in a logical manner consistent with the underlying goals and purposes of the statute (multiple citations omitted). *Id.* at 94-95. The Court addressed Father's argument that the trial court may find *either* there was a reasonable probability that the conditions that resulted in the children's removal would not be remedied *or* the reasons for placement outside the home of the parents would not be remedied, and a finding of one will preclude a finding of the other absent an independent trial court conclusion (emphasis in opinion). *Id.* at 95. The Court interpreted the legislature's intent in drafting IC 31-35-2-4(b)(2)(B) is that a finding that one part of subsection (i) has been fulfilled is equivalent to a finding that subsection (i) as a whole has been fulfilled. *Id.* The Court said, in support of its interpretation, that IC 31-35-2-4(b)(2)(B) requires DCS to show that *one* of the following is true: subsection (i), subsection (ii), or subsection (iii) (emphasis in opinion). *Id.* The Court, noting that the legislature refers to subsection (i) as a complete entity, opined that if the legislature had intended the contents of subsection (i) to constitute two independent elements, it would have separated IC 31-35-2-4(b)(2)(B) into four separate subsections rather than three. *Id.*

The Court determined that the trial court's findings supported its conclusion that the conditions causing the children's removal from Father's home would not be remedied. *Id.* at 97. The Court noted the following case law principles on determining whether there is a reasonable probability that a parent will not remedy the conditions justifying a child's removal from the home or continued placement outside of the home: (1) the trial court must judge a parent's fitness to care for the child at the time of the termination hearing; (2) the trial court must evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child; (3) DCS is not required to rule out all possibilities of change, but need only establish that there is a reasonable probability that the parent's behavior will not change (multiple citations omitted). *Id.* at 95-96. The Court concluded that the trial court had sufficient findings to support its conclusion in that Father consistently failed to take advantage of services provided and ordered by the court, consistently failed to stay clean of drugs, and although Father testified that he had not used drugs in a month, his sobriety was "tenuous" in light of his history. *Id.* at 96-97.