

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

11/18/14

In ***In Re E.P.***, 20 N.E.3d 915 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's order terminating incarcerated Father's parental rights to the child. *Id.* at 917. The child was born on August 20, 2011, and had a maternal half-sister (Sister) born in 2008. The child and Sister were removed from Father and Mother in November 2011 after the Dearborn County Department of Child Services (DCS) learned that Sister had been treated at the local hospital for severe burns to her genital area and buttocks. Neither parent could explain how Sister had been burned. In March 2012, Mother and Father admitted that both children were CHINS. Both parents were ordered to do a number of things to facilitate reunification with the children, including participate in services. Neither parent made any discernible progress towards reunification. Father was incarcerated shortly after the CHINS adjudication for battering Mother. Father later pled guilty to domestic battery of Mother. Upon Father's release from incarceration on the battery charge one month later, Mother and Father were arrested and charged with molesting and neglecting Sister. These charges stemmed from the burns Sister suffered in 2011. Mother and Father ultimately pled guilty to Class B felony child molesting and Class B felony neglect of a dependent. At the guilty plea hearing, Father admitted the truth of allegations against him, and the Honorable James Humphrey, Judge of the Dearborn Circuit Court, sentenced Father to twenty years. Father is scheduled to be released on 2029, and he is a credit-restricted felon. Mother was also sentenced to twenty years, is scheduled to be released in 2029, and she is a credit-restricted felon.

DCS filed an amended petition to terminate Mother's and Father's parental rights. In early 2014, Judge Humphrey held a hearing on the petition. At the beginning of the hearing, Judge Humphrey informed counsel for the parties that he was familiar with the parents' criminal cases and their guilty pleas to child molesting and neglect. At no point did any party object to Judge Humphrey presiding over the termination case. At the hearing, DCS caseworkers testified that: (1) the child, who was only a few months old when he was removed from his parents' care years earlier, was thriving in his foster care placement; and (2) termination of Father's rights was in the child's best interests because he was doing so well in foster care. The child's guardian ad litem opined that Father's rights should be terminated because Father would not be available to parent the child any time in the near future. Father testified that: (1) he had only been partially compliant with services; (2) he loved the child and had been sending him letters from prison; (3) if he got out of jail, he would participate in services to regain custody of the child; (4) he denied molesting or neglecting Sister and wanted to withdraw his guilty plea and go to trial; (5) he only pled guilty because he was going to be found guilty and did not want Sister to have to go through

the legal proceedings. Father later stated that “if [Sister] said something happened, then I guess something may have happened. . . I’m sorry for that.” In light of Father’s conflicting statements, the trial court indicated that it would take judicial notice of Father’s statements at his guilty plea hearing, and there were no objections. In February 2014, the trial court entered its order terminating both parents’ rights. Father appealed. Mother did not participate in this appeal.

The Court concluded Father’s claim that Judge Humphrey violated IC 31-32-8-2 by presiding over his termination proceeding when Judge Humphrey had also presided over Father’s criminal case was a procedural claim that Father had waived. *Id.* at 919. Father asked the Court to reverse the trial court’s termination order and remand the case for a new hearing before a new judge. The Court noted IC 31-32-8-2 provides that the judge who presided over the trial at which an individual was convicted of an offense listed at IC 31-35-3-4 may not be the judge who presides over the proceedings in an action filed under IC 31-35-3 [termination petition on parent convicted of specific criminal acts] with respect to that individual. *Id.* The Court noted that child molesting is one of the offenses listed in IC 31-35-3-4. *Id.* at n. 7. The State responded that IC 31-32-8-2 is a procedural statute and Father had waived his argument by failing to object at the trial because IC 31-32-8-2 does not implicate jurisdiction. The Court agreed with the State. *Id.* The Court said that Judge Humphrey had jurisdiction to consider the petition to terminate Father’s parental rights pursuant to IC 33-28-1-2, which provides that all circuit courts have original and concurrent jurisdiction in all civil and criminal cases. *Id.*

The Court opined that Father’s claim, which is that he was entitled to a change of judge, implicated procedural or legal error, not jurisdiction. *Id.* Citing *Johnson Cnty. Rural Elec. Membership Corp. v. S. Cent. Ind. Rural Elec. Membership Corp.*, 883 N.E.2d 141, 145 (Ind. Ct. App. 2008), the Court said that non-jurisdictional procedural errors may be waived if they are not raised at the appropriate time. *E.P.* at 919. The Court noted that, at the beginning of the termination hearing, Judge Humphrey reminded the parties that he had presided over the parents’ criminal cases, yet Father never objected to Judge Humphrey presiding over the termination case. *Id.* The Court found that Father raised this issue for the first time on appeal; therefore, he had waived his claim of error. *Id.*

In light of all the evidence presented, the Court concluded that the trial court properly determined that there was a reasonable probability that the conditions resulting in the child’s removal or the reasons for his placement outside Father’s home would not be remedied. *Id.* at 922. Father argued that there was insufficient evidence to support the trial court’s termination order. Citing *In Re K.T.K.*, 989 N.E.2d 1225, 1230 (Ind. 2013), the Court observed that the parent-child relationship is one of our culture’s most valued relationships, but parental rights are not absolute, and may be terminated if the parent is unable or unwilling to meet parental responsibilities by failing to provide for the child’s immediate and long term needs. *E.P.* at 920. On appeal, Father challenged the trial court’s finding that DCS had proven the elements of IC 31-35-2-4(b)(2)(B), namely, that there was a reasonable probability that the conditions that resulted in the child’s removal would not be remedied, and that continuation of the parent-child relationship posed a threat to the child’s well-being. The Court observed that

IC 31-35-2-4(b)(2)(B) is written in the disjunctive. Id. at 921. Because the Court found it dispositive, the Court discussed only whether there was a reasonable probability that the conditions that resulted in the child's removal or the reasons for his placement outside Father's home would not be remedied. Id.

The Court observed that IC 31-35-3-8(1) states that a showing that Father has been convicted of an offense listed at IC 31-35-3-4 is prima facie evidence that "the conditions that resulted in the removal of the child from the parent under a court order will not be remedied." Id. The Court noted that IC 31-35-3-4(1)(G) includes child molesting as one of the listed offenses. Id. Quoting Earl v. Am. States Prepared Ins. Co., 744 N.E.2d 1025, 1028 (Ind. Ct. App. 2001), the Court defined "prima facie" as "such evidence as is sufficient to establish a given fact and which will remain sufficient if uncontradicted." E.P. at 921. Citing Mullins v. State, 646 N.E.2d 40, 50 (Ind. 1995), the Court noted that the contradiction of prima facie evidence merely creates a question for the trier of fact. E.P. at 921. The Court observed that, at the termination hearing, DCS introduced evidence of Father's incarceration for molesting Sister, and Father did not object to this evidence. Id. Although Father argued that he had contradicted this prima facie evidence by protesting his innocence at the hearing, the Court was not convinced that his claims contradicted the prima facie evidence presented by DCS. Id. The Court noted that Father "muddied the waters" when he apologized for "something" happening to Sister. Id. The Court opined that, to the extent that Father created a question of fact on the continuation of the parent-child relationship posing a threat to the child's well-being, the trial court resolved that question in DCS's favor. Id. The Court found no error in that regard. Id.

The Court opined that the other evidence presented by DCS clearly supported the trial court's conclusion that there was a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside Father's home would not be remedied. Id. at 922. Citing A.F. v. Marion Cnty. Office of Family & Children, 762 N.E.2d 1244 (Ind. Ct. App. 2002), *trans. denied*, the Court noted that the trial courts may consider evidence of a parent's prior criminal history, drug and alcohol abuse, neglect, failure to provide support, and lack of adequate housing and employment. E.P. at 922. The Court observed the trial court heard evidence that: (1) Father was only partially compliant with services before he was incarcerated, first for battering Mother and later for molesting and neglecting Sister; and (2) Father will be unable to parent the child until at least 2029 due to his convictions, by which time the child will be an adult. Id.