

Children's Law Center of Indiana



CHINS and Termination of the Parent-Child Relationship

3/13/14

In ***In Re G.P.***, 4 N.E.3d 1158 (Ind. 2014), the Supreme Court vacated the trial court's judgment which had terminated Mother's parental rights to her child. *Id.* at 1169. The child was born on June 5, 2009, and on October 5, 2010, DCS filed a CHINS petition because Mother had a history of drug abuse that hindered her ability to care for him. Mother waived her right to counsel at the CHINS initial hearing on October 13, 2010, admitted the allegations in the CHINS petition, and the child was placed with Paternal Grandparents with Mother's consent. As part of its dispositional decree, the court ordered Mother to comply with a number of requirements and services aimed at reunifying her with the child. At a CHINS review hearing in February 2011, Mother requested appointed counsel, and the court conducted an indigency examination and found that she was entitled to counsel. The court did not then actually appoint counsel, but continued with the hearing during which DCS reported several violations of Mother's obligations under the dispositional decree. The court ordered the child to remain with Paternal Grandparents, but still viewed reunification with Mother as the plan for permanency. In May 2011, Mother appeared at another review hearing, without counsel. The court never inquired as to whether Mother wanted representation, whether counsel had been appointed, or whether Mother wanted counsel before proceeding. At this hearing, DCS again alleged that Mother had violated her obligations under the dispositional decree. DCS requested that a permanency hearing be set. Mother effectively admitted to DCS's allegations, but said that she was turning herself around and wanted to re-engage with her required services in order to be given custody of the child. The court scheduled an August 16, 2011 permanency hearing. Mother failed to appear for the permanency hearing, and the trial court apparently believed that Mother was representing herself. DCS stated that it had not had contact with Mother since the May hearing and that she had not actually re-engaged in services. The child's Guardian ad Litem added that the child was doing well with Paternal Grandparents, and, with DCS's agreement, sought to change the permanency plan from reunification with Mother to adoption by Paternal Grandparents. The court agreed that it would be in the child's best interests to change the permanency plan to adoption.

On August 18, 2011, DCS filed a petition to terminate the parent-child relationship between Mother and the child. The trial court set the matter for an initial hearing on September 11, 2011. Neither Mother nor counsel for Mother appeared for the September 11 hearing, so the court continued the hearing to September 30, 2011. The hearing was continued two more times because neither Mother nor her counsel appeared. The court set the case for a default hearing on January 12, 2012, and continued the hearing to February 16, 2012 on the request of DCS. On

January 29, 2012, Mother filed a letter with the court requesting to have counsel appointed to represent her. The court then appointed a public defender to represent Mother and changed the February default hearing to a pre-trial hearing. Mother did not appear at the pre-trial hearing, but her public defender appeared. The matter was set for a trial to begin on April 9, 2012. Mother filed a motion to dismiss, arguing that she had been deprived of due process in that she requested the appointment of counsel in February 2011, but counsel had not been appointed until nearly a year later. Mother argued that, if counsel had been appointed, she would have had representation at the CHINS hearings she missed, and her counsel would have been able to inform the court that she was absent due to her efforts to re-engage in services, maintain her sobriety, and have a healthy drug-free pregnancy with a second child. The trial court denied Mother's motion. A three day trial was held on the termination petition, and on July 10, 2012, the trial court issued its order terminating the parent-child relationship between the child and Mother. One month after the termination order was entered, the child was adopted by Paternal Grandparents. Mother appealed the termination order, arguing that the evidence was insufficient to justify the termination of her parental rights and that she had been denied due process by not receiving appointed counsel after she had been found to qualify. The Court of Appeals affirmed the trial court's termination order in a published opinion at 985 N.E. 2d 786 (Ind. Ct. App. 2013). The Supreme Court granted transfer, thereby vacating the Court of Appeals opinion. The Supreme Court found Mother's due process claim dispositive, and addressed only that claim and its impact on the termination proceedings.

The Court opined that the trial court must appoint counsel for parents in CHINS cases if the parent requests the appointment of counsel and the court finds the parent to be indigent. *Id.* at 1163. The Court looked to IC 31-32-4-3, which states that “[t]he court *may* appoint counsel to represent any parent in any other proceeding,” and to IC 31-32-4-1, which includes among its list of persons entitled to court appointed counsel, “[a]ny other person designated by law” (emphasis in opinion). *Id.* at 1162. The Court noted DCS's arguments that these statutes, when read together, mean that the appointment of counsel in a CHINS proceeding is a matter of trial discretion and not a statutory right. *Id.* The Court agreed that DCS's position was consistent with past Indiana Appellate decisions, but held that, to the extent any case law holds that a trial court has discretion to appoint counsel for an indigent parent in a CHINS proceeding, those cases are not correct on that point. *Id.* at 1163.

The Court looked to IC 31-34-4-6, which enumerates a number of legal rights afforded to the parent of a child alleged to be abused or neglected when that child is subject to detention or DCS has filed a CHINS petition. *Id.* at 1162. The Court noted that DCS is required to inform the parent in writing of those rights, and, importantly, IC 31-34-4-6(a)(2) states that the parent *has the right to be represented by a court appointed attorney* at each court proceeding on a petition alleging the child is a CHINS upon the request of the parent if the court finds that the parent does not have sufficient financial means for obtaining representation as described in IC 34-10-1 (emphasis in opinion). *Id.* The Court held that IC 31-34-4-6: (1) is an explicit provision of a statutory right, though subject to its own internal qualifications; and (2) exists independently of any constitutionally compelled right to counsel pursuant to the Due Process Clause of the Fourteenth Amendments. *Id.* at 1163. The Court opined that the trial court does *not* have discretion on the appointment of counsel in a circumstance falling under IC 31-34-4-6 (emphasis

in opinion). Id. The Court emphasized that IC 31-34-4-6 does not necessarily compel the trial court to inquire, in each and every case, as to whether the parent wants appointed counsel; the language of this statute provides that the parent must affirmatively request this statutory right. Id. at 1163-64 n.7.

The Court opined that IC 31-32-4-3 would give the trial court discretion to appoint counsel, for example, for a parent who perhaps fails to meet the statutory requirements for being indigent but for whom court appointed counsel might still be appropriate. Id. at 1164. The Court clarified that appellate review of any denials of these discretionary appointments would still entail the analysis from prior case law, balancing the factors outlined in Matthews v. Eldridge, 424 U.S. 319 (1976) against the general presumption that does not favor appointed counsel in civil matters. Id. The Court said that, where those factors overcome the presumption, due process would require appointed counsel, and a trial court would abuse its discretion in deciding otherwise. Id.

The Court found that Mother did not permanently waive her right to counsel for all subsequent proceeding. Id. at 1164. The Court said that it was not persuaded by DCS's arguments that: (1) Mother should have contested the trial court's failure to appoint counsel at subsequent hearings; or (2) Mother invited the error by failing to ask for counsel or to question the court about the appointment of counsel. Id. Citing Gunashekar v. Grose, 915 N.E. 2d 953, 955 (Ind. 2009), the Court noted that a pro se litigant is held to the same standards as a trained attorney and is afforded no leniency simply by virtue of being self-represented. G.P. at 1164. The Court clarified that it has never held that: (1) a litigant who elects to waive the right to counsel is permanently bound by that decision; or (2) a litigant who has been told that she would receive appointed counsel must continually re-request counsel at each and every hearing where counsel is not provided to her. Id.

The Court opined that the trial court denied Mother her due process by its failure to actually appoint counsel for Mother after finding that she was entitled to court appointed counsel by virtue of her indigency. Id. at 1166. On the subject of due process the Court noted that: (1) due process protections bar "state action that deprives a person of life, liberty, or property without a fair proceeding," quoting In Re C.G., 954 N.E.2d 910, 916 (Ind. 2011); (2) due process protections at all stages of CHINS proceedings "are vital" because "[e]very CHINS proceeding 'has the potential to interfere with the rights of parents in the upbringing of their children,'" quoting In Re K.D., 962 N.E.2d 1249, 1257 (Ind. 2012); (3) CHINS and termination proceedings are deeply and obviously intertwined to the extent that an error in the former may flow into and inflect the latter. G.P. at 1165. The Court has therefore urged that "an abundance of caution should be used when interfering with the makeup of a family and entering a legal world that could end up in a separate proceeding with parental rights being terminated." In Re K.D. at 1259. G.P. at 1165. The Court opined that it is appropriate that a CHINS adjudication is subject to the same due process analysis as a proceeding terminating a parent's relationship with a child. In Re K.D. at 1257. G.P. at 1165. The Court, quoting In Re C.G., 954 N.E.2d at 917, observed it is true that "if the State imparts a due process right, then it must give that right." G.P. at 1166. The Court found that the trial court had not appointed counsel to represent Mother "even though it had no discretion on the matter." Id.

The Court vacated the termination judgment because Mother was denied her statutory right to counsel during the course of the CHINS proceedings, and those proceedings flowed directly into an action to terminate Mother’s parental rights. *Id.* at 1169. The Court observed that the CHINS statutes themselves are silent on the question as to what happens when the statutory right to counsel is denied. *Id.* at 1166. The Court noted that, in a number of contexts, Indiana courts have applied a bright-line rule as to the right to counsel, reversing convictions or other judgments when that right is denied. *Id.* at 1167. Citing *In Re Adoption of G.W.B.*, 776 N.E.2d 952, 954 (Ind. Ct. App. 2002), *In Re Petition of McClure*, 549 N.E.2d 392, 393-95 (Ind. Ct. App. 1990), and *Taylor v. Scott*, 570 N.E.2d 1333, 1335-36 (Ind. Ct. App. 1991), adoption cases where judgments were reversed due to the trial courts’ failures to appoint counsel for parents, the Court observed that, in these cases, the denial of counsel itself was a prejudice requiring reversal and review for its prejudicial impact on the litigant was not required. *G.P.* at 1167. The Court opined that this bright-line rule was the right approach to take here. *Id.*

The Court observed that there was a literal denial of Mother’s statutory right to counsel in this case. *Id.* The Court explained that an attorney representing Mother: (1) could have informed the CHINS court as to the reasons for her absence and her efforts engage in services, maintain sobriety, and find a healthy support network in Virginia; (2) might have helped push application of the Interstate Compact on the Placement of Children to place the child in Virginia with the maternal grandmother; and (3) certainly could have objected to DCS’s allegations at the hearings, offered evidence to mitigate the allegations, or advised Mother not to respond to the allegations of not completing services. *Id.* at 1167-68. The Court, quoting *In Re C.G.*, 954 N.E. 2d at 917, observed that the requirement of due process “embodies a requirement of ‘fundamental fairness.’” *G.P.* at 1168. The Court opined that, without question, it was fundamentally unfair to tell Mother she would receive court appointed counsel, as she was entitled to by statute, and then not follow through with the appointment but instead continue with proceedings challenging her fitness as a parent. *Id.* The Court found that the CHINS hearings where Mother was denied her right to counsel were those in which her parental participation was cut off as a precursor to the termination case. *Id.* The Court held the defectiveness of the CHINS action inevitably had a destructive collateral impact on the termination action. *Id.* The Court opined that the undoing of the CHINS process here compelled the undoing of the termination process. *Id.*

The Court clarified that the child’s adoption could not be set aside because that case was not before the Court. *Id.* at 1169 n.10. The Court observed that, to the extent the child’s adoption was based upon the termination judgment, Mother might have grounds to request relief from that judgment pursuant to Trial Rule 60 (B)(7) and, consistent with the boundaries set out in *In Re Adoption of C.B.M.*, 992 N.E.2d 687 (Ind. 2013). *Id.* The Court also noted that it could not simply remand this case to the CHINS court because it was not clear whether the CHINS cause number remained open or if the child had been discharged from the court’s jurisdiction pursuant to IC 31-34-21-11. *Id.* The Court explained that, if the CHINS case was closed and Mother challenged and was able to set aside the adoption order, DCS (or some other party authorized by statute) would have to file a new CHINS petition for the trial court to regain jurisdiction. *Id.*