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## The Children's Law Center of Indiana

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### Termination of Parental Rights

8/5/02

#### **In Re W.B., 772 N.E.2d 522 (Ind. Ct. App. 2002)**

In **In Re W.B.**, 772 N.E.2d 522 (Ind. Ct. App. 2002), the Court affirmed the trial court's order terminating the parents' rights as to their twins. In doing so, the Court held (1) the trial court did not improperly focus on the parents' past behavior as a factor in terminating their parental rights, (2) the improper admission of the therapist's testimony did not warrant reversal of the termination order, and (3) it was in the trial court's discretion to conclude that the parents' pattern of past conduct would overcome their present short term improvements.

The parents had seven children, the two youngest (the twins) being the subject of this appeal. Prior to the twins' birth, the Grant County Office of Family and Children received complaints that the parents' home was dirty and inappropriate for the older children. Subsequent investigation revealed that the house was filthy, there were no tables or chairs, the children were dirty, half dressed and infected with lice, and there was very little food available. The children were removed and placed in foster care, where it was found that they were severely developmentally delayed. They were determined to be CHINS, and eventually the parents' rights to the older children were terminated. During the CHINS proceeding, however, the mother gave birth to the twins. On the day following their birth, GCOFC filed a petition alleging the twins were CHINS, based on the parents' history of neglect with respect to the older children. The twins were immediately placed in foster care upon release from the hospital. The trial court adjudicated them CHINS, agreeing with GCOFC that they would be subject to a high risk of abuse and neglect if returned to their parents. By the time of the disposition hearing, the parents had completed the parenting classes required of them under the older children's CHINS dispositional decree. The mother, in fact, had taken additional classes on her own, and both parents were successfully participating in visitation with the twins. At the next review hearing, the twins were placed with a paternal great-aunt. Approximately six months later, while acknowledging that the parents had cooperated with service providers and were actively involved in completing services, GCOFC requested termination of parental rights based on the previous termination involving the older children. At the termination hearing, the trial court heard testimony from case managers, the CASA, the mother and father, and counselors who had worked with the older children. At the conclusion of the evidence, the trial court entered its judgment terminating the parental rights of both parents as to the twins. The parents then appealed.

**Standard of Review.** Because the trial court supported its termination order with specific findings and conclusions, the Court engaged in a two tiered standard of review: it first determined whether the evidence supported the findings, then decided whether the findings supported the judgment. In *Re W.B.* at 529 (quoting *In re J.J.*, 711 N.E.2d 872, 874 (Ind. Ct. App. 1999)). The Court will not set aside specific findings unless they are clearly erroneous. In *Re W.B.* at 529. A finding is clearly erroneous when there are no facts or reasonable inferences in the record to support it. *Id.* In reviewing the record, the Court considers only the evidence and inferences that support the trial court's judgment, without reweighing it and without judging the credibility of witnesses. *Id.*



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**The trial court was entitled to focus on the past behavior of the parents as a factor favoring termination of their parental rights.** In determining that there was a reasonable probability that the conditions which led to the removal of the children would not be remedied, the trial court specifically found, inter alia, that while the parents had remained in one residence for more than a year and maintained it appropriately, it was likely that their “previous pattern would continue given the longer history of unstable and unsuitable living conditions.” Id. at 530. The parents asserted that the trial court erred by focusing on their past failures instead of their present successes. They argued that this finding, in particular, was at odds with their living conditions at the time of the termination hearing. They maintained that their house was clean and appropriate, that there was adequate food, that the mother had been employed at the same job for more than a year, that the father had started his own business, and that the father would be available to watch the twins while the mother worked. The Court noted that in making a determination that conditions which led to the child’s removal would not be remedied (under I.C. 31-35-2-4 (b)(2)(B)(i)), the trial court should judge the parents’ fitness to care for their children at the time of the termination hearing. Id. (quoting *In re D. J.*, 755 N.E.2d 679, 684 (Ind. Ct. App. 2001)). Any improvement in the parents’ ability to care for the twins is relevant, but the trial court must also balance the parents’ habitual patterns of conduct to determine their long term effect on the parents’ short term improvements. Id. (quoting *In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000)). The Court opined that the balancing of past conduct with present behavior is even more important in cases like this one, where the children have never resided with the parents. In these situations, a court’s focus is on the conditions that led to the welfare department’s retention of the custody of the child. *In re A.A.C.*, 682 N.E.2d 542, 544 (Ind. Ct. App. 1997). As this inquiry necessarily asks a court to examine prior conduct, the trial court, in this case, did not wrongly focus on the parents’ past behavior. The Court further noted that by asking it to consider only evidence favorable to them, the parents impermissibly invited the Court to reweigh the evidence and judge the credibility of witnesses. The Court may only consider evidence favorable to the trial court’s findings. Finally, the Court noted that, while the parents had made improvements in their lives, it came at a time when they were not burdened with caring for two young children. Whether these improvements could be sustained with the burden of caring for two children remained to be seen. In any case, the Court stated that the trial court need not wait until the children are irreversibly harmed such that their physical, mental, and social development is permanently impaired before terminating the parent-child relationship. Id. at 531 (quoting *In re B.D.J.*, 728 N.E.2d at 201).

**The improper admission of the therapist’s hearsay testimony regarding children’s accusations of sexual abuse against parents did not warrant reversal of termination order; record contained additional admissible evidence to support finding that children were traumatized while living with their parents.** The Court noted that, having found a reasonable probability that conditions which led to the twins’ removal would not be remedied, the trial court was not required to find that continuation of the parent child relationship posed a threat to the well being of the children. Id. at 531, f.n. 2. However, because the trial court made both findings, the Court addressed both issues.



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The trial court determined that continuation of the parent-child relationship posed a threat to the well being of the children, and supported this determination with a number of specific findings. The parents took issue with the finding that three of their older children “were subjected to sexual and physical abuse while in the care of Mother and Father.” *Id.* at 532. Some of the evidence supporting this finding was admitted through the testimony of one of the children’s therapists, under the hearsay exception found at Ind. Evidence Rule 803(4). That rule establishes a hearsay exception for statements made for purposes of medical diagnosis or treatment. Such statements are admitted as an exception to the hearsay rule based upon a belief that a declarant’s self interest in seeking medical treatment renders it unlikely that he will mislead the person he wants to treat him. *Id.* at 532 (quoting *McClain v. State*, 675 N.E.2d 329, 331 (Ind. 1996)). This hearsay exception requires a two-step analysis for evaluating whether the statement was properly admitted under Evid. R. 803(4): (1) was the declarant motivated to provide truthful information in order to promote treatment; and (2) is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment. *Id.* The parents contend that GCOFC failed to establish that the children were motivated to provide truthful information in order to promote treatment – the first prong of the McClain test. The Court agreed. It found that the therapist’s testimony portrayed the children as mentally and emotionally incompetent and undoubtedly unaware of the therapist’s professional purpose. Thus, because they did not understand the professional’s role, the children could not have the requisite motivation to provide her with truthful information. The Court held it was error for the trial court to admit the statements made by the children to the therapist. However, the improper admission of this hearsay evidence did not warrant reversal, as the record revealed additional testimony by case workers and another therapist. These witnesses testified to direct observations of the children’s behavior that left the Court convinced that the children had been traumatized during the time they lived with their parents. This evidence, plus additional findings, was sufficient to support the trial court’s conclusion that continuation of the parent-child relationship posed a threat to the children’s well-being.

**The trial court could reasonably conclude that termination was in the children’s best interest because the parents’ habitual pattern of past conduct might eventually overcome their short term improvements.** The parents contested the trial court’s finding that termination was in the best interests of the children, again citing evidence demonstrating the improvement they made during the previous year. The Court, however, noted that the trial court did acknowledge this improvement in its findings, but went on to declare that it was likely the parents’ previous pattern of conduct would continue given their long history of instability. The mother had been through the system twice, having already had her parental rights to eight children terminated. The parenting classes she had recently completed were the same ones she had taken during earlier proceedings involving her older children. The father had also lost his parental rights to his five older children. The Court opined that it was clearly within the trial court’s discretion to conclude that the parents’ current improvement might not stand the test of time, based on their prior history. Furthermore, under *In re B.D.J.*, the trial court was obligated (emphasis added) to evaluate the parents’ habitual patterns of conduct to determine their long term effects on the parents’ short-term improvements. *Id.* at 534. Based on the record before it, the Court could not fault the trial court’s conclusions.