

Children's Law Center of Indiana



Termination of Parental Rights (TPR)

02/14/2007

In **Lang v. Starke Cty Office of Fam. Children**, 861 N.E.2d 366 (Ind. Ct. App. 2007), the Court affirmed the trial court's termination of Father's parental rights to his three children who were born during his marriage to their now-deceased Mother. On July 19, 2002, Father hit the oldest child with a belt, leaving bruises and marks and affecting her ability to walk, which resulted in Father's being convicted of battery resulting in bodily injury, a class D felony, on March 17, 2003. On July 29, 2002, the Starke County Office of Child Services (DCS) filed petitions alleging that all three children were CHINS as a result of the July 19 incident and information gained in subsequent interviews with the children. Following a hearing, on September 25, 2002, the children were adjudicated to be CHINS. On October 1, 2002, the trial court entered dispositional orders providing that the children would remain in out-of-home placement, and that Father would participate in family counseling with the children and would have supervised visitation. The family counseling organization required that Father not use corporal punishment, a condition on which he soon reneged. Father was denied unsupervised home visitation as a result. Father's aggressive attitude caused the therapy sessions to be moved for the therapists' safety, and the counseling was ended in February 2003 because of a lack of progress and Father's oppositional manner. In the spring of 2003, Father moved into his stepson's residence. Visitation with the children was halted in May 2003, after a Family Focus staff member in charge of supervising Father's visitation felt threatened by the stepson's aggressive behavior and Father failed to cooperate with arrangements for an alternative visitation site. Father's home-based parenting counseling was also halted after six months because of Father's failure to attend sessions, return the therapist's phone calls, or initiate services. On December 10, 2003, DCS filed TPR petitions regarding the three children. On December 17, 2003, the trial court entered an order that, among other things, conditioned Father's visitation with the children on his agreement not to discuss the pending TPR proceeding with them. Father refused to agree to this condition and was denied visitation. Following a February 17, 2006 termination hearing, the trial court terminated Father's parental rights by order dated February 28, 2006. Father appealed.

If the trial court had terminated Father's parental rights on the sole bases that he used reasonable corporal punishment and failed to repudiate the use of reasonable corporal punishment, the trial court's judgment would be clearly erroneous. However, the trial court did not terminate Father's parental rights on these bases. *Id.* at 372. The Court noted that under Indiana law, reasonable corporal punishment is legal, *see Dayton v. State*, 501 N.E.2d 482, 484-85 (Ind. Ct. App. 1986), and that a parent involved in a CHINS proceeding is not inherently required to repudiate corporal punishment. In Re Termination of

Parent-Child Relationship between Children: T.C., C.F., 630 N.E.2d 1368, 1375 (Ind. Ct. App. 1994). Lang at 371.

The trial court's findings that (1) the children have been removed from Father for more than six months; (2) there is a reasonable probability that the situation that led to the children's removal will not be remedied; (3) termination of Father's parental rights is in the children's best interests; and (4) there is a suitable plan in place for the children's care, were supported by the evidence and support the trial court's judgment terminating Father's parental rights. Id. at 375. The Court reviewed the statutorily required bases to terminate a parent-child relationship found in I.C. 31-35-2-4(b)(2), and noted that the factor that the children had been removed from Father for at least six months was not in dispute. Id. at 371-72. It analyzed the facts of the case in light of the other three factors.

The Court concluded that there was clear and convincing evidence supporting the trial court's conclusion that the conditions that resulted in the children's removal would not be remedied. Id. at 372 n.2. The Court noted, "Regardless of whether the BHC can legally require [Father] to agree to not use corporal punishment on his children or discuss an impending termination proceeding with children, the trial court's findings clearly indicate that [Father] refused to cooperate with counselors and therapists and failed to recognize the unreasonableness of the corporal punishment he used in the past." Additionally, the Court pointed to Father's failure to actively seek visitation with any of his children after being told that visitation was suspended based on his failure to repudiate corporal punishment or to agree to not discuss the termination proceeding with his children, and observed that this inaction indicated Father's lack of commitment to preserve his relationship with his children. Id. at 372-73.

The Court also concluded that the trial court's finding that termination was in the children's best interests was supported by the evidence and was not clearly erroneous. Id. at 374. The Court observed that a determination of the best interests of the children should be based on the totality of the circumstances rather than merely on factors identified by DCS. Further, according to the Court, a parent's historical inability to provide a suitable environment along with the parent's current inability to do the same supports a finding that termination of parental rights is in the best interests of the children. The Court held that, here, the evidence supported the trial court's findings that (1) Father failed or refused to complete all of the requirements and services in his DCS case plan; (2) Father physically abused the children for several years causing them physical and psychological harm; (3) Father refused to agree to not use corporal punishment on the children; (4) the children feared Father; and (5) the children did not want to be reunified with Father. In this regard, the Court noted: (1) Father's history of using unreasonable corporal punishment and his refusal to work with DCS which presents a reasonable probability that he will continue to do so; (2) DCS case workers and the CASA testified that termination would be in the children's best interests for a variety of reasons, including that the children do not want to return to Father who they fear, and that termination would ease the children's anxiety about the possibility that they will have to return home at some point; (3) Father's refusal to cooperate with DCS in several manners, and failure to complete either family or individual counseling; (4) Father failed to pay court-ordered child support since July 2003, again subordinating the interests of his children to his personal aversion towards those assigned to help him; and (5) Father demonstrated that he

was willing to forego visitation if he was not allowed to use corporal punishment or discuss the termination proceeding with his children. Id. at 373-74.

The Court observed that for a placement plan for the children to be satisfactory under the statute, it need not be detailed, so long as it offered a general sense of the direction in which the child would be going after the parent-child relationship was terminated. Here, the proposed plans for the three children which involved adoption for all three children and/or adoption for the youngest, or the youngest two and independent living for the oldest or the oldest two children, were found by the Court to be sufficient to meet the statutory requirement. Id. at 374-75

The Court concluded that Father’s attorney provided him with effective assistance, “as we cannot say that our confidence that the conditions leading to the removal of the children from [Father’s] parental care are unlikely to be remedied and that termination is in the children’s best interests has been undermined.” Id. at 376. The focus of the inquiry into whether counsel’s assistance was effective in TPR cases is “whether it appears that the parents received a fundamentally fair trial whose facts demonstrated an accurate determination.” Baker v. Marion County Office of Family and Children, 810 N.E.2d 1035, 1041 (Ind. 2004). “Therefore, we must decide whether the lawyer’s overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child’s best interest.” Id. Father argued that his attorney was ineffective because: (1) he failed to ensure that Father had an opportunity to review the tapes and transcripts of the previous CHINS proceeding; (2) he failed to cite statutory or case law during his cross examination regarding DCS’s denial of visitation based on Father’s refusal to repudiate corporal punishment or to agree to not discuss the termination proceeding with his children; and (3) he failed to take action to reinstate Father’s visitation during the pendency of the termination hearing. The Court noted that (1) Father’s attorney arranged for him to review the tapes and transcripts, but the machines were not available when Father appeared to do so; (2) regardless of whether the attorney should have further assisted Father in reviewing these materials, Father’s inability to review them in no way cast doubt on the result of the proceeding; and (3) Father’s failure to review these hearings, at which he himself was present, did not affect the Court’s confidence that termination of the parent-child relationship was in the children’s best interests or that the reasons for which the children were removed would not be remedied. Lang at 375-76. As to Father’s attorney’s failure to cite case law and statutes during his cross-examination, inasmuch as the Court reviewed the case law and statutes here and found no error, this failure to cite the law at trial did not affect the Court’s confidence in the trial court’s decision. Id. at 376. The Court also noted that (1) Father neither argued nor presented evidence that he requested his attorney to attempt to reinstate his visitation with the children; (2) it is not incumbent upon an attorney to take the step of securing visitation when not requested to do so; and (3) this failure “hardly casts doubt on the trial court’s proceeding.” Id.

DCS’s actions in this case deprived Father of neither his substantive nor procedural due process rights. Id. at 377. The Court analyzed this case in the accepted framework for assessing whether a parent’s due process rights have been violated in a termination proceeding. That framework involves the balancing of three factors: (1) the private interests

affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing government interest supporting use of the challenged procedure. In Re A.L.H., 774 N.E.2d 896, 900 (Ind. Ct. App, 2002). The Court noted that Father neither argued nor presented evidence that the State denied him notice of any hearing, prevented him from attending a court hearing, or denied him the opportunity to be heard or confront witnesses at any hearing. Lang at 376-77. As to the substantive due process concerns, the Court acknowledged that DCS is required to make reasonable efforts to preserve and reunify families. Here, according to the Court, DCS repeatedly offered Father services and opportunities to reunite his family; and DCS was justified in denying visitation when it had a justifiable belief that the children would be subject to abuse unless Father complied with the restrictions that DCS saw as necessary to preserve the health and well-being of the children. The Court emphasized that Father was not prevented from visiting his children; visitation was merely premised on his agreement to neither use corporal punishment nor discuss the termination proceedings; and it was Father's refusal to abide by these reasonable conditions that led to his lack of contact with his children. The Court also noted that the termination of Father's parental rights was not based on his failure to repudiate corporal punishment or refusal to not discuss the termination proceeding. Id. at 377.

As to the legality of the conditions DCS placed on Father's visitation, the Court held that, although it is not required that a parent repudiate corporal punishment in order to maintain parental rights, the DCS may, under certain circumstances in which it has determined that children are at risk of abuse, deny visitation to a parent who refuses to repudiate corporal punishment. Further, the Court declined to second-guess the determination of DCS that prohibiting discussion of the termination proceeding was necessary to protect the children's well being, and concluded that, regardless of this condition's legality, inasmuch as it had no effect on the result of this termination hearing, any error was harmless. Id. at 378-79.