

Children's Law Center of Indiana



Termination of the Parent-Child Relationship

11/5/13

In **S.L. v. Indiana Dept. of Child Services**, 997 N.E. 2d 1114 (Ind. Ct. App. 2013), the Court affirmed the trial court's judgment terminating Father's and Mother's parental rights to their two children. In early 2011, Mother took the children, who were ages four years and three years, to the Wabash County Department of Child Services (WCDCS) office and told the employees that she could not care for the children and had struck the older child in the face. WCDCS took custody of the children and filed a CHINS petition. Mother and Father, who was incarcerated for a child molesting conviction, admitted the CHINS allegations. Father was released at the end of January 2011. To facilitate reunification with the children, Mother and Father were ordered not to use drugs and to participate in substance-abuse assessments, random drug screens, individual counseling, parenting assessments, other home-based services, and supervised parenting time with the children. Father was sent back to prison shortly after his release for violating the terms of his parole. While he was incarcerated, Mother obtained a protective order against him based on allegations of past domestic violence. Mother also claimed that Father sexually molested the parties' older daughter (who was not the subject of this case), and Mother said she worried that Father might molest the two children who were the subjects of this case. Based on these allegations and Father's child-molesting conviction, WCDCS filed a motion to suspend Father's parenting time, and the court granted the motion. Mother's participation in services was sporadic and ultimately unsuccessful in that she: (1) tested positive for marijuana, methamphetamine, and synthetic drugs; (2) failed to complete individual counseling, home-based services, and the parenting assessment; and (3) failed to attend supervised parenting time regularly. Father was released from prison in February of 2012, and was arrested one month later at Mother's house for violating the protective order and failing to register as a sex offender. WCDCS petitioned to terminate Mother's and Father's parental rights. Father was incarcerated in federal prison for the duration of the termination proceedings.

The trial court heard evidence on the termination petition on two days in August and September 2012 and a third day in February 2013. WCDCS requested that Father be transported to court for the hearings or allowed to participate by phone, but those requests were denied by federal authorities. Before the first hearing, WCDCS, Mother, Mother's counsel, and Father's counsel met with the court and agreed that: (1) WCDCS would present evidence at the first and second hearings; (2) the trial court would then have a transcript prepared and sent to Father, who would have two months to review the transcript and communicate with his counsel; and

(3) Mother would present her evidence at the third hearing. At the first two hearings, WCDCS presented evidence regarding the parents' troublesome relationship and their failure to complete services. Evidence included that Mother: (1) continued to be involved with Father despite his child-molesting conviction and her belief that he had molested one of their children; (2) referred to Father as a "sick, sick man" who "has a problem masturbating to children"; (3) failed to successfully complete court-ordered services and used drugs, particularly marijuana, throughout the termination proceedings; (4) described marijuana as a "friend, family member, a way of life"; (5) did not know whether she would stop smoking marijuana. Father had completed a parenting assessment but no other services, and service providers testified that they could not work with Father due to his repeated incarceration. When Father received the transcript of the evidence presented by WCDCS, he indicated that he did not intend to present any additional evidence in opposition to what had been previously testified to at the hearings. By the time of the third hearing, Mother was incarcerated on drug-related charges and awaiting trial. Mother attended the hearing, and told the court that she had participated in some drug-related services in prison, now understood that she could not smoke marijuana, and gave conflicting answers on whether she would cut ties with Father in the future. In March 2013, the trial court terminated Mother's and Father's parental rights. Mother and Father appealed.

The Court concluded that Father's due process rights were not violated because he was not permitted to attend the termination hearings and did not receive a transcript of the third hearing, at which Mother presented her evidence. *Id.* at 1121. The Court observed that Father never raised any due process claim at the trial level; therefore he had waived his constitutional challenge by raising that claim for the first time on appeal. *Id.* at 1120. The Court said that, waiver notwithstanding, Father was incarcerated in federal prison at the time and federal authorities refused to allow him to attend the hearings or to participate by phone, so the matter was entirely out of the trial court's control. *Id.* The Court noted that: (1) because Father could not attend the hearing, he was given a transcript of the State's evidence and had two months to review the transcript and communicate with his counsel, but chose not to respond to it or to present additional evidence; (2) Father had not requested a transcript and time to respond to Mother's testimony at the third hearing; (3) Father was ably represented by counsel at all three hearings, which significantly decreased the risk of an inaccurate result; (4) Father failed to establish how he was prejudiced in that he made no argument that the outcome would have been different had he also received a transcript of the third hearing. *Id.* The Court, having considered Father's rights at length, also noted that the children have a significant interest in securing permanency and finality. *Id.* at 1121.

The Court opined that the termination order clearly identified the reasons for terminating the parents' rights, and found no error. *Id.* at 1122. The Court did not agree that the trial court's findings were merely recitation of the evidence as claimed by the parents. *Id.* Quoting *Parks v. Delaware Cnty. Dep't of Child Servs.*, 862 N.E. 2d 1275, 1279 (Ind. Ct. App. 2007), the Court said that, "[a] finding of fact must indicate, not what someone said is true, but what is determined to be true, for that is the trier of fact's duty." *S.L.* at 1122. The Court said that, while the order references evidence, it also contains thoughtful findings that flow from the evidence. *Id.* As examples, the Court noted findings that "Mother has put her relationship with [F]ather and

her desire to smoke marijuana above the interests of her children”, “It is wholly against [the children’s] interests to be reunited with either Mother or Father”, and “Mother is very, very, troubled and emotionally distraught.” Id.

The Court concluded there was clear and convincing evidence to support the trial court’s ultimate determination that there was a reasonable probability that the condition resulting in the children’s removal or the reasons for placement outside the home would not be remedied. Id. at 1125. The Court noted the following findings regarding Mother which were supported by the evidence: (1) her drug use during the termination proceedings; (2) her ongoing relationship with Father despite her concerns that he had molested one of their older children and posed a threat to the children in this case; (3) her lack of progress in her ability to parent the children because she did not complete services; (4) her incarceration at the time of the hearing awaiting trial on drug-related charges. Id. at 1124. In response to Mother’s argument that her marijuana use was “not a sufficient reason” for terminating her parental rights and her citation of the legalization of recreational marijuana in other states as support for her claim, the Court said that Mother failed to acknowledge that recreational marijuana use is not legal in Indiana and that one of the prerequisites for reunification with her children was that she not use marijuana. Id. Although Mother argued that, at the time of the last termination hearing, she finally understood that using marijuana was illegal and had recently tested negative for all substances, the Court observed that, by that time, Mother was incarcerated and her access to illegal substances was limited. Id. The Court said that the trial court was entitled to weigh Mother’s statements at the last hearing against her history of drug use. Id.

With regard to Father’s claims on the issue of whether there was a reasonable probability that the reasons for removal or placement outside the home would not be remedied, the Court noted the following findings which were supported by the evidence: (1) Father made no progress in services because of his incarceration; (2) Father’s history, particularly his repeated incarceration, was proof of his instability; (3) the trial court concluded that Father was “simply bad for the children”; (4) Father was incarcerated at the time of the termination hearings. Id. at 1124-25. Although Father argued that his circumstances were similar to those in M.W. v. Indiana Department of Child Services, 943 N.E. 2d 848 (Ind. Ct. App. 2011), a case in which the order terminated the incarcerated father’s parental rights was reversed, the Court find M.W. distinguishable from this case. S.L. at 1125. The Court stated that Father poses a specific threat to his children that was absent in M.W. because Father is a convicted child molester, Mother testified that Father is a threat to *his own* children, Mother recounted an instance in which Father stood above his sleeping child and masturbated, and the significant concerns about Father’s behavior toward children had not been addressed, much less remedied, at the time of the termination hearings due to his repeated incarcerations (emphasis in opinion). Id.