IN THE SUPREME COURT OF INDIANA
Appellate Cause No. 03A05-0912-JV-676

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF I.B., Appellant,	)	Appeal from the Bartholomew Circuit Court
vs.	)	Cause No. 03C01-0809-JT-2077
INDIANA DEPARTMENT OF CHILD SERVICES, Appellee.	)	The Honorable Stephen Heimann, Judge

APPELLANT'S PETITION TO TRANSFER

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QUESTION PRESENTED ON TRANSFER

Are indigent parents in termination proceedings entitled to appointed counsel on direct appeal as a matter of statutory or constitutional right or, as the court of appeals held, must the trial court in every case make a discretionary determination grounded in the likelihood of reversal?

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

This is an appeal of the denial of trial counsel's motion for the appointment of appellate counsel for the Mother in a termination of parental rights proceeding.

Mother was represented by appointed counsel in the trial proceedings. Although counsel moved to withdraw early in those proceedings because he had never met nor had any contact with Mother, DCS objected because Mother had initially participated in services. The trial court denied the motion to withdraw and held a fact-finding hearing on February 24 and 27, 2009, at which Mother was not present. On July 28, it entered an order terminating parental rights.

Trial counsel filed a notice of appeal and motion for appointment of appellate counsel on July 31. Tr. 4. At the August 12 hearing on that motion, trial counsel explained that, although he had no contact with Mother, he felt obligated to file a notice of appeal because Mother's "legal rights extend beyond the hearing" and his public defender contract required his representation through the filing of a notice of appeal. Tr. 7. The trial court entered an order denying the motion on August 13, which specifically requested "guidance from an appellate tribunal" about when appointment and withdrawals of counsel are appropriate in termination cases. App. 8. Because of the absence of any "case law determining the trial court's obligations under these circumstances," the court appointed counsel to appeal its order denying appointment of appellate counsel. App. 7-8.

On February 17, 2010, the Court of Appeals issued a published opinion affirming the trial court's order denying the appointment of appellate counsel. It held that parents in termination proceedings must meet the same statutory requirements as any other civil

litigant in order to secure appointed counsel on appeal. Slip op. at 11. Those statutes allow for the appointment of counsel "under exceptional circumstances" and require trial courts to assess the likelihood of the applicant prevailing. Slip op. at 10 (quoting Ind. Code § 34-10-1-2(b) & (c)). If a litigant is "unlikely to prevail," the court must deny counsel. Id.

This Petition to Transfer was timely filed on March 16, 2010.

INTRODUCTION

This is the first Indiana case to consider whether indigent parents have a right to appointed counsel on direct appeal in a termination case. The Court of Appeals' holding requires the same trial judge who has just terminated parental rights to make a discretionary determination about the entitlement of counsel, focusing on the likelihood of reversal on appeal. This approach violates clear U.S. Supreme Court precedent and is inconsistent with Indiana's statutory language and longstanding practice.

Lumping termination cases in with all other civil cases fails to recognize their unique significance; termination cases are "the civil death penalty." See Tammila G. v. Nevada, 148 P.3d 759, 763 (Nev. 2006); accord M.E. v. Shelby County Dep't of Human Resources, 972 So.2d 89, 102 (Ala. Civ. App. 2007); In re Smith, 601 N.E.2d 45, 55 (Ohio Ct. App. 1991). Without counsel these parents cannot navigate the treacherous waters of an appeal, and the "absolute right to one appeal" becomes wholly meaningless. Ind. Const. art. 7, § 6. Transfer is necessary to hold that indigent parents have the right to appointed counsel on direct appeal in termination cases. Ind. Appellate Rule 57(H)(3), (4), & (6).

ARGUMENT

I. When a court terminates the parental rights of an indigent litigant, appellate counsel must be provided to pursue the direct appeal.

Any of the following four roads—statutory construction, federal equal protection, federal due process, or state fundamental fairness—leads to the same destination of a right to appointed appellate counsel in termination cases. Before heading down each of these roads, though, the dangerous road charted by the Court of Appeals is briefly considered. It held that parents in termination proceedings must meet the same statutory requirements as any other civil litigant in order to secure appointed counsel on appeal. Slip op. at 11. Those statutes allow for the appointment of counsel "under exceptional circumstances" and require trial courts to assess the likelihood of the applicant prevailing. Slip op. at 10 (quoting Ind. Code § 34-10-1-2(b) & (c)). If a person is "unlikely to prevail," the court must deny counsel. Id.

The termination of parental rights requires proof by "clear and convincing evidence" rather than the mere preponderance standard in most civil cases. Santosky v. Kramer, 455 U.S. 745 (1982). It is difficult to imagine that a trial judge who had just found termination appropriate under the clear and convincing evidence standard to turn around and appoint counsel when such a request must be denied if the parent is "unlikely to prevail on the applicant's claim or defense." Ind. Code § 34-10-1-2(d). Indeed, a judge with such doubt in the judgment should probably reconsider it.

If counsel is not appointed in termination cases, indigent parents will either not appeal or be forced to proceed pro se. Such a scheme cannot withstand scrutiny under the plain language of the statute, the federal Equal Protection Clause, the federal Due Process Clause, or any notion of fundamental fairness under Article 1, Section 12 of

Indiana's Constitution.

A. The plain language of the statute provides for appointed appellate counsel.

Indiana Code section 31-32-2-5 unequivocally provides that "[a] parent is entitled to representation by counsel in *proceedings* to terminate the parent-child relationship." (emphasis added). The statute does not limit the appointment of counsel to the trial proceeding but rather applies to proceedings (plural) for each parent (singular). The plain meaning of this provision is that parents are entitled to counsel in the trial proceeding and also the direct appeal proceeding.[1]

The Court of Appeals' suggestion that a "proceeding" may only occur in a trial court, slip op. at 7-8, is in direct conflict with numerous references to "appellate proceedings" in this Court's decisional law. See, e.g., Mosley v. State, 908 N.E.2d 599, 604 (Ind. 2009); Hardley v. State, 905 N.E.2d 399, 403 (Ind. 2009); Allstate Ins. Co. v. Fields, 842 N.E.2d 804, 806 (Ind. 2006). Moreover, if there is any doubt about the proper construction, this Court has long held when a statute may "be construed to support its constitutionality, such construction must be adopted." Miller v. State, 517 N.E.2d 64, 71 (Ind. 1987). As explained below, the federal Due Process Clause does not always require counsel in trial-level proceedings, but appointed counsel is required by the Equal Protection Clause in any appeal as a matter of right. Finally, other courts have found a right to appointed appellate counsel based on similar statutory language. See, e.g., In re Grove, 897 N.E.2d 1252, 1258-59 (Wash. 1995) (statute provided for counsel at "all stages of a proceeding"); In re D.D.F., 784 P.2d 89, 90 (Okla. Civ. App. 1989) (statute

[1] The statute was originally enacted as Indiana Code section 31-6-7-2(b) in 1978. The earlier version spoke of appointment of counsel "at the initial hearing or at any earlier time," which is admittedly a reference to trial proceedings. The current version uses language broad enough to encompass appellate proceedings—without the earlier reference to initial hearings.

provided for "the right to be represented by counsel at every stage of the proceedings").

In sum, this case can be easily and appropriately resolved by holding that Indiana Code section 31-32-2-5 requires the appointment of counsel on direct appeal in termination cases.[2]

B. Federal Constitutional Provisions

The right to counsel, whether at the trial or appellate level, has a long and sometimes tortured history in Supreme Court decisional law. The distinction between due process and equal protection is not always clear. See generally Steven D. Schwinn, The Right to Counsel on Appeal: Civil Douglas, 15 Temp. Pol. & Civ. Rts. L. Rev. 603, 608 (2006). Although the focus of cases involving the appointment of counsel at trial often turns on the physical liberty interest of the litigant, cases involving the appointment of counsel on appeal instead turn on process, guaranteeing counsel in appeals pursued as a matter of right. Id. at 628-30. Moreover, the majority of states that have addressed the appointment of counsel for the appeal of termination cases have concluded that indigent parents have such a right. Patricia C. Kussmann, Annotation, Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights, 92 A.L.R.5th 379 (1997 & Supp. 2010).[3]

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[2] The Court of Appeals' reliance on this Court's opinion in Baker v. Marion County Office of Family and Children, 810 N.E.2d 1035 (Ind. 2004), is misplaced. Specifically, the court quoted the following sentence: "The Code does not provide for appointment of counsel to seek post-judgment or collateral relief." Slip op. at 9; Br. of Appellee at 16 (quoting Baker, 810 N.E.2d at 1038). Baker did not address the issue presented here, namely the appointment of counsel on direct appeal. The appointment of counsel was not even at issue in that case. Rather, the focus of Baker was an ineffective assistance of counsel claim, which usually requires the development of a record and is done through a collateral proceeding such as a petition for post-conviction relief for adults or Trial Rule 60(B) motion in juvenile court.

[3] The few states in the minority have primarily decided cases involving adoption proceedings initiated not by the State but a private party. Id. at § 10b.

1. Equal Protection Clause

The Indiana Constitution grants all litigants the "absolute right to one appeal." Ind. Const. art. 7, § 6. Parents with financial resources are free to hire counsel of their choosing, while under the Court of Appeals' requirements many indigent parents will not be afforded counsel. Such disparate treatment based solely on financial resources violates the Equal Protection Clause.

In Douglas v. California, 372 U.S. 353 (1963), the Supreme Court struck down a state law that permitted appellate courts to determine whether to appoint counsel on appeal based on "an independent investigation of the record and [a determination] whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed." Id. at 335 (quoting People v. Hyde, 331 P.2d 42, 43 (1958)). It held the Equal Protection Clause is violated when a "rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself." Id. at 357-58.[4] Since Douglas, the Court has found no right to counsel in discretionary appeals[5] while affirming a right to appointed counsel in those cases pursued as of right. See Halbert v. Michigan, 545 U.S. 605 (2005) (indigent appellant who pleaded nolo contendere entitled to counsel); Mayer v. Chicago, 404 U.S. 189 (1971) (indigent appellant convicted of crimes punishable only by fines entitled to counsel).

[4] Although the case involved a conviction for a felony, the Court's reasoning had nothing to do with physical liberty but rather focused on "discrimination against the indigent." Id. at 355.

[5] See, e.g., Pennsylvania v. Finley, 481 U.S. 551 (1987) (no constitutional right to appointed counsel for postconviction proceedings); Ross v. Moffitt, 417 U.S. 600 (1974) (no constitutional right to appointed counsel for discretionary appeal to the state supreme court).

Relying on many of these precedents, neighboring supreme courts in Ohio and Michigan have appropriately held that counsel must be appointed for indigent parents appealing the termination of their parental rights. State ex rel. Heller v. Miller, 399 N.E.2d 66 (Ohio 1980); Reist v. Bay Circuit Judge, 241 N.W.2d 55 (Mich. 1976). This Court would be on very solid constitutional ground by granting transfer and joining them.

2. Due Process Clause

Although presenting a slightly more difficult route, the Due Process Clause also requires the appointment of appellate counsel in termination cases. The Court has long held the right to appointed counsel exists when "if [a litigant] loses, he may be deprived of his physical liberty." Lassiter v. Dep't of Social Servs. of Durham County, N.C., 452 U.S. 18, 26-27 (1981). Although termination cases do not involve physical liberty, the Court in Lassiter did not categorically reject a right to counsel in cases not involving physical liberty. Rather, the Court held the following three factors must be weighed in deciding whether to appoint counsel: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decision." Id. at 27 (citing Matthews v. Eldridge, 424 U.S. 319, 335 (1976)). Applying those factors, the Court concluded:

> the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

Id. at 31. Lassiter, though, involved the appointment of counsel in a trial-level proceeding. In finding no due process right to counsel, the Court noted that "no expert

witnesses testified, and the case presented no specially troublesome points of law, either procedural or substantive." Id. at 32.

Unlike a trial proceeding, an appeal will always present complexity that may not exist in a trial proceeding. As the Michigan Supreme Court noted, "Prosecution of an appeal requires a knowledge and understanding of court rules, statutes and judicial decisions. The procedures for prosecuting an appeal are intricate and, to one not experienced in appellate work, complex." Reist, 241 N.W.2d at 65 Appeals can be a daunting task for lawyers, but this difficulty is multiplied manifold for laypeople untrained in the law. Moreover, parents whose rights have been terminated often face challenges well beyond the average layperson, including poverty, development disabilities, mental illness, and substance abuse issues; they "are usually the least equipped, in terms of intellectual and emotional resources, to respond in such proceedings." Id. at 63. Although the proceedings may be routine for DCS employees, they are often "incomprehensible" for indigent parents. Id. at 64.

The Due Process Clause requires the appointment of counsel for every appeal because the risk of an erroneous deprivation is at its highest in such a formal, complex proceeding.[6] Indeed, in finding no constitutional right to counsel in CHINS proceedings, the Court of Appeals noted the relatively minor impact of an erroneous adjudication while observing "an erroneous result obviously would be disastrous" in a termination proceeding. In re E.P., 653 N.E.2d 1026, 1032 (Ind. Ct. App. 1995).

C. *Fundamental Fairness*

As a final alternative, this Court could hold that fundamental fairness requires that

[6] The non-participation of a parent in the proceeding may provide an exception to this rule, see Lassiter, 452 U.S. at 33, which is discussed in Part II of this petition.

counsel be appointed on direct appeal. Article I, Section 12 of the Indiana Constitution refers to "justice" being administered "freely," as well as "completely, and without denial." See generally Sanchez v. State, 749 N.E.2d 509, 514-15 (Ind. 2001); McIntosh v. Melroe Co., 729 N.E.2d 972, 975-76 (Ind. 2000). As this Court put it in Sanchez, "fundamental fairness in judicial proceedings is assumed and required by our state constitution." 749 N.E.2d at 515. For the same reasons explained above, the denial of appellate counsel to indigent parents whose rights have been terminated is a denial of the administration of free or complete justice. The indigent parent is treated differently from the parent with resources to hire a lawyer to navigate the difficult process of an appeal. The indigent parent will be forced to forego the appeal or proceed pro se, which will almost certainly lead to affirmance. It appears that no parent has ever prevailed pro se in a termination appeal, while reversals in cases litigated by counsel are not uncommon. See, e.g., In re G.Y., 904 N.E.2d 1257 (Ind. 2009); K.S. v. Marion County Dep't of Child Servs, 917 N.E.2d 158 (Ind. Ct. App. 2009); In re H.T., 901 N.E.2d 1118 (Ind. Ct. App. 2009).

II. Parents must be advised of their right to appointed appellate counsel, and any waiver of that right must be knowing and voluntary.

"A parent who is entitled to representation by counsel may waive that right if the parent does so knowingly and voluntarily." Ind. Code § 31-32-5-5. A knowing and voluntary waiver can only occur if trial courts first inform parents of their right to counsel. Taylor v. Scott, 570 N.E.2d 1333, 1334 (Ind. Ct. App. 1991). In cases where a parent is present, this is easily done. The trial court advises the parent of the right to appeal (and the right to appointed counsel if indigent), and the parent makes a decision. If a parent wants to appeal, counsel files a notice of appeal. If a parent decides not to

appeal after being advised of that right in open court, no notice of appeal is filed. The matter becomes more complicated when, as in this case, the parent is not present at the termination hearing.

Here, the Fathers did not participate in the trial-level proceeding and were not represented by counsel. App. 6. If there is no trial counsel and no parent in the trial proceeding, as a practical matter no one could request the appointment of counsel.

If a parent is absent from the proceeding but represented by counsel, however, counsel would seem to have an obligation to request the appointment of appellate counsel as occurred in this case. Trial counsel explained that, although he had no contact with Mother, he felt obligated to file a notice of appeal because Mother's "legal rights extend beyond the hearing" and his public defender contract required his representation through the filing of a notice of appeal. Tr. 7. As explained above, parents in termination proceedings often face a number of challenges. Although some of these parents may have no interest in maintaining a parent-child relationship, others desperately want to maintain that relationship but may be difficult to locate by counsel because they lack a stable address or telephone number. If a notice of appeal is not filed within thirty days, the parent forever loses their right to appeal the termination. App. R. 9(A)(1)&(5). There are no belated appeals in termination proceedings. Cf. Ind. P-C.R. 2.

Requiring the appointment of counsel for an absent parent who has not expressly waived the right to counsel for appeal offers a bright-line rule that would best protect the rights of parents. Counsel should certainly attempt to locate and communicate with their client. Even if they are not able to reach the client, however, counsel is well-positioned to argue sufficiency of the evidence or procedural defects in the proceeding. Such

appeals ensure that DCS and the trial court have followed statutory and constitutional requirements.

Here, trial counsel made clear that he had no contact with Mother, and nothing in the record evinces a knowing and voluntary waiver of the right to appeal.[7] This Court has held that a criminal "defendant's intentional and inexcusable absence from trial can serve as a knowing, voluntary, and intelligent waiver of the right to counsel." Jackson v. State, 868 N.E.2d 494, 496 (Ind. 2007). Justice Rucker, joined by Justice Sullivan in dissent, though, reasoned that the trial court had made no finding about the defendant's waiver of the right to counsel and had not engaged in the necessary colloquy about the dangers and disadvantages of the self-representation. Id. at 503-04 (Rucker, J., dissenting). Jackson is distinguishable because the defendant there was advised of his jury trial date in open court at an earlier hearing. Id. at 496-97. Here, Mother was never in court to be advised of hearing dates, and the only possible notice of the hearing would have occurred through publication. App. 1-2, 5. There was no knowing and voluntary waiver of appellate counsel.

CONCLUSION

For the foregoing reasons, transfer is appropriate to hold that indigent parents have a right to appointed counsel on direct appeal. Trial courts must advise parents of that right. Because there was not a knowing or voluntary waiver in this case, the trial court improperly denied the motion to appoint counsel for appeal.

[7] At the hearing on the motion to appoint appellate counsel, counsel for DCS argued that "a person's failure to appear after lawful notice can be considered to have waived their right to counsel." Tr. 13. The cited statute, however, says nothing of the right to counsel but instead that "[t]he right of a parent, guardian, or custodian *to be present* at any hearing concerning the person's child is waived by the person's failure to appear after lawful notice." Ind. Code § 31-32-5-7 (emphasis added).

Respectfully submitted,

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Daniel B. Schuetz, Attorney No. 26578-03

Counsel for the Appellant

VERIFICATION

I affirm under penalties for perjury that this petition contains no more than 4,200 words.

_____

Joel M. Schumm

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition to Transfer was duly served by personal delivery upon the following on this 16th day of March, 2010:

Robert Henke
Heather H. Kestian
Indiana Department of Child Services
302 W. Washington Street
Indianapolis, Indiana 46204

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Joel M. Schumm