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

REPLY IN SUPPORT OF APPELLANT'S PETITION TO TRANSFER

Joel Schumm
Appellate Clinic
Indiana University School of Law
530 W. New York St.
Indianapolis, IN 46202
(317) 278-4733

Daniel B. Schuetz
58 W. Jefferson Street
Franklin, IN 46131
(317) 738-9564

Counsel for Appellant

ARGUMENT

This case is not simply about the right to appointed appellate counsel for a mother who has shown no recent interest in being a parent. Rather, the breadth of the Court of Appeals' opinion affects hundreds of termination proceedings litigated around the state every year in which parents are fighting desperately for their right to maintain a relationship with their children. For many years and in many counties, these parents have routinely been appointed counsel for appeal. If the Court of Appeals' opinion stands, appellate counsel will routinely be denied to many—and potentially all—of those parents, and there will be no appellate review of termination proceedings.

Although the constitutional issues argued in the petition to transfer were not explicitly raised in the Appellant's brief to the Court of Appeals, waiver is a discretionary doctrine that should not be applied to this case of fundamental and far-reaching significance. Courts "prefer to decide issues on their merits, and not to erect procedural obstacles to their presentation." Maldonado v. State, 265 Ind. 492, 498, 355 N.E.2d 843, 848 (1976). Moreover, the "constitutionality of a statute may be raised at any stage of the proceeding . . . ." Morse v. State, 593 N.E.2d 194, 197 (Ind. 1992). If these significant issues are not addressed now, they will surely surface, again and again, after a great deal of irreparable harm to parents and needless confusion among lawyers and judges in the interim.

A. Statutory Language

Indiana Code section 31-32-2-5 provides that "[a] parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship." DCS does not cite, much less quote, this statute. Rather, it contends "Indiana has a

statute making it mandatory to appoint parents legal counsel in trial proceedings to terminate parental right" but "does not make it mandatory for appointment of appellate counsel in termination cases . . . ." Resp. to Trans. 7-8.

The statute, however, makes no mention of "trial" or "appellate" proceedings but rather applies to proceedings (plural) for each parent (singular). The DCS and Court of Appeals' conclusion that a "proceeding" may only occur in a trial court conflicts with numerous references to "appellate proceedings" in this Court's decisional law. Pet. to Trans. 6. If there is any doubt about the proper construction of this statute, the one that supports its constitutionality must be adopted, and the petition to transfer argues significant constitutional concerns. Id. Finally, although DCS makes no mention of it, other courts confronted with the issue have found a right to appointed appellate counsel based on similar statutory language. Id.

B. Constitutional Issues

The Supreme Court has made clear termination cases are not just another civil case, as DCS suggests. "Few forms of state action are both so severe and so irreversible." Santosky v. Kramer, 455 U.S. 745, 759 (1982) (requiring proof by clear and convincing evidence in termination proceedings). Lassiter v. Dep't of Social Servs. of Durham County, N.C., 452 U.S. 18 (1981), is instructive but far from dispositive of the claims here because that case addressed only (1) a due process challenge (2) in a trial court. An appeal is a far different—and more intimidating—animal than a trial, and the Lassiter factors play out very differently in the appellate context. Pet. to Trans. at 9-10.

The most straightforward constitutional obstacle to the DCS approach is the Equal Protection Clause. Although physical liberty is important in due process claims such as

Lassiter, "discrimination against the indigent" controls the equal protection analysis. Pet. to Trans. 8 & n.4 (quoting Douglas v. California, 372 U.S. 353, 355 (1963)). Equal treatment of indigents and non-indigents in appeals pursued as of right is the guiding principle, as the Supreme Court made clear in Mayer v. Chicago, 404 U.S. 189 (1971), which involved a fine—and no restraint of liberty. Pet. to Trans. 8.[1] Parents appealing a termination proceeding must be provided a transcript at state expense, M.L.B. v. S.L.J., 519 U.S. 102 (1996), and transcripts are meaningless in most termination cases where parents lack the knowledge and ability to perfect a pro se appeal. The Supreme Courts of Ohio and Michigan have correctly required the appointment of appellate counsel for indigent parents in termination proceedings—and have never retreated from that position. 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).[2]

C. Wavier of Counsel and The Right to be "Left Alone"

It is difficult to disagree with the importance of the right to be left alone or manage one's own life as a person sees fit. Resp. to Trans. 11. Not every parent absent from a termination hearing is exercising that right, however. Some have not received adequate notice, and denying appellate counsel will forever forfeit their right to appeal. Pet. to Trans. 12.

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[1] The parenthetical in the petition to transfer mistakenly stated that the indigent appellant was entitled to counsel. Pet. to Trans at 8. Mayer involved the mandatory provision of transcripts and not counsel.

[2] DCS is incorrect that these cases were "impliedly overruled in part" by post-Lassiter cases; neither case cited even mentions Lassiter. The Michigan Court of Appeals simply observed, in a paternity case, that strict scrutiny did not apply in a case involving a father who had never established a relationship with his son. In re D.D.F., 617 N.W.2d 745 (Mich. Ct. App. 2000). The cited Ohio opinion involved transcripts in civil appeals, and the court distinguished Heller, noting that Heller involved state action to deprive a litigant of a fundamental right. McDermott v. State, No. 2004-CA-00178, 2004 WL 2348520 (Ohio Ct. App. Oct. 18, 2004).

In short, transfer is crucial in this case not because of its unique facts or concern for the few parents who do not appear in termination proceedings; rather, transfer is necessary to protect the significant rights of the majority of parents, who do appear in court and who desperately want to maintain their parent-child relationships.

Respectfully submitted,

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Joel M. Schumm, Attorney No. 20661-49

Daniel B. Schuetz, Attorney No. 26578-03

Counsel for the Appellant

VERIFICATION

I verify this brief contains no more than 1,000 words.

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Joel M. Schumm

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief in Support of Petition to Transfer was duly served by personal delivery upon the following on this 14th day of April, 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