

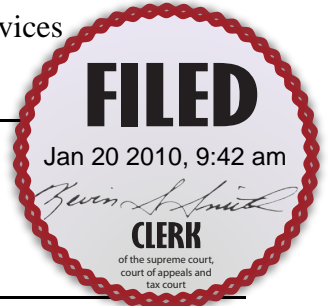
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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE INVOLUNTARY TERMINATION)
OF THE PARENT-CHILD RELATIONSHIP)
OF M.A., B.A., N.A., and C.A., minor children,)
and S.A. and E.A., their parents,)
)
S.A.,)
)
Appellant-Respondent,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES,)
)
Appellee-Petitioner.)

No. 48A02-0907-JV-676

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable G. George Pancol, Judge
Cause Nos. 48D02-0804-JT-172, -173, -174, -175

January 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent S.A. (Father) appeals the trial court's order terminating his parental relationship with M.A., B.A., N.A., and C.A., the minor children of Father and E.A. (Mother). Father argues that his due process rights were denied when the trial court refused his request for a continuance of the factfinding hearing and that there is insufficient evidence supporting the termination. Finding no denial of due process and sufficient evidence, we affirm.

FACTS

Mother and Father had four children: B.A., born June 26, 1998; C.A., born December 1, 2000; N.A., born September 29, 2001; and M.A., born May 18, 2003. Before the family moved to Indiana, they lived in Nevada. While they lived in Nevada, a house fire arose, causing significant injuries to C.A. and N.A., both of whom will require lifelong medical care. All four children suffer from developmental delays and behavioral problems.

On December 12, 2006, the Indiana Department of Child Services (DCS) filed a petition alleging B.A., N.A., and M.A. to be Children in Need of Services (CHINS). The petition stemmed from a December 11, 2006, incident, in which Mother had allegedly been driving under the influence of cocaine, caused a car accident, and fled the scene, all while the children were in the vehicle. Father was incarcerated at that time, so the DCS detained the children and placed them in foster care. On December 21, 2006, DCS filed a CHINS petition regarding C.A., who had not been included in the original petition because he was already residing outside of the parents' home in a medical treatment

facility. Thus, after C.A. was released from the facility and ready to go home, DCS filed the CHINS petition. The parents admitted that the children were CHINS, and the trial court entered orders granting the respective petitions.

On January 11, 2007, the trial court issued a dispositional order declaring the children to be wards of DCS, ordering them to remain in foster care, and ordering the parents to comply with certain services directed at resolving the problems that led to the children's removal from the home. These services included substance abuse treatment, Alcoholics and Narcotics Anonymous meetings, random drug screens, parenting classes, and home-based services.

During the pendency of the underlying CHINS matter, Father was arrested multiple times: in June 2006, for theft; in December 2006, for contempt of court and failure to appear; in February 2007, for failure to appear and a probation violation; in January 2008, for theft and criminal mischief; in April 2008, for public intoxication; and in October 2008, for theft and a probation violation. Additionally, Father's supervised visitation with the children was suspended in December 2007 because of his continued inappropriate outbursts that occurred in front of the children, leading to police involvement on more than one occasion. At the time of the final day of the factfinding hearing, it had been sixteen months since Father's last contact with the children.

On April 16, 2008, DCS filed a petition to terminate the parent-child relationships of Father, Mother, and their four children. At the initial hearing on the petition, the factfinding hearing was scheduled for December 16, 2008. On December 16, however,

both parents failed to appear. Thus, the trial court continued the matter to January 23, 2009, and stated that no further continuances would be granted. On January 23, Father requested another continuance to allow him to meet with his counsel and to delay the proceedings until he was released from incarceration. The trial court denied the request and held the first day of the hearing as scheduled, with Father and his attorney present. The factfinding hearing took place over the course of three days: January 23, February 11, and April 3. Father and his attorney were present for the first two days of the hearing. On March 25, 2009, Father requested yet another continuance so that he could travel out of state to visit his ailing mother; the trial court denied the request and completed the final day of the hearing as scheduled, with Father's attorney present but Father himself absent.

At the conclusion of the evidence on April 3, Father's counsel requested an additional hearing date be set so that Father could be present to testify. The trial court stated that it would withhold a ruling on this request until April 9 to allow Father to submit additional documentation or evidence showing why another day of hearing should be permitted. On April 9, Father submitted a formal motion with his affidavit attached. While the affidavit explained the reason for his absence, it did not explain why more evidence was needed. The trial court denied Father's request on April 21, 2009.

On May 29, 2009, the trial court entered an order terminating the parental relationship of Mother, Father, and their four children. In pertinent part, the trial court found as follows:

18. Mother and Father were also both ordered to attend the medical appointments of [C.A.] and [N.A.]
19. Both children have had several surgeries, and the parents only attended one of those surgeries and left early as mother reported that she felt uncomfortable.

21. [Father] did complete a substance abuse evaluation and the recommended intensive outpatient program.
22. [Father] did not complete the after care program.
23. [Father] relapsed subsequently to completing the "IOP" program.
24. [Father] failed to complete anger management, obtain a psychological evaluation, pay child support, maintain stable employment, secure appropriate housing, and attend AA/NA meetings as ordered by this Court.
25. [Father's] visitation was stopped due to an incident whereby the police were called at the visitation site due to [Father's] behavior.
26. [Father] was court ordered to participate in anger management due to his behavior at the visitation site.
27. [Father] has not visited with his children since December 2007.

29. [Father] has been arrested and charged on multiple occasions throughout the duration of this case.
30. The children have never been returned to the care of either parent and [have] continuously remained in Foster Care.
31. The children's health, and behavior have improved drastically since outside the care of the parents.
32. The foster parents are the people who have been responsible for taking the children to their medical and psychological appointments.

35. [The] DCS plan for these children is adoption.
36. Both DCS and [the children's Court Appointed Special Advocate (CASA)] believe it is in these children's best interest that parental rights be terminated.

Appellant's App. p. 98-99. The trial court found that the relevant statutory sections had been met and terminated the parental relationship. Father now appeals.

DISCUSSION AND DECISION

I. Due Process

Father first argues that his due process rights were denied when the trial court refused his multiple requests for continuances of the final hearing. First, we note that he raises this claim for the first time on appeal. Thus, he has waived the argument. See In re S.P.H., 806 N.E.2d 874, 877-78 (Ind. Ct. App. 2004) (finding that the father in a termination of parental rights proceeding had waived a procedural due process argument by failing to object in limine or otherwise bring the issue to the trial court's attention).

Waiver notwithstanding, we note that the decision to grant or deny a motion to continue rests within the trial court's sound discretion. Parmeter v. Cass County Dep't of Child Servs., 878 N.E.2d 444, 449 (Ind. Ct. App. 2007). Thus, a trial court's ruling on a motion to continue will be reversed only upon a showing of an abuse of discretion and prejudice resulting from such an abuse. J.M. v. Marion County Office of Family & Children, 802 N.E.2d 40, 43 (Ind. Ct. App. 2004). In other words, no abuse of discretion will be found when the movant fails to demonstrate how he or she was prejudiced by the

denial. Rowlett v. Vanderburgh County Office of Family & Children, 841 N.E.2d 615, 618 (Ind. Ct. App. 2006).

In a termination of parental rights matter, the nature of process due to a parent is determined by a 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 governmental interest supporting use of the challenged procedure. In re C.C., 788 N.E.2d 847, 852 (Ind. Ct. App. 2003).

Here, the initial factfinding hearing was set for December 16, 2008. Father and Mother failed to appear and the trial court continued the hearing until January 23, 2009. At the January 23 hearing, Father requested another continuance, so that he could confer with his attorney and delay the proceedings until he was released from incarceration. The trial court denied the request, and the hearing proceeded as scheduled with Father and his attorney present. Father and his attorney were also present for the second day of the hearing, on February 11. On March 25, Father requested yet another continuance of the final day of the hearing scheduled for April 3, stating that his mother was ailing and he needed to travel out of state to be with her. The trial court denied the request. Father failed to appear on April 3 and the hearing continued in his absence.

We have no reason to doubt the veracity of the stated reason for Father's absence, namely, a severely ill mother. That said, even if we assume solely for argument's sake that the trial court erred by denying his request for a continuance—a dubious proposition given the length of time this termination petition had been pending—Father has failed to

establish that he was prejudiced as a result. His interests were represented by his attorney, who cross-examined witnesses and presented evidence on Father's behalf. And the only evidence to which Father directs our attention in support of his argument that the trial court should have permitted him to testify after April 3 was fully covered by the witness who testified on Father's behalf. He fails to identify any other evidence he might have been able to provide had he testified.

Finally, we note that Father knew that his request for a continuance had been denied prior to the hearing on April 3, and he also knew that there was a chance that he might not make it back in time for the hearing. This court has stated that parents who know that they will be unavailable to testify at a factfinding hearing on a termination petition always have the option of deposing themselves and introducing the deposition at the hearing. Tillotson v. Clay County Dep't of Family & Children, 777 N.E.2d 741, 746 (Ind. Ct. App. 2002). Although a deposition is undeniably inferior to actual presence at and participation during a hearing, it appears to have been the next best option for Father, and he chose not to exercise it. Under these circumstances, therefore, we find that Father has not established that he was prejudiced by the trial court's refusal to continue the third day of the termination hearing. Thus, Father has not established that his due process rights were violated and we decline to reverse on this basis.

II. Sufficiency of the Evidence

A. Standard of Review

Father next argues that the evidence is insufficient to support the trial court's decision to terminate the parental relationship. We will not set aside the trial court's judgment terminating a parent-child relationship unless it is clearly erroneous. In re A.A.C., 682 N.E.2d 542, 544 (Ind. Ct. App. 1997). We neither reweigh the evidence nor judge the credibility of witnesses, and we will consider only the evidence that supports the trial court's decision and the reasonable inferences that may be drawn therefrom. Id. If the evidence and the inferences support the trial court's decision, we must affirm. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999).

We acknowledge that the involuntary termination of parental rights is the most extreme sanction a court can impose on a parent because termination severs all rights of a parent to his or her children. Id. Therefore, termination is intended as a last resort, available only when all other reasonable efforts have failed. Id. The purpose of terminating parental rights is not to punish the parents but, instead, to protect their children. Id. Thus, although parental rights are of a constitutional dimension, the law provides for the termination of these rights when the parents are unable or unwilling to meet their parental responsibilities. Id.

To effect the involuntary termination of a parent-child relationship, the State must present clear and convincing evidence establishing the following elements:

- (A) one (1) of the following exists:
 - (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;

- (ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or
 - (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;
- (B) there is a reasonable probability that:
- (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
 - (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
- (C) termination is in the best interests of the child; and
- (D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2).

In construing this statute, this court has held that when determining whether certain conditions that led to the removal of the children will be remedied, the trial court must judge the parent's fitness to care for the children at the time of the termination hearing, taking into consideration evidence of changed conditions. In re D.J., 755 N.E.2d 679, 684 (Ind. Ct. App. 2001). A parent's habitual pattern of conduct must also be evaluated to determine the probability of future negative behavior. Id. The trial court need not wait until a child is irreversibly harmed such that his physical, mental, and

social development are permanently impaired before terminating the parent-child relationship. Id.

Additionally, the trial court may consider the services offered as well as the parent's response to those services. Id. Parental rights may be terminated when parties are unable or unwilling to meet their responsibilities. Ferbert v. Marion County Office of Family & Children, 743 N.E.2d 766, 776 (Ind. Ct. App. 2001). Also, when determining what is in the best interests of the children, the interests of the parents are subordinate to those of the child. Id. at 773. Thus, parental rights will be terminated when it is no longer in the child's best interests to maintain the relationship. In re B.D.J., 728 N.E.2d 195, 200 (Ind. Ct. App. 2000).

B. Conditions Will Not be Remedied

First, we turn to Father's argument that the evidence does not support the trial court's conclusion that there is a reasonable probability that the conditions that resulted in the children's removal from the home will not be remedied. The children were initially removed from the home because Father was incarcerated and Mother was arrested for driving under the influence of cocaine, causing an accident, and fleeing the scene, all while the children were in the vehicle with her. After DCS became involved, the investigation revealed that C.A. and N.A. required extensive medical care and treatment and that all four children required services to deal with developmental delays and behavioral problems.

DCS presented evidence that during the underlying CHINS proceeding, the parents were unable to meet their children's needs. Specifically, the parents failed to attend multiple surgeries of C.A. and N.A., and left early during the one surgery they did attend because it made them uncomfortable. Two of B.A.'s therapists at different facilities testified that during their time working with the boy, the parents had never participated in his therapy or made any attempt to contact them. A teacher of N.A. and M.A. testified that neither parent was involved in the services she provided to the children. An occupational therapist of C.A. and N.A. testified that Father was not involved with any of her work with the children, including the creation and implementation of the children's Individualized Education Plan. The parents' continuing drug use and criminal activity only compounded their inattention to their children's needs.

DCS also presented evidence that Father substantially failed to comply with court-ordered services. Specifically, the family's DCS case manager testified that Father had not obtained a psychological evaluation, had paid no child support, had not completed anger management, had failed to participate in the services being provided to the children, including their medical appointments, had been arrested and violated his probation multiple times, and had moved at least eight times since the CHINS case was opened. Father's Addictions Counselor testified that Father had to complete the IOP Program twice because of a relapse and that he had not completed Aftercare as ordered. The children's CASA testified that Father had not complied with court directives, had not

participated in services or medical treatment being provided to the children, and had demonstrated a pattern of criminal behavior. Father directs our attention to evidence that he completed a minimal number of programs just before the factfinding hearing occurred. This amounts to a request that we reweigh the evidence, which we decline to do.

Additionally, Father failed to fully exercise his right to visit with the children. See Lang v. Starke County Office of Family & Children, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007) (holding that when a parent fails to exercise his right to visit his child, he “demonstrate[s] a lack of commitment to complete the actions necessary to preserve the parent-child relationship”), trans. denied. At the January 11, 2007, dispositional hearing, the trial court ordered that Father was to have supervised visitation with the children. During the ensuing year, there were several occasions when he canceled or failed to show up. Then, in December 2007, Father’s visitation rights were suspended because of multiple inappropriate outbursts that occurred during visits with the children. On more than one occasion, the police had to be called because of Father’s behavior. At the time of the factfinding hearing, Father had not seen his children for sixteen months. Given Father’s habitual patterns of conduct, behavior during the CHINS proceedings, and failure to fully exercise his visitation rights, we find that the trial court did not err by concluding that DCS had presented clear and convincing evidence that there was a reasonable probability that the conditions that resulted in the children’s removal were not likely to be remedied.

C. Best Interests

Finally, Father argues that there is insufficient evidence supporting the trial court's conclusion that there is a reasonable probability that termination of the parent-child relationship is in the children's best interests. In addition to the above-described evidence regarding Father's criminal behavior, failure to complete the vast majority of court-ordered services, and failure to exercise his visitation rights with his children, there is evidence that, while the children made virtually no improvement or progress while living with Father and Mother, the service providers overwhelmingly testified that the children had made huge strides after being placed with their foster parents. Multiple service providers also testified that they believed the parents presented a real danger to the children and their well-being.

Furthermore, multiple service providers testified that they did not believe the parents were willing or able to provide or oversee the significant medical and emotional services the children will need for the rest of their lives. Father offered no evidence that he had taken any steps to educate himself about the children's delays and medical issues or that he was willing and/or able to have the children back in his care at any time in the near future. Indeed, at the time of the factfinding hearing, Father had just moved into an apartment that was not large enough for the children.

The children's case manager, CASA, and the vast majority of service providers involved with this family testified that they believed it was in the children's best interests to terminate the parent-child relationship. Given this record, we do not find that the trial

court erred by finding that it was in the children's best interests to grant DCS's petition to terminate the parent-child relationship.

The judgment of the trial court is affirmed.

BAILEY, J., and ROBB, J., concur.