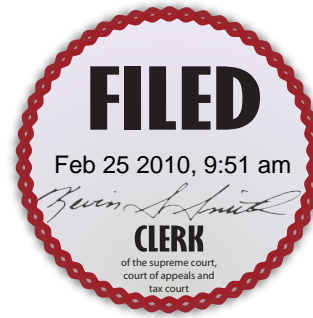


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IN THE
COURT OF APPEALS OF INDIANA

THE MATTER OF: Involuntary Termination)
Of the Parent-Child Relationship of the Minor)
Child, M.R. and the Parent, C.R.)
)
C.R., Parent,)
)
Appellant-Respondent,)
)
vs.)
)
DEPARTMENT OF CHILD SERVICES,)
)
Appellee-Petitioner.)

No. 29A05-0909-JV-509

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Paul Felix, Judge
The Honorable Todd L. Ruetz, Master Commissioner
Cause No. 29C01-0901-JT-91

February 25, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent C.R. (Father) appeals the trial court's order terminating his parent-child relationship with his minor daughter, M.R. Specifically, Father argues that his due process rights were violated because he was not provided with notices, case plans, and opportunities to participate in the Child In Need of Services (CHINS) proceedings. Father also contends that appellee-petitioner Indiana Department of Child Services (DCS) failed to present sufficient evidence to support the termination order. Concluding that Father's due process rights were not violated and finding the evidence sufficient to support the termination of his parental rights, we affirm the trial court's judgment.

FACTS

Mother gave birth to M.R. on January 27, 2004. At the time, Father lived with both of them, but he and Mother separated when M.R. was approximately one year old. Father ceased contact with M.R., and in September 2007, DCS received domestic reports concerning M.R. and her two half-sisters, who were all living with Mother in Sheridan. The reports alleged that Mother was abusing the children, leaving them alone during the evenings, and that the residence lacked appropriate plumbing facilities. At some point during the DCS investigation, it was determined that Father began serving a sentence on a burglary conviction in the Putnamville Correctional Facility (Putnamville) in March 2007.

Although an informal adjustment and safety plan had been in place since September 2007, and a petition claiming that all three children were Children in Need of Services (CHINS) had been filed, DCS had no record of Father's contact information. Thus, DCS listed Father's address as "unknown," and Father was unaware of the informal adjustment and had not been served with the CHINS petition. Tr. p. 67.

On November 5, 2007, the trial court held a detention hearing and entered an order stating that "actual notice of the time, place and purpose of Detention Hearing has been given to Mother." Appellant's App. p. 69. The order was also distributed to the DCS and M.R.'s Guardian Ad Litem (GAL), but neither notice nor the order was provided to Father. The children were removed from Mother's residence and placed with their maternal grandmother (Grandmother). The children have remained in Grandmother's care since November 5, 2007.

The trial court conducted a fact finding hearing on the CHINS petition on February 11, 2008. Neither Mother nor Father appeared, and following the hearing, the trial court determined that M.R. was a CHINS. The trial court's order on a subsequent disposition hearing that was held on March 24, 2008, indicated that Mother had failed to appear despite being provided with notice of the hearing. Father was not mentioned in that order and the trial court determined that M.R. should remain with Grandmother.

At a review and permanency hearing that commenced on December 8, 2008, the DCS case manager testified that Mother had not followed through on the services that

had been offered to her. Additionally, the GAL testified that a grandparent guardianship would be in the childrens' best interests.

Father was neither present nor mentioned at the hearing and was not listed as a party entitled to distribution of the order. Following the hearing, the trial court approved a permanency plan for adoption by grandmother.

On January 27, 2009, DCS filed a petition to terminate Father and Mother's parental rights as to M.R. Father was served with a summons and transported from Putnamville for the initial hearing on March 16, 2009. The trial court agreed to consolidate the initial hearing on the termination of parental rights with a review hearing on the CHINS action. Although Mother was served with the petition, she failed to appear.

At the hearing, the trial court appointed counsel to represent Father. Father informed the trial court that he had previous convictions for burglary, theft, resisting law enforcement, criminal confinement, and battery. Father also requested an immediate transport back to prison because he was in college and did not "want to get kicked out of school." Tr. p. 68-69. However, during cross-examination, Father admitted that his first semester of college did not commence until August 2009, and if he failed to complete the college program, his release date would be in either August or October 2012.

Father appeared at the fact finding hearing that commenced on June 25, 2009. During the hearing, a DCS representative testified that the agency developed a plan for M.R. and her half-siblings that included adoption by Grandmother. As of the date of the

hearing, M.R. was six years old and had been raised by Grandmother for nineteen consecutive months. It was determined that M.R. had neither lived with nor seen Father since her first year of her life.

The DCS family case manager testified that it would be detrimental to M.R.'s stability and well-being to be removed from Grandmother's care. In fact, the case manager remarked that M.R.'s well-being would be enhanced if the parent-child relationship was terminated. DCS representatives expressed no reservation or concern about Grandmother's ability to provide a safe and stable home for M.R. or her siblings.

The GAL testified that M.R. was doing "great" and "wonderful" in Grandmother's care and believed that it was within M.R.'s best interests for Grandmother to adopt her. Id. at 102. The GAL also testified that it would be detrimental for M.R. to wait and see whether Father would be in a position to effectively parent M.R. following his release from prison.

Father testified that he did "not have the means to take care of a child . . . and [could] barely live on his own." Id. at 112-13. Although Father expressed a desire to be a part of M.R.'s life, he agreed that M.R. was "in the best place she can be" with her grandmother. Id. at 109.

At the conclusion of the hearing, the trial court terminated Father's parental rights as to M.R. In its findings, the trial court pointed out that Father had been convicted of burglary and began serving his sentence for that offense in March 2007, and that his earliest release date from prison would be in 2011 or 2012. The trial court also found that

Father had been convicted of other felonies and misdemeanors, that he had not provided for M.R. for five years prior to his incarceration, and was unable to provide for M.R.'s basic necessities. As a result, the trial court determined that Father's pattern of criminal conduct, the lack of involvement with M.R., and his failure to assert his parental rights before incarceration constituted clear and convincing evidence of the reasonable probability that the conditions that resulted in M.R.'s removal will not be remedied. The trial court also concluded that continuation of the parent-child relationship posed a threat to M.R.'s well-being.

Additionally, the trial court found that DCS's plan for M.R.'s adoption by Grandmother was satisfactory and noted DCS witnesses' testimony that adoption was in M.R.'s best interests. Finally, the trial court observed that because of Father's lack of interest in pursuing a course of conduct sufficient to reunite with M.R., termination of parental rights was in M.R.'s best interests. Father now appeals.

DISCUSSION AND DECISION

I. Due Process

Father first contends that the termination order must be set aside because his due process rights were violated. Father maintains that his rights were violated because he was not served with notice of the CHINS petition, hearings, or the detention and dispositional reports in the matter. Thus, father claims that he was denied the opportunity to participate in the CHINS proceedings.

In resolving this issue, we initially observe that the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that “no person shall be deprived of life, liberty, or property without due process of law.” U.S. CONST. amend. XIV. A parent’s right to raise his or her children is protected by the Due Process Clause. McBride v. Monroe County Office of Family & Children, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003).

However, we also note that a party on appeal may waive a constitutional claim. Hite v. Vanderburgh County Office of Family & Children, 845 N.E.2d 175, 180 (Ind. Ct. App. 2006). Generally, a party waives a claim when it is raised for the first time on appeal. McBride, 798 N.E.2d at 194; see also In re K.S., 750 N.E.2d 832, 834 n.1 (Ind. Ct. App. 2001) (finding waiver of alleged due process violations in pre-termination proceedings because they were raised for the first time on appeal).

As noted above, Father raised a number of alleged procedural irregularities that occurred during the underlying CHINS proceeding, including lack of notice and opportunity to participate in the matter, and the fact that he was not provided with various case plans. However, Father failed to object or argue at the termination hearing that such irregularities violated his due process rights. Because Father failed to object to the alleged due process violations in a timely manner and has raised these issues for the first time on appeal, he has waived the issue. McBride, 798 N.E.2d at 194-95.

Waiver notwithstanding, we note that the nature of the process that is due in termination of parental rights proceedings depends on 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 governmental interest supporting use of the challenged procedure. In re B.J., 879 N.E.2d 7, 16 (Ind. Ct. App. 2008), trans. denied. The balancing of these factors recognizes that although due process is not dependent on the underlying facts of the particular case, it is nevertheless flexible and calls for such procedural protections as the situation demands. Lawson v. Marion County Office of Family & Children, 835 N.E.2d 577, 580 (Ind. Ct. App. 2005).

Father's private interest in this matter is his ability to provide the care, custody, and control of the child, and the countervailing interest of the State is the interest in protecting the child's welfare. In the Matter of E.M., 581 N.E.2d 948, 952 (Ind. Ct. App. 1991).

While both of these interests are substantial, the record demonstrates Father's lack of interest and practical ability to provide for M.R.'s welfare. Indeed, Father admitted that he had not been in contact with M.R. since she was a year old, that he was obligated to pay child support for two other children, and that his resources were so inadequate that he could "barely live on [his] own." Tr. p. 112. Father has also committed multiple criminal acts that have resulted in his lengthy incarceration during the critical time period encompassing the CHINS and termination matters. Each time that Father has committed a criminal offense, it is apparent that he has placed his own interests well above those of M.R.

On the other hand, DCS placed M.R. with Grandmother and has facilitated foster care and therapy for M.R. throughout the CHINS and termination proceedings. As noted above, DCS representatives testified that M.R. is progressing well in Grandmother's care and the family is providing for her care on a daily basis.

In weighing these competing interests, it is apparent that DCS's interest in protecting M.R. from Father's judgment and lifestyle should be given greater weight and deference. In other words, it is the State's interest that leads to permanency, stability, and M.R.'s improved well-being that Father acknowledges that he cannot provide.

The second factor requires an assessment of the risk of error created by the challenged procedure; namely, proceeding at the various hearings without Father's presence and the lack of notices and orders that allegedly should have been provide to him. Father directs us to A.P. v. Porter County Office of Family & Children, 734 N.E.2d 1107 (Ind. Ct. App. 2000), where we noted the many irregularities that occurred during the proceedings, including DCS's failure to provide the parents with copies of case plans, the absence of permanency hearings, the fact that the termination order did not contain written findings and conclusions, and the deprivation of father's right to be present at review hearings. In light of those irregularities and others—when taken together—we reversed the termination order because they amounted to a deprivation of the parent's right to due process. Id. at 1117. However, we also found that none of the deficiencies standing alone would have resulted in a due process violation. Id. at 1118.

We subsequently determined in Hite that Indiana Code section 31-35-2-2 clearly states that termination proceedings are distinct from CHINS proceedings. In particular, we observed that “CHINS proceedings are separate and distinct from involuntary termination proceedings because a CHINS cause of action does not necessarily lead to an involuntary termination cause of action.” Id.

The evidence established in Hite that father was incarcerated when DCS detained and removed his child from the biological mother. Father never received notice of the CHINS petition or proceedings, and it was not until fifteen months after the CHINS fact finding hearing that a termination petition was filed, with notice of the petition being sent to the father at that time. Thereafter, a permanency hearing was held nearly six months later, at which time the plan was changed to termination. Father was not present at that hearing and Mother consented to the termination of her parental rights.

After five additional months, father appeared in person for the first time at a CHINS review hearing that was held at the same time as an initial hearing on the termination petition. The record reflected that father’s first appearance in the CHINS and termination proceedings occurred twenty-seven months after the child was removed. Father remained in jail from before the initiation of the CHINS proceeding, and throughout the CHINS and termination actions. Father’s projected release date from prison was approximately two years after the termination hearing. Id. at 184.

On appeal, father claimed that his due process rights were violated because he did not receive notice of the original CHINS action and copies of case plans. Id. at 183. We

concluded that the alleged procedural irregularities did not amount to a due process violation requiring reversal of the termination because the father had not been “denied the opportunity to be heard in the latter portions of the CHINS action and in the termination proceedings.” Id. Also, because Father had been imprisoned at the time of the CHINS and termination proceedings, there was no deprivation of “notice as to what conduct on his part could lead to termination of his parental rights.” Id.

Here, as in Hite, Father was incarcerated throughout the CHINS proceedings. He was not provided with notice of the CHINS action and was not present for the fact-finding, disposition, or review hearings. However, Father was present for the review hearing held on March 16, 2009, the same day as his initial hearing on the termination petition, just as in Hite. And his first appearance in the CHINS and termination proceedings occurred sixteen months after the child was removed from Mother’s home. This was precisely the amount of time that elapsed from removal to father’s receipt of notice of the termination petition in Hite. Also, as in Hite, father was present and represented by counsel at the termination hearing.

When considering these circumstances and weighing the factors set forth above, we must conclude that Father’s appearance at the review hearing and termination proceedings establishes that he was not denied the opportunity to be heard in a meaningful way. As in Hite, Father has not shown that he was deprived of any notice as to what conduct on his part could lead to the termination of his parental rights. And we cannot say that Father’s lack of participation in the early stages of the CHINS case or the

fact that he was not provided with case plans resulted in a substantially increased risk of error in the ultimate termination of his parental rights. Moreover, Father's choices that led to his resulting incarceration have led to his own acknowledged inability to provide for himself and M.R. Thus, the State's interest in protecting M.R. from Father's deleterious influence and absence in her life because of his incarceration weighs heaviest in this balance. For all these reasons, Father's claim that his due process rights were violated fails.

II. Sufficiency of the Evidence

Father contends that the termination of his parental rights must be set aside because DCS failed to demonstrate that the conditions resulting in M.R.'s removal will not be remedied and the evidence failed to prove that continuation of the parent-child relationship poses a threat to M.R.'s well being. Finally, Father maintains that DCS failed to show that terminating his parental rights was in M.R.'s best interests.

A. Standard of Review

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 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. Pursuant to this rule, courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment. A.F. v. Marion County Office of Family & Children, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002). 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. In re D.J., 755 N.E.2d at 684.

The trial court may also 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. In re T.F., 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).

Finally, we note that Father challenges the sufficiency of the evidence supporting the trial court's judgment with regard to Indiana Code sections 31-35-2-4(b)(2)(B) and (C) set forth above. We point out that Indiana Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, the DCS was required to establish, by clear and convincing evidence, only one of the two requirements of subsection (B). In re L.S., 717 N.E.2d 204, 209 (Ind. Ct. App. 1999). However, we note that in this case, the trial court found that both prongs of Indiana Code Section 31-35-2-4(b)(2)(B) were satisfied.

B. Father's Contentions

Father maintains that the evidence failed to show that a reasonable probability exists that the conditions justifying M.R.'s removal and continued placement outside the home will not be remedied. Specifically, Father argues that the trial court improperly relied upon his incarceration as the sole basis for this finding.

We acknowledge that the mere fact of a parent's incarceration may not suffice to support termination of the parent-child relationship. See In re G.Y., 904 N.E.2d 1257, 1263 (Ind. 2009) (reversing termination because mother's criminal offenses had all occurred before her child was conceived, mother had completed a drug therapy program while incarcerated, had made good faith efforts to complete required services available to

her in prison, and had maintained a consistent, positive relationship with her child while she was incarcerated). Here, however, the record demonstrates that Father's parental rights were not terminated merely because he was incarcerated.

The record shows that there was a period of nearly five years during which Father had no meaningful contact with M.R. He did not take any affirmative steps to locate M.R. or secure custody or visitation rights after he and Mother separated and before he was incarcerated. See Lang v. Starke County Office of Family & Children, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007) (holding that the failure to exercise the right to visit one's child demonstrates a lack of commitment to complete the actions necessary to preserve the parent-child relationship). Additionally, even before Father began serving his sentence for burglary, he admitted that he could not provide for M.R. because he had other child support obligations and was barely able to support himself. Tr. p. 112-13.

As discussed above, Father informed the trial court at the initial hearing that he wanted to be transported back to prison immediately because he was "in college," and did not want to be "kicked out" because he was trying to shorten his sentence. Tr. p. 68-69. However, Father later contradicted this statement at the final hearing when he testified on cross-examination that he had not yet started college and his first semester was not to begin for two months. Id. at 111.

In our view, Father's inaccurate statements regarding his prison and college status constitutes a reflection upon his honesty regarding his intent and desire to continue as M.R.'s parent and his contentions that he has repented from further criminal activity. See

Castro v. Office of Family & Children, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006) (observing that Father has demonstrated an historical inability to provide adequate housing, stability and supervision for his child and his “continued incarceration at the time of the . . . termination hearing is strong evidence of his current inability to provide the same”).

Grandmother, the DCS case manager, and GAL all testified that permitting Father to reassert parental authority after his long absence and excluding M.R.’s two other sisters might jeopardize M.R.’s well-being. While Grandmother’s family have provided love and support to M.R., Father would not be free to demonstrate whatever parenting skills he may have learned while in prison for at least two years after the termination hearing. Hence, Father does not have the ability to remedy the reasons for M.R.’s removal, regardless of whether his status as a prison inmate is considered.

In light of these circumstances, it is apparent that, even though the DCS was not obligated to prove both prongs of Indiana Code Section 31-35-2-4(b)(2)(B), it did so. Thus, we agree with the trial court’s conclusion that

Father’s pattern of criminal conduct, failure to assert parental dominion over [M.R.] prior to incarceration, and continuing long-term incarceration, constitute clear and convincing evidence of the reasonable probability that the conditions which resulted in the removal of the child and reasons for the continued placement of the child outside the father’s home will not be remedied, and that continuation of the parent-child relationship poses a threat to [M.R.’s] well-being.

Appellant’s App. p. 16.

C. M.R.'s Best Interests

Finally, Father argues that DCS failed to show that termination of his parental rights was in M.R.'s best interests. More specifically, Father asserts that the trial court erroneously relied on the GAL and case manager's testimony in its conclusion because those witnesses had never met Father and did not know what parenting services were offered to him while he was incarcerated.

Termination of parental rights is proper if necessary to protect the child's emotional and physical health and development. Egly v. Blackford County DPW, 592 N.E.2d 1232, 1234-35 (Ind. 1992). Moreover, termination is allowed in situations not only where the child is in immediate danger of losing his life, but also where the child's emotional and physical development is threatened. Id. More specifically, "the trial court need not wait until the child is irreversibly harmed such that his physical, mental and social development is permanently impaired before terminating the parent-child relationship. In re A.A.C., 682 N.E.2d at 544.

We have also recognized that "children continue to grow up quickly; their physical, mental, and emotional development cannot be put on hold while their recalcitrant parent fails to improve the conditions that led to their being harmed and that would harm them further." Matter of D.T., 547 N.E.2d 278, 286 (Ind. Ct. App. 1989). And individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children. Castro, 842 N.E.2d at 374. Finally, we have previously determined that recommendations of the case

manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. In re M.M., 733 N.E.2d 6, 13 (Ind. Ct. App. 2000).

As discussed above, M.R. was removed from Mother's residence on November 5, 2007. She has not lived with or been around Father for the most recent five of her six years of life. Father failed to use any means available to locate M.R., and he admitted that he cannot provide for M.R. Even more compelling, Father engaged in criminal conduct and has committed several serious felonies. As a result, Father's conduct has resulted in a lengthy incarceration that has spanned from before the CHINS petition was filed through the life of that proceeding and the termination action. Father's incarceration will continue a minimum of two more years before he will be released.

In the meantime, Grandmother has been raising M.R. and her siblings since M.R. was removed from Mother's custody. M.R. is progressing well with this placement and Father admitted during the termination hearing that Grandmother is the proper person to raise M.R.

If M.R. was compelled to wait for Father's release from prison, she would have to wait and see whether Father completes various parenting programs, obtains a college degree in a program that he has not yet begun, and whether he could find employment, obtain housing, and have the means to provide for her. Moreover, M.R. would have to

wait and see whether Father reverted to a pattern of criminal conduct. Given that she has had no contact with Father in five of her six years of life, this is too much to ask.

In light of these circumstances, we conclude that there is ample evidence to support the trial court's determination that termination of Father's parental rights is in M.R.'s best interests.

The judgment of the trial court is affirmed.

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