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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 02A03-0912-JV-563

March 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

D.W.-C. (“Mother”) appeals the juvenile court’s order terminating her parental rights (“TPR”) as to her children C.R. and J.R. Mother raises one issue for our review, which we restate as whether the juvenile court properly concluded procedural irregularities in the prior child in need of services (“CHINS”) proceedings did not violate Mother’s due process rights in the subsequent TPR proceedings. Concluding Mother was not denied due process, we affirm.

Facts and Procedural History

C.R.¹ and J.R.² were removed from Mother’s care, for their protection, on or about October 11, 2005. On October 11, 2005, the juvenile court held a detention hearing at which Mother appeared. The juvenile court found probable cause that C.R. and J.R. were CHINS, placed C.R. and J.R. in foster care, and appointed counsel for Mother. The juvenile court ordered all parties to appear without further notice for an initial hearing on November 15, 2005. In addition, the juvenile court placed Mother under provisional orders to refrain from criminal activity, maintain appropriate housing, cooperate with Department of Child Services (“DCS”) caseworkers, submit to a psychological evaluation, obtain a drug and alcohol assessment and follow all recommendations, complete a placement diversion program,

¹ Born April 23, 1998.

² Born March 9, 1999.

refrain from use of alcohol and illegal drugs, and submit to random drug testing. On November 4, 2005, DCS filed a petition alleging C.R. and J.R. were CHINS.

On November 15, 2005, the juvenile court held an initial hearing on the CHINS petition at which Mother did not appear but was represented by counsel. The juvenile court ordered Mother to have supervised visitation with C.R. and J.R. On February 7, 2006, a second initial hearing was held at which Mother appeared in person and with counsel. The juvenile court entered a new provisional order including a provisional parent participation plan requiring Mother to, among other things: refrain from criminal activity; maintain appropriate housing; take all medications as prescribed and refrain from unprescribed drugs; notify DCS of all changes in household composition, housing, and employment; and cooperate with DCS caseworkers by attending case conferences and accepting unannounced home visits.

On March 23, 2006, the juvenile court held a review hearing at which Mother appeared in person and by counsel. The juvenile court found Mother had “generally complied with the Parent Participation Plan as required in the Dispositional Order entered herein.” Appellant’s Appendix at 127. The juvenile court ordered the children’s continued placement in foster care, ordered DCS to prepare a permanency plan, and ordered the parties to appear without further notice for a permanency hearing on September 5, 2006. The juvenile court set a CHINS fact-finding hearing for October 23, 2006. On June 27, 2006, the juvenile court held a status hearing at which Mother appeared in person and by counsel. The juvenile court ordered Mother to “submit to a drug screen at the Allen County Juvenile

Center immediately following” the hearing and thereafter “submit to a drug screen a minimum of 2 times per month.” Appellee’s Appendix at 50.

On September 5, 2006, the juvenile court held a permanency hearing at which it found Mother was “not in compliance with the Parent Participation Plan,” it was contrary to the welfare of C.R. and J.R. to be placed with Mother, and it was in C.R.’s and J.R.’s best interests that DCS be authorized to initiate TPR proceedings. Appellant’s App. at 130-31. Thus, the juvenile court approved and adopted DCS’s permanency plans recommending TPR proceedings with regard to C.R. and J.R.

On October 5, 2006, DCS filed an amended CHINS petition with respect to C.R. and J.R. On October 23, 2006, the juvenile court held a fact-finding hearing at which Mother appeared in person and by counsel. The juvenile court found Mother was unemployed, had not maintained stable housing for the children, had used excessive discipline and inflicted an injury upon J.R., had allowed drug paraphernalia in plain view in her residence and in the children’s access, and had been convicted in 2006 of social security fraud, after which she violated the terms of her probation and was incarcerated by order of the federal district court. At the conclusion of the hearing the juvenile court announced its judgment that C.R. and J.R. were CHINS, and on December 7, 2006, issued written findings of fact in support of its judgment.

On January 3, 2007, the juvenile court held a CHINS dispositional hearing. Mother did not appear in person due to her incarceration but was represented by counsel. In its

dispositional order, the juvenile court continued C.R.'s and J.R.'s placement in foster care but did not enter any orders specific to Mother.

In February and May 2007, the juvenile court held a review hearing and a detention hearing, respectively, at which Mother did not appear due to her incarceration but was represented by counsel. On August 2, 2007, the juvenile court held a permanency hearing at which Mother did not appear but was represented by counsel. The juvenile court found DCS had made reasonable efforts to reunify and that it was in C.R.'s and J.R.'s best interests for DCS to be authorized to initiate TPR proceedings.

On January 30, 2008, the juvenile court held a permanency hearing at which Mother appeared in person and by counsel. The juvenile court's finding regarding reasonable efforts reflected DCS had provided Mother with the following: "case conference, drug screens, home visits, maintain contact with [Mother]," supervised visitation for Mother, authorization for Mother to attend school events for C.R. and J.R., and a "housing certification for Fort Wayne Housing Authority." Appellee's App. at 79. The juvenile court further found Mother was in "non-compliance with the Parent Participation Plan" in that she had "not demonstrated an ability to benefit from services." *Id.* at 78. Finally, the juvenile court found it was in the best interest of C.R. and J.R. that DCS be authorized to file a TPR petition with respect to them.

On May 22, 2008, the juvenile court held a detention hearing at which Mother appeared in person and by counsel. The juvenile court ordered Mother to have supervised visitation with C.R. and J.R.; "obtain a drug and alcohol assessment . . . by June 22, 2008,

and follow all recommendations”; “enroll in family counseling by June 22, 2008, and follow all recommendations”; and “obtain a psychological evaluation . . . by June 22, 2008, and follow all recommendations.” Id. at 83.

On July 10, 2008, the juvenile court held a permanency hearing at which Mother appeared in person and by counsel. On August 28, 2008, DCS filed petitions for involuntary termination of Mother’s parental rights as to J.R. and C.R. On September 15, 2008, the juvenile court held a detention hearing at which Mother failed to appear but was represented by counsel. On January 5, 2009, the juvenile court held a review hearing at which Mother failed to appear but was represented by counsel. The juvenile court found Mother was in “non-compliance with the Parent Participation Plan,” id. at 106, and ordered Mother to have supervised visitation with C.R. and J.R.

A TPR fact-finding hearing was held in January, March, May, and June 2009, at which Mother appeared in person and by counsel. During the first date of the hearing, the juvenile court denied Mother’s oral motion to dismiss the TPR petitions on the ground that she had never been placed under a dispositional decree in the underlying CHINS case. At the close of the hearing, the juvenile court granted DCS’s oral motion “to amend the pleadings to conform to any of the evidence offered at this particular hearing.” Appellee’s App. at 306.³ On September 4, 2009, the juvenile court issued its orders terminating Mother’s parental rights as to C.R. and J.R. The juvenile court found facts including:

³ The TPR petitions alleged C.R. and J.R. had been removed from Mother “for at least six (6) months under a dispositional decree herein.” Appellee’s App. at 3, 6. However, the juvenile court found C.R. and J.R. had been removed from Mother and under the supervision of DCS for fifteen of the most recent twenty-two months, which is an alternate precondition for TPR proceedings. See Ind. Code § 31-35-2-4(b)(2)(A)(i), (iii).

8. Notwithstanding the lack of the incorporation of a formal parent participation plan into the Dispositional Decree services were provided to [Mother]. DCS Casemanager Justin Goree completed referrals for services for [Mother] in 2005 according to the terms of the provisional parent participation plan. From the testimony of Jo Shonda Weeks, a DCS casemanager assigned to this case in December 2005, the Court finds that a case plan was prepared and reviewed with [Mother]. Ms. Weeks sent several letters to [Mother] detailing services and the need for their satisfactory completion. The fact that these services were provided to [Mother] is substantiated by the subsequent court findings following Periodic Review Hearings. From a review held March 23, 2006, the Court incorrectly referenced a “Parent Participation Plan as required in the Dispositional Order . . .” yet found that [Mother] had generally complied. Then, on September 5, 2006 the Court found that [Mother] had not complied with the parent participation plan (see paragraph 7 of States [sic] Exhibit 19) in clear reference to the provisional parent participation plan noted in paragraph 2 of that same order and exhibit.

* * *

16. From the testimony of the casemanager Jo Shonda Weeks, the Court finds that at case conferences and the court conducted facilitation, the casemanager reviewed the services and expectations with [Mother]. Conferences were held on October 21, 2005, in December 2005, March 2005, on August 6, 2005, January 17, 2007, August 5, 2008 and December 10, 2008.⁴ In addition, [Mother] appeared with counsel at five (5) Court hearings between January 2008 and January 2009 during which services and her level of compliance was reviewed.

* * *

33. The child⁵ has been placed outside the care of the parents for more than fifteen of the most recent twenty-two months.

Appellant’s App. at 48-52, 56-60. The juvenile court concluded, inter alia, that:

1. . . . Although [Mother] has argued that she was not placed under a parent participation plan, she is still subject to the dispositional decree that was entered. . . . At all times she has been aware of the underlying CHINS case and she was placed under a provisional order for services originally designed to bring about reunification. She has received case plans from [DCS]’s casemanager and has met with her with regard to services at least seven times

⁴ According to Weeks’s testimony, the dates of the conferences were “October 21, 2005, October 31, 2005, December of 2005, August 6, 2006, January 17, 2007, August 5, 2008, and . . . December 10, 2008.” Transcript Vol. VII, at 9. This discrepancy in the dates likely reflects a typographical error.

⁵ The juvenile court issued separate but identical orders as to each child.

and participated in at least five court hearings. . . . [Mother] was given opportunity to address her concerns about the procedures in the underlying CHINS case. Her due process rights were therefore not abridged and the length of time that the child has been removed from [Mother]’s care is also chargeable to her.

Id. at 53, 61. Mother now appeals.

Discussion and Decision

When the State seeks to terminate the parent-child relationship, it must do so in a manner consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Hite v. Vanderburgh County Office of Family & Children, 845 N.E.2d 175, 181 (Ind. Ct. App. 2006). “Although due process has never been precisely defined, the phrase expresses the requirement of ‘fundamental fairness.’” Id. (quotation omitted). The nature of the process due in termination of parental rights proceedings turns on balancing the factors specified in Mathews v. Eldridge, 424 U.S. 319, 335 (1976): the private interests affected by the proceeding; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. In re T.F., 743 N.E.2d 766, 770 (Ind. Ct. App. 2001), trans. denied. “Finally, we must keep in mind the general proposition that if the State imparts a due process right, then it must give that right.” Id.

The general assembly has enacted an interlocking statutory scheme governing CHINS proceedings and involuntary termination of parental rights proceedings. In re S.P.H., 806 N.E.2d 874, 878 (Ind. Ct. App. 2004). This statutory scheme is designed to protect the rights of parents in raising their children while allowing the State to effect its legitimate interest in

protecting children from harm. Id. The CHINS and involuntary termination statutes are not independent from each other. Id. Rather, Indiana Code section 31-35-2-2 states that although termination proceedings are distinct from CHINS proceedings, an involuntary termination proceeding is “governed by the procedures prescribed by” the CHINS statutes contained in Indiana Code article 31-34. Therefore, “procedural irregularities . . . in a CHINS proceeding may be of such import that they deprive a parent of procedural due process with respect to a potential subsequent termination of parental rights.” In re N.E., 919 N.E.2d 102, 108 (Ind. 2010) (quotation omitted). Mother argues several irregularities in the CHINS proceeding deprived her of procedural due process in the subsequent TPR proceeding.

A. Permanency Plan for TPR

Mother contends the trial court erred by adopting on September 5, 2006, prior to the CHINS adjudication or fact-finding hearing, a permanency plan for termination of her parental rights. A juvenile court “shall” hold a permanency hearing, inter alia, “every twelve (12) months after: (A) the date of the original dispositional decree; or (B) a child in need of services was removed from the child’s parent, guardian, or custodian,” or “more often if ordered by the juvenile court.” Ind. Code § 31-34-21-7(a)(2), (3). At a permanency hearing, the juvenile court “shall . . . consider and approve a permanency plan for the child that complies with the requirements set forth in section 7.5 of this chapter.” Ind. Code § 31-34-21-7(b)(5). A permanency plan may include, if consistent with the best interests of the child, initiation of a TPR proceeding. Ind. Code § 31-34-21-7.5(c)(1)(B). In addition, the juvenile

court at a permanency hearing is required to “consider the question of continued jurisdiction,” Ind. Code § 31-34-21-7(b)(2), as “[t]here is a rebuttable presumption that jurisdiction over the child in a child in need of services proceeding continues for not longer than twelve (12) months after the date of the original dispositional decree or twelve (12) months after the child in need of services was removed from the child’s parent, guardian, or custodian, whichever occurs first,” Ind. Code § 31-34-21-7(d).

In light of the foregoing, the juvenile court may well have scheduled a permanency hearing for September 5, 2006, in order to consider its continued jurisdiction over C.R. and J.R., given the children were removed from Mother’s custody somewhat less than one year previously, in October 2005. As noted above, a permanency plan may include the initiation of TPR proceedings. Yet it does appear unusual, and at odds with the statutory scheme governing CHINS and TPR proceedings, for a juvenile court to approve a permanency plan for termination of parental rights before the child has been adjudicated a CHINS. See Ind. Code § 31-35-2-1 (Indiana Code chapter 31-35-2 “applies to the termination of the parent-child relationship involving: (1) a delinquent child; or (2) a child in need of services”); Rowlett v. Vanderburgh County Office of Family & Children, 841 N.E.2d 615, 623 (Ind. Ct. App. 2006) (termination of parental rights “is an extreme measure to be used only as a last resort when all other reasonable efforts . . . have failed”), trans. denied.

However, this procedural irregularity in September 2006, viewed in relation to the entire history of the CHINS and TPR proceedings, does not rise to the level of a due process violation. C.R. and J.R. were adjudicated CHINS in October 2006. The juvenile court held

subsequent permanency hearings in January and July 2008, and DCS did not file a TPR petition until August 2008. Thus, Mother had additional opportunities, well after the CHINS adjudication, to persuade DCS and the juvenile court to adopt permanency plans more favorable to her. Mother had twenty-two months between the CHINS adjudication in October 2006 and the initiation of TPR proceedings in August 2008 to improve her fitness as a parent, yet she failed to do so. Therefore, Mother cannot show any prejudice resulting from the adoption of an erroneous permanency plan in September 2006, and consequently, this error, if any, did not deny Mother due process in the subsequent TPR proceeding.

B. Timing of Dispositional Hearing

Next, Mother contends she was denied due process because the CHINS court failed to hold a dispositional hearing within the statutory time frame. In CHINS proceedings, “[t]he juvenile court shall complete a dispositional hearing not more than thirty (30) days after the date the court finds that a child is a child in need of services” Ind. Code § 31-34-19-1. C.R. and J.R. were adjudicated CHINS on October 23, 2006, the juvenile court entered findings of fact in support of its judgment on December 7, 2006, and a dispositional hearing was held on January 3, 2007. Assuming without deciding that the thirty-day deadline for completing a dispositional hearing begins to run from the date the juvenile court announces its judgment, rather than the date it enters written findings in support thereof, Mother would be correct that the juvenile court failed to hold a dispositional hearing within the statutory time frame. However, Mother does not explain or show how this delay deprived her of an opportunity to participate in the dispositional hearing or otherwise prejudiced her. Therefore,

any error in the timing of the dispositional hearing does not amount to or contribute to a due process violation.

C. Lack of Dispositional Order

The bulk of Mother’s due process argument focuses on the juvenile court’s omissions at the CHINS dispositional hearing. Specifically, Mother contends the juvenile court never held a dispositional hearing as to Mother and no dispositional order or parent participation plan was entered relative to her, thereby “denying her . . . notice as to what conduct on her part might lead to termination of her parental rights.” Brief of Appellant at 4. DCS replies the juvenile court “did not enter a specific dispositional order as to [Mother],” but Mother “continued in the case as if the court had,” and DCS and the juvenile court provided Mother with services and participation in family case conferences and court hearings. Brief of Appellee at 28. Thus, DCS argues the omission of a formal dispositional order with respect to Mother did not affect Mother’s right to fundamental fairness. We agree.

Initially, we point out the juvenile court did hold a dispositional hearing regarding which Mother was provided notice and an opportunity to be heard. Although Mother’s counsel was present, Mother did not appear due to her incarceration. The juvenile court later acknowledged the parts of the parental participation plan relating to Mother were not incorporated into the dispositional order.⁶ This court addressed a similar situation in T.F.,

⁶ A juvenile court is required by statute to accompany its CHINS dispositional order with: written findings and conclusions upon the record concerning the following:

- (1) The needs of the child for care, treatment, rehabilitation, or placement.
- (2) The need for participation by the parent, guardian, or custodian in the plan of care for the child.
- (3) Efforts made, if the child is a child in need of services, to:
 - (A) prevent the child’s removal from; or

743 N.E.2d 766, which considered whether a due process violation in the TPR proceedings resulted from the office of family and children’s failure to provide the parents with a case plan following the CHINS adjudication. Id. at 770. This court noted the parents were, following the CHINS adjudication, provided with a predispositional report and a parental participation decree, which “outlined the requirements the [parents] needed to complete that would allow their children to be returned to them.” Id. at 772. Further, the parents were provided reasonable opportunities to complete services, but the services were either not completed or not effective. Id. In light of the entire procedural history of the CHINS and TPR proceedings, the absence of a CHINS case plan did not deny the parents due process because “the record is replete with evidence that the [parents] were provided with notice of what conduct could lead to a termination of their parental rights.” Id.; see id. at 776 (Robb, J., concurring) (“[T]he record before us does not indicate that the parties, in this case, were without knowledge of what was expected of them. Therefore, they had fair warning that they were not in compliance.”).

Here, both before and after the dispositional hearing, the juvenile court ordered Mother to take specific actions and complete specified services as part of DCS’s reasonable efforts at reunification. The juvenile court found Mother participated in case conferences at which the DCS case manager “reviewed the services and expectations with [Mother].”

(B) reunite the child with;
the child’s parent, guardian, or custodian in accordance with federal law.
(4) Family services that were offered and provided to:
(A) a child in need of services; or
(B) the child’s parent, guardian, or custodian;
in accordance with federal law.
Ind. Code § 31-34-19-10(a) (emphasis added). In entering these findings and conclusions, the juvenile court

Appellant's App. at 50. Mother appeared in person at eight court hearings during the CHINS proceedings, and at eight additional hearings did not appear in person but was represented by counsel. At three of the hearings altogether, the juvenile court made specific findings regarding Mother's compliance or lack thereof with what it referred to as the parental participation plan. At no point in the CHINS proceedings does the record reflect any objection by Mother or her counsel to the lack of a formal dispositional order or parental participation plan with respect to Mother. Thus, as in T.E., the record does not indicate Mother was without knowledge of what was expected of her during the CHINS process. Under such circumstances, it would require the elevation of form over substance to conclude Mother's due process rights in the TPR proceedings were violated by the juvenile court's failure to enter a sufficient dispositional order in the CHINS matter. For these reasons, the juvenile court did not err when it concluded Mother was afforded due process in the TPR proceedings.

Conclusion

Mother was not denied procedural due process in the TPR proceedings. Therefore, the judgment of the juvenile court is affirmed.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.

"may incorporate a finding or conclusion from a predispositional report." Ind. Code § 31-34-19-10(b).