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IN THE COURT OF APPEALS OF INDIANA

IN RE: THE TERMINATION OF THE PARENT / CHILD RELATIONSHIP OF S.H. (minor child), and A.W. (mother),	)	
Appellant,	)	
vs.	)	No. 76A05-1001-JT-42
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee.	)	

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause No. 76C01-0901-JT-10

July 22, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

A.W. ("Mother") appeals from the trial court's order terminating her parent-child relationship with her son, S.J.H.

We affirm.

ISSUE

Whether Mother was denied due process of law.

FACTS

In July 2006, the Indiana Department of Child Services ("IDCS") removed three of Mother's other minor children from her care due to unsanitary living conditions. Her parental relationships with the children were subsequently terminated.[1]

Mother and M.S. ("Father")[2] are the parents of S.J.H. (born April 4, 2007). On September 24, 2007, S.J.H. was removed from Mother's care based upon allegations that she (1) lacked food and diapers for S.J.H.; (2) had failed to ensure that S.J.H. regularly wore the corrective brace/boot prescribed for his club foot; and (3) lacked stable and

[1] At the time of the underlying fact-finding hearing, the three older children were in foster care awaiting permanent adoptive placement.

[2] Father is not participating in this appeal. His parental relationship with S.J.H. was voluntarily terminated on February 17, 2009.

suitable housing. S.J.H. was placed into foster care, where he remained throughout the pendency of this action.

On September 25, 2007, IDCS filed a petition alleging S.J.H. to be a child in need of services ("CHINS"). On May 5, 2008, IDCS filed a case plan with the juvenile court. Under the case plan, Mother was required *inter alia* to (1) participate in Lifeline home-based parenting services; (2) attend and participate actively in supervised visitations; (3) "obtain healthy and appropriate housing"; (4) demonstrate the ability to timely pay her rent and utility bills; (5) "obtain and maintain stable income"; and (6) cooperate with IDCS. (Mother's App. 47-48).

On May 13, 2008, the trial court conducted a dispositional hearing and entered a dispositional order, which provides, in pertinent part, as follows:

> The Court having carefully considered the contents of the Case Plan filed in this case on May 8, 2008, and further having carefully considered the arguments of counsel, if any, and being otherwise duly advised in the premises now finds and orders as follows:
>
> * * *
>
> 3. The Court finds that each and every[ ]one of the recommendations made by the Steuben County DCS as set forth in its Case Plan should be adopted by this Court, and made the Order of this Court all as if fully incorporated herein . . . .
>
> * * *
>
> **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** as follows:
>
> 1. The Court expressly adopts each and every recommendation made by the Steuben County DCS as set forth in its Case Plan . . . .
>
> * * *
>
> * * *
>
> 4. The Court finds it remains in the best interests of the minor child to continue out of home placement in foster care for all of those reasons

set forth in the Case Plan and the responsibility for the care and placement of the child is vested in the Steuben County DCS for this purpose.

5. Reasonable services have been provided and shall continue to be provided as set forth in the Case Plan to effectuate reunification of parent and child all in keeping with the best interests of the minor child.

(Mother's App. 39-40). Mother raised no objection to the juvenile court's dispositional order; rather, she attempted to comply with its terms during the pendency of this action.

On January 12, 2009, IDCS filed a petition for involuntary termination of Mother's parent-child relationship with S.J.H.[3] On October 28, 2009, the juvenile court conducted a fact-finding hearing. On November 11, 2009, the juvenile court entered an order terminating Mother's parent-child relationship with S.J.H. Its order provided, in part, as follows:

7. The Disposition Decree [Order] approved by the Court ordered Lifeline into Mother's home to instruct Mother on basic parenting skills; and, ordered Solutions Counseling to monitor Mother's supervised visits with S.J.H. Further, Mother was to obtain a stable source of income and appropriate housing for S.J.H.

8. Mother did not attend all scheduled appointments with Lifeline. Some of the missed appointments were rescheduled and some of the missed appointments were not rescheduled.

9. Mother, with the help of Lifeline, did learn the importance of keeping certain doors locked in order to keep harmful items out of the reach of S.J.H. but, otherwise, showed little improvement in learning basic parenting skills. For example, Mother failed to realize the importance of keeping small items off of the floor which S.J.H. could pick[ ]up and place in his mouth. Mother failed to realize the importance of always

[3] On August 20, 2009, IDCS amended its petition to terminate Mother's parental rights. The amended petition included a citation to Indiana Code section 31-35-2-4, which establishes the evidentiary burden that the State must carry in order to involuntarily terminate a parent-child relationship.

monitoring S.J.H. who suffers from bronchial deficits. Mother failed to [sic] the importance of always monitoring S.J.H. to be certain he wore his leg brace and shoe per instructions of his physician. Mother failed to learn how to appropriately discipline S.J.H.

10. Mother did not make all scheduled supervised parenting appointments with Solutions Counseling.

11. During some of Mother's parenting times with S.J.H. she had to be redirected to interact more with S.J.H.

12. Mother has not been employed since 2007. At that time, Mother worked for a period of five (5) months at the Ramada Inn and was terminated from this position of employment.

13. Mother presently receives monthly social security benefits in the amount of $674.00.

14. Since the inception of this case, Mother has lived in four (4) different residences, and has been evicted from three (3) of these residences.

15. Mother was most recently evicted from her home on October 8, 2009.

16. Thereafter, Mother moved to Adrian, Michigan, and there resides with her parents.

17. Mother intends to move into an upstairs, one (1) bedroom apartment, in Adrian, Michigan.

18. Mother's rent will be $375.00 per month, plus electricity.

19. Mother has not parented with S.J.H. since her move to Adrian, Michigan.

20. Mother has undergone a parenting assessment conducted by David N. L[o]mbard, Ph.D.

21. During parts of the parenting assessment, Mother unsuccessfully attempted to present herself to Dr. Lombard as mentally ill.

22. Mother is not mentally ill.

23. Mother tested at the low/average range of intellectual functioning.

24. Mother could appropriately parent S.J.H. if she would put forth the necessary effort to do so.

25. All service providers agree, and the Court so finds, that Mother is not at this time capable of caring for S.J.H. without continuing assistance from caregivers.

26. During May and June, 2009, Mother did attend nine (9) parenting classes at the Carnegie Public Library. Each class lasted for approximately one and one-half (1½) hour.

27. S.J.H. is thriving in the care of foster parents.

28. Foster parents desire to adopt S.J.H.

[29]. To have the parent/child relationship existing between Mother and S.J.H. involuntarily terminated, the DCS must prove by clear and convincing evidence those matters set forth at Ind. Code 31-35-2-4(2) . . . .

* * *

30. The Court concludes that S.J.H. has been removed from the care of his Mother for more than six (6) months under a Dispositional Decree.

31. The Court concludes there exists a reasonable probability that the conditions which resulted in S.J.H. bring removed from the home of his Mother will not be remedied in the future. Mother does not have a position of employment which provides a regular source of income. Mother does not intend to seek out such a position of employment in the future. Mother has not learned basic parenting skills. Mother cannot provide stable housing for S.J.H. and herself. Of the four (4) most recent residences lived in by Mother she has been evicted from three (3) of them. Mother, currently, is living with her parents, but intends to move once again into a converted one (1) bedroom upstairs apartment with S.J.H.

32. The Court concludes that it is in the best interest of S.J.H. that the parent/child relationship be terminated. Over the course of this case, Mother has been provided with a multitude of services to assist her in being able to provide adequate care and nurturing to S.J.H. Two (2) years later, despite the best efforts of caregivers being provided to Mother, we find ourselves with but few minor exceptions in the same place we started.

> A Court need not wait until a child is irreparably harmed before terminating the parent/child relationship.

(Mother's App. 8-12). Mother now appeals.

DECISION

1. Standard of Review

When reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004). Instead, we consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. *Id.* Where, as here, the juvenile court enters findings of fact and conclusions of law in its termination of parental rights, we apply the following two-tiered standard of review: we must determine whether the evidence supports the findings; and whether the findings support the judgment. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005).

"In deference to the juvenile court's unique position to assess the evidence, we will set aside the court's findings and judgment terminating a parent-child relationship only if they are clearly erroneous." *In re J.H.*, 911 N.E.2d 69, 73 (Ind. Ct. App. 2009). A finding of fact is clearly erroneous when there are no facts or inferences drawn therefrom that support it. *D.D.*, 804 N.E.2d at 264. A judgment is clearly erroneous only if the conclusions of law drawn by the court are not supported by its findings of fact or the conclusions of law do not support the judgment. *J.H.*, 911 N.E.2d at 73.

2. Due Process Claim

It is axiomatic that the traditional right of parents "to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *Id*. Mother argues that the juvenile court's findings and conclusions in its dispositional order lacked sufficient specificity to comply with the statutory requirements of Indiana Code 31-34-19-10, which defect "ma[de] the [dispositional] decree void and the required time of the filing of the petition to terminate not met." Mother's Br. at 2. Absent a valid dispositional decree, she argues, the juvenile court's conclusion that S.J.H. "had been removed from her for more than six months under a dispositional decree" was clearly erroneous and warrants reversal of the juvenile court's judgment. (Mother's App. 11). We cannot agree.

First, because Mother failed to raise an objection, her due process claim is waived. It is well established that a party on appeal may waive a constitutional claim. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003). Generally, a party waives a claim when it is raised as an issue for the first time on appeal. *Id*. Here, Mother did not object to the dispositional order during the underlying CHINS action or the termination proceedings. Thus, her due process claim is waived.

Moreover, we find support in the record for the State's claim of invited error. "The doctrine of invited error, grounded in estoppel, provides that a party may not take advantage of an error that he commits, invites, or which is the natural consequence of his own neglect or misconduct." *C.T. v. MCDCS*, 896 N.E.2d 571, 588 (Ind. Ct. App. 2008).

The record reveals that from May 13, 2008 -- when the trial court entered the dispositional order incorporating and adopting IDCS's case plan -- through the fact-finding hearing on October 28, 2009, Mother treated the dispositional order as valid and attempted, albeit unsuccessfully, to satisfy its objectives by participating in Lifeline parenting services, attending supervised visitations monitored by Solutions Counseling, and receiving services aimed toward helping her to secure appropriate housing and a stable source of income. Accordingly, we find that Mother invited the alleged error of which she now complains. *See Szpunar v. State*, 783 N.E.2d 1213, 1217 (Ind. Ct. App. 2003) (Error invited by the complaining party is not reversible error).

Waiver notwithstanding, the juvenile court did not deny Mother due process of law. The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. U.S. CONST. amend. XIV. "Due process requires notice, an opportunity to be heard, and an opportunity to confront witnesses." *In re M.L.K.*, 751 N.E.2d 293, 295-96 (Ind. Ct. App. 2001). "A parent's right to raise his or her children is protected by the Due Process Clause." *McBride*, 798 N.E.2d at 194. Thus, "[w]hen the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process." *In re E.E.*, 853 N.E.2d 1037, 143 (Ind. Ct. App. 2006).

> A parent's interest in the care, custody, and control of his or her children is a fundamental liberty interest; thus, the private interest involved is substantial. The government's interest is also substantial, as the State of Indiana has a compelling interest in protecting the welfare of its children.

In re H.L., 915 N.E.2d 145, 147 (Ind. Ct. App. 2009). The nature of the process due in a termination of parental rights proceeding turns on the balancing of the following 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) (internal citation omitted).

Indiana Code 31-34-19-10(b) expressly permits the juvenile court to, as here, "incorporate a finding or conclusion from a predispositional report as a written finding or conclusion upon the record in the court's dispositional decree." However, Mother argues that the juvenile court's dispositional order adopted a deficient case plan which contained "no description of the dispositional options," "no[ ] evaluations of the options," "no criminal history check of each person residing in the placement home," and "no consideration of the out-of-home placement." Mother's Br. 8-9. We are not persuaded by her contention that said deficiency rendered the trial court's order void and constituted reversible error.

In support of her claim, Mother directs our attention to the following statutes:

> Indiana Code section 31-34-18-6.1 -- Predispositional report; contents
>
> (a) The predispositional report prepared by the department or caseworker must include the following information:
>
> (1) A description of all dispositional options considered in preparing the report.

(2) An evaluation of each of the options considered in relation to the plan of care, treatment, rehabilitation, or placement recommended under the guidelines described in section 4 of this chapter.

(3) The name, occupation and position, and any relationship to the child of each person with whom the preparer of the report conferred as provided in section 1.1 of this chapter.

(b) If the department or caseworker is considering an out-of-home placement, including placement with a blood or an adoptive relative caretaker, the department or caseworker shall conduct a criminal history check (as defined in IC 31-9-2-22.5) for each person who is currently residing in the location designated as the out-of-home placement. The results of the criminal history check must be included in the predispositional report.

(c) The department or caseworker is not required to conduct a criminal history check under this section if:

(1) the department or caseworker is considering only an out-of-home placement to an entity or a facility that:

(A) is not a residence (as defined in IC 3-5-2-42.5); or
(B) is licensed by the state; or

(2) placement under this section is undetermined at the time the predispositional report is prepared.

I.C. § 31-34-18-6.1.

In addition, Indiana Code 31-34-19-7 provides,

[Dispositional decree; out-of-home placement]

In addition to the factors under section 6 of this chapter, if the court enters a dispositional decree regarding a child in need of services that includes an out-of-home placement, the court shall consider whether the child should be placed with the child's suitable and willing blood or adoptive relative caretaker, including a grandparent, an aunt, an uncle, or an adult sibling, before considering other out-of-home placements for the child.

I.C. § 31-34-19-7.

The above-cited statutory language does not require the preparer of the predispositional report to enumerate and discuss *ad nauseum* any and all available dispositional options or to consider unsuitable relative caretakers. Rather, pursuant to Indiana Code section 31-34-18-6.1, the preparer of the predispositional report must describe and "evaluat[e] . . . each of the options [actually] considered in relation to the plan of care, treatment, rehabilitation, or placement recommended" under the guidelines contained in Indiana Code section 31-34-18-4. Those guidelines provide that "[i]f consistent with the safety and best interest of the child," the preparer of the report shall recommend the care, treatment, rehabilitation, or placement plan that:

> (1) is:
> (A) in the least restrictive (most family like) and most appropriate setting available; and
> (B) close to the parents' home, consistent with the best interest and special needs of the child;
> (2) least interferes with family autonomy;
> (3) is least disruptive of family life;
> (4) imposes the least restraint on the freedom of the child and the child's parent, guardian, or custodian; and
> (5) provides a reasonable opportunity for participation by the child's parent, guardian, or custodian.

I.C. § 31-34-18-4. Thus, the preparer's omission of a particular dispositional option may reflect his or her conclusion that said option is not "consistent with the safety and best interest of the child." *Id*.

Here, although Mother does not identify any of her relatives who desired, but were denied the opportunity to serve as out-of-home placements for S.J.H., the record indicates that at the underlying fact-finding hearing, S.J.H.'s paternal grandmother, P.P., testified that she was a willing adoptive placement.[4] P.P.'s testimony revealed, however, that she (1) was unemployed; (2) smoked cigarettes, which could exacerbate S.J.H.'s bronchial deficits; (3) had prior involvement with DCS regarding her own children; and (4) is married to a convicted habitual traffic violator, who at the time of the fact-finding hearing was serving a Community Corrections sentence for alcohol-related driving offenses. Based upon the foregoing, we cannot say that IDCS' failure to evaluate P.P. as an out-of-home placement in its predispositional report was inconsistent with the safety and best interest of S.J.H.

Although we have held that "procedural irregularities in CHINS proceedings may be so significant that they deprive a parent of procedural due process with respect to the termination of h[er] parental rights," such is not the case here. *See in re H.L.*, 915 N.E.2d 145, 147 (Ind. Ct. App. 2009). It is Mother's burden to demonstrate that she was denied due process as a result of any act or omission in the dispositional order; however, she has not carried her burden. She does not argue that she was denied notice of any of the various proceedings; that she was deprived of the opportunity to be heard at any meaningful stage of the proceedings; or that she was denied the opportunity to confront witnesses against her. Most significantly, she does not assert that the State failed to

[4] Prince also testified that although her son, Father, had voluntarily terminated his parental relationship with S.J.H., that she still was willing to adopt S.J.H.

present clear and convincing evidence that her parent-child relationship with S.J.H. should be terminated.

In light of the foregoing facts, and ever cognizant of the strain that a protracted wardship may impose upon a child, we cannot say that any deficiency in the dispositional order rendered it void or gave rise to a denial of due process.

Affirmed.

BAKER, C.J., and CRONE, J., concur.