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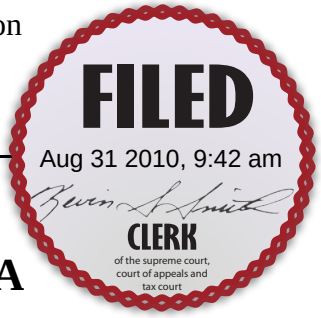

IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF: A.O.S., Minor Child, AND HER FATHER, A.M., Jr.	)	
A.M., Jr.,	)	
Appellant-Respondent,	)	
vs.	)	No. 20A03-0911-JV-539
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
The Honorable Deborah Domine, Juvenile Magistrate
Cause No. 20C01-0902-JT-2

August 31, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, A.M., Jr. (Father), appeals the involuntary termination of his parental rights to A.O.S.[1]

We affirm.

ISSUES

Father raises two issues for our review, which we restate as:

(1) Whether the Department of Child Services, Division of Elkhart County (DCS) proved by clear and convincing evidence that termination of his parental rights was proper; and

(2) Whether the trial court violated his right to due process of law where Father personally participated in the termination hearing only by phone, and only for the limited opportunity to give testimony.

FACTS AND PROCEDURAL HISTORY

On March 10, 2008, A.O.S. was born and tested positive for marijuana. Two days later, DCS filed a petition alleging that A.O.S. was a Child In Need of Services (CHINS). On March 13, 2008, the trial court found probable cause supporting the CHINS petition and authorized DCS to take A.O.S. into protective custody. At this time, T.S. was believed to be A.O.S.'s biological father, while Father was incarcerated at a federal prison in Virginia and unaware of A.O.S.'s birth.

[1] We heard oral argument on this cause on July 12, 2010, at the Indiana Court of Appeals Courtroom in Indianapolis, Indiana. We thank counsel for their advocacy.

On March 20, 2008, T.S. and A.O.S.'s biological mother, L.S. (Mother), each entered admissions to the allegation of the CHINS petition. On April 17, 2008, the trial court ordered Mother and T.S. to complete certain requirements, including that T.S. was to establish paternity through DNA testing or provide proof that paternity had been established. On January 14, 2009, DCS filed a petition seeking the involuntary termination of both Mother and T.S.'s parental rights to A.O.S. On January 23, 2009, the results of a DNA test determined that T.S. was not A.O.S.'s biological father, and T.S. was subsequently dismissed from the termination proceedings.

Thereafter, in a May 2009 CHINS report, Father was named as the possible biological father of A.O.S. Father was the third alleged biological father of A.O.S. On June 24, 2009, DCS filed an amended involuntary termination petition seeking the termination of Father's parental rights to A.O.S. At the time, Father remained incarcerated in federal prison.

An initial hearing on the amended termination petition was held in August, 2009. During this initial hearing, Father informed the trial court that he did not wish to relinquish his parental rights to A.O.S. Father also stated that he expected to be released from incarceration in September 2010. At the conclusion of this hearing, the trial court set the matter for an evidentiary hearing to be held on October 16, 2009. Meanwhile, in July 2009, Mother voluntarily relinquished her parental rights to A.O.S.

In September 2009, the trial court ordered, and Father submitted to, DNA testing to establish paternity of A.O.S. On September 21, 2009, DNA testing results confirmed that

Father is A.O.S.'s biological Father. The DNA report was filed with the trial court on October 2, 2009.

On October 16, 2009, the trial court conducted the termination hearing.[2] Father, who was then being held at an Illinois federal prison, was represented by counsel at the hearing and personally participated by giving testimony via the telephone. Father testified that he first learned that he may be the biological parent of A.O.S. "probably June . . . of 2009." (Tr. p. 128). He was not sure when he expected to be released from federal prison, but thought it was sometime in 2010. Upon his release he was facing pending charges in Elkhart County for domestic battery, strangulation, residential entry, and invasion of privacy.

That same day, the trial court entered its Order terminating Father's parental rights. In doing so, the trial court found that A.O.S., who had been taken into custody by the DCS three days after her birth and was then eighteen months old, had been removed from her home for eighteen of the most recent twenty-two months. A.O.S. was living with her three half siblings in foster care and her foster parents hoped to adopt her if possible. The trial court found she was "thriving in her current placement . . . [and] had a strong connection" with her foster family. (Appellant's App. pp. 12-13). The trial court found that Father had no home, no means to support a child, and had two other daughters for which he did not provide support. Reviewing Father's habitual pattern of conduct, the trial court found that Father's past criminal charges, current incarceration, and pending charges "support a finding that

[2] Notably, Father did not seek a continuance of the October 16, 2009 hearing, nor does he claim he had inadequate time to prepare for the same.

future incarceration and the resulting future neglect of his children is highly likely." (Appellant's App. p. 12).

Father now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of Evidence and Findings*

A. *Requisite Time Period*

Father contends that A.O.S. had not been removed from his custody for the requisite period of time to support a termination of his parental rights. The DCS responds to this argument by contending that removal from one parent is removal from all parents, and therefore the requisite time period has been satisfied.

The Fourteenth Amendment of the United States Constitution protects the traditional right of parents to establish a home and raise their children. *Bester v. Lake County Office of Family and Children*, 839 N.E.2d 143, 147 (Ind. 2005). Our supreme court has acknowledged that the parent-child relationship is "one of the most valued relationships in our culture." *Id*. (quoting *Neal v. DeKalb County Div. of Family and Children*, 796 N.E.2d 280, 285 (Ind. 2003)). That being said, parental interests are not absolute and must be subordinated to the child's interest in determining the proper disposition of a petition to terminate parental rights. *Id*.

We have long applied a highly deferential standard of review in cases concerning the termination of parental rights. *R.W., Sr. v. Marion County Dep't of Child Servs.*, 892 N.E.2d 239, 244 (Ind. Ct. App. 2008).

> When reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. Moreover, in deference to the juvenile court's unique position to assess the evidence, we will set aside its judgment terminating a parent-child relationship only if it is clearly erroneous. If the evidence and inferences support the juvenile court's decision, we must affirm.

Id. (citations omitted).

Where, as here, the trial court has entered findings of fact and conclusions thereon, we apply a two-tiered standard of review. *Bester*, 839 N.E.2d at 147. First, we determine whether the evidence supports the findings, and second we determine whether the findings support the judgment. *Id*.

Indiana Code section 31-35-2-4 contains the requirements for a petition to terminate parental rights. "To involuntarily terminate a parent-child relationship, the State must establish the elements of Ind. Code § 31-35-2-4(b) [] by clear and convincing evidence." *In re J.W.*, 779 N.E.2d 954, 959 (Ind. Ct. App. 2002), *trans. denied*. Indiana Code section 31-35-2-4 includes that the DCS allege and prove one of the following three options:

> (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.
>
> (iii) The child has been removed from the parent and has been under the supervision of a county office of family and children or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child[.]

I.C. § 31-35-2-4(b)(2)(A).

We first note that by the explicit language of the statute, the DCS must allege and prove only one of the requirements of Indiana Code section 31-35-2-4(b)(2)(A). Of the three options in Indiana Code section 31-35-2-4(b)(2)(A), the trial court relied upon the third, which requires removal from the parent and placement with the county for fifteen of the prior twenty-two months "*beginning with the date the child is removed from the home* as a result of the child being alleged to be a child in need of services or a delinquent child." I.C. § 31-35-2-4(b)(2)(A)(iii) (emphasis added). It is undisputed that A.O.S. had been removed from the home and placed by the DCS with foster parents for eighteen consecutive months prior to the termination hearing.

Nevertheless, Father contends that A.O.S. has not been removed from *him* for the requisite period because he only knew with certainty that A.O.S. was his child for approximately four weeks prior to the termination hearing, and had only learned that he was potentially A.O.S.'s biological parent approximately four months prior to the termination hearing. However, we conclude that option (iii) does not calculate the requisite time by way of computing how long the child has been removed from the parent, but rather requires that the child be removed from its *home* for fifteen of the last twenty-two months. To interpret option (iii) as Father has requested would permit A.O.S. to potentially languish in the uncertainty of temporary custody for a minimum of six additional months after Father's paternity has been established, despite the fact that A.O.S. had been in the custody of the DCS for approximately seventeen months at the time paternity was officially established.

See I.C. § 31-35-2-4(b)(2)(A)(i) (requiring removal from the parent for at least six months). Such an interpretation would make application of option (iii) contingent upon the satisfaction of option (i). However, we conclude that each option is independent and distinct and refuse to apply the statute in such a redundant manner.

That being said, removal from the parent is additionally required under option (iii), although no specified duration is defined in option (iii). We conclude that removal from Father was satisfied when Father's paternity was established and he was unable to take custody of A.O.S. due to his incarceration.

The DCS argues that another way to affirm the termination of Father's rights is to apply our prior precedent that removal from one parent is removal from both parents for purposes of involuntary terminations. To support its contention, DCS cites to our prior precedents which hold that a child is effectively removed from the non-custodial parent who is incarcerated at the time when the child is removed from the custodial parent (*Perry v. Elkhart Office of Fam. & Children*, 688 N.E.2d 1303, 1305 (Ind. Ct. App. 1997); *Wagner v. Grant County Dept. of Public Welfare*, 653 N.E.2d 531, 533 (Ind. Ct. App. 1995); and *Tipton v. Marion County Dept. of Public Welfare*, 629 N.E.2d 1262, 1266 (Ind. Ct. App. 1994)). However, we note two distinctions consistent between each of these prior decisions and the facts before us here: (1) all three cases considered whether "the child ha[d] been removed from the parent for at least six months under a dispositional decree" as required by former I.C. § 31-6-5-4(c), which is identical to option (i); and (2) all involved non-custodial parents who had some sort of established relationship with the child at the time of removal, although

each non-custodial parent was incarcerated. Therefore, we find these precedents to be inapplicable for two reasons: (1) A.O.S. had been removed from her home for more than fifteen of the prior twenty-two months; therefore, DCS was not required to prove that A.O.S. had been removed from Father for six months; and (2) at the time that A.O.S. was removed from Mother, Father was not A.O.S.'s legally recognized parent, and A.O.S. could not have been removed from him at that time.

In sum, we conclude that the trial court did not commit clear error when it found that A.O.S. had been removed from her home for more than fifteen of the prior twenty-two months, and that she had been removed from Father as required by I.C. § 31-35-2-4(b)(2)(A)(iii).

B. *Threat to A.O.S.'s Well-being*

Father contends that none of the trial court's findings support the conclusion that continuation of the parent-child relationship poses a threat to A.O.S.'s well-being. Indiana Code section 31-35-2-4(b)(2)(B), requires that DCS prove either that the conditions which resulted in the removal of the child from the home will not be remedied, or that the continuation of the parent-child relationship poses a threat to the well-being of the child. *See Castro v. State Office of Family and Children*, 842 N.E.2d 367, 373 (Ind. Ct. App. 2006), *trans. denied* (holding that because subsection (b)(2)(B) is written in the disjunctive, the trial court need only find one of the two elements). Here, the trial court found that the continuation of the parent-child relationship posed a threat to A.O.S.'s well-being, but made no finding as to whether the reason for removal from the home would not be remedied,

evidently because Father was not a part of A.O.S.'s life when she was removed from the home.

In finding that continuation of Father's parent-child relationship poses a threat to A.O.S.'s well-being, the trial court noted that Father is currently incarcerated on federal gun and drug convictions and will be held until at least September, 2010. Upon release, Father faces pending charges in Elkhart County, Indiana, for domestic battery, strangulation, residential entry, invasion of privacy, criminal recklessness while armed with a deadly weapon, resisting law enforcement, and possession of marijuana. Although Father is due the presumption of innocence in regard to his pending charges, we conclude that they are properly considered by the trial court to determine whether continuation of the parent-child relationship poses a threat to A.O.S.'s well-being. As of Father's earliest release date from his current sentence, A.O.S. will have been in custody of the DCS for approximately thirty-one months. Considering the sheer number and serious nature of Father's pending charges, it is likely that Father will be held pending trial in Elkhart County. Therefore, even if Father establishes his innocence on all pending charges, it could be quite some time before he is available to provide a home and care for A.O.S.

The trial court also noted that Father has two other daughters for which Father does not pay child support. Luckily, these children have a mother who is able to provide the care and support which Father cannot provide. However, A.O.S. is not so fortunate and Father presented no evidence that he can arrange for A.O.S.'s care and support any time soon.

In *B.R.F. v. Allen County Dep't. of Public Welfare*, 570 N.E.2d 1350, 1352 (Ind. Ct. App. 1991), we concluded that "Father's inability to provide Son with adequate housing, along with Father's convictions and present incarceration, demonstrates" that continuation of the parent-child relationship poses a threat to the well-being of the child. We find this reasoning to be equally applicable here. We have previously recognized that "[i]ndividuals 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. Furthermore, our supreme court has recognized the detrimental effect that a prolonged provisional home can have upon children. *See Baker v. Marion County Office of Family and Children*, 810 N.E.2d 1035, 1040 (Ind. 2004) (quoting *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 513-14 (1982) ("There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged.").

Here, Father cannot provide a home anytime in the foreseeable future, and has failed at providing support for his other children. This is because Father chose a life of crime, instead of choosing to live a life of legitimacy. For these reasons, we conclude that the trial court did not err by finding that continuation of the parent-child relationship poses a threat to A.O.S.'s well-being.

II. *Due Process*

Father contends that his due process rights were violated by the manner in which the termination hearing was conducted. At the time of the hearing, Father was incarcerated in an

Illinois federal penitentiary. Father was permitted to testify by telephone, but only his attorney participated in the remainder of the hearing.

"When the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of the due process clause." *In re Involuntary Termination of Parental Rights of S.P.H.*, 806 N.E.2d 874, 878 (Ind. Ct. App. 2004). Due process in parental rights cases involves 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 government interest supporting the use of the challenged procedure. *A.P. v. Porter County Office of Family and Children*, 734 N.E.2d 1107, 1112 (Ind. Ct. App. 2000), *reh'g denied, trans. denied*.

In *In re E.E.*, 853 N.E.2d 1037, 1040-41 (Ind. Ct. App. 2006), we considered a parent's (Secrest) claim that his due process rights had been violated when the trial court denied his motion for continuance of a termination hearing where Secrest had failed to appear. We identified the private interests of the parent and the countervailing government interests as both being substantial. *Id*. at 1043.

> In particular, the action concerns a parent's interest in the care, custody, and control of his child, which has been recognized as one of the most valued relationships in our culture. Moreover, it is well settled that the right to raise one's child is an essential, basic right that is more precious than property rights. As such, a parent's interest in the accuracy and justice of the decision is commanding. On the other hand, the State's *parens patriae* interest in protecting the welfare of a child is also significant. Delays in the adjudication of a case impose significant costs upon the functions of government as well as an intangible cost to the life of the children involved.

Id. at 1044. After identifying these countervailing interests, we noted that parents do not have a constitutional right to be present at a termination hearing. *Id*. (citing *In re C.C.*, 788 N.E.2d 847 at 853 (Ind. Ct. App. 2003) (holding that a parent's "rights were not significantly compromised" where the parent testified and was represented by counsel in the remainder of the proceedings)). Therefore, we acknowledged that Secrest's attorney represented Secrest's interest by cross-examining witnesses, and concluded that any risk of error caused by the denial of the continuance was minimal. *Id*. at 1044. Similarly, we conclude that Father's right to due process was not violated because he was he was permitted to testify and was represented by counsel throughout the entire termination proceeding.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not commit clear error by finding that A.O.S. had been removed from her home for the requisite time period to permit the termination of Father's parental rights, or by determining that continuation of the parent-child relationship posed a threat to A.O.S.'s well-being. Additionally, the trial court did not infringe upon Father's due process rights by permitting him to testify via phone, and then having his attorney represent his interests through the remainder of the termination hearing.

Affirmed.

BRADFORD, J., concurs.

MATHIAS, J., dissents with separate opinion.

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Appellant-Respondent,	)	
vs.	)	No. 20A03-0911-JV-539
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

MATHIAS, J., dissents

I respectfully dissent because I do not believe that DCS satisfied its statutory obligation under the unique and undisputed facts in this case.

A.O.S. was initially removed not from Father but from Mother and her live-in boyfriend, T.S., who claimed to be A.O.S.'s biological father. Neither Father nor DCS had actual or constructive knowledge of Father's potential paternity of A.O.S. throughout the

entire duration of the CHINS proceedings, as well as for several months after DCS filed its January 2009 involuntary termination petition naming T.S. as the father. Father's paternity of A.O.S. was established only four weeks before the termination hearing. This is insufficient evidence to support the trial court's determination that A.O.S. had been removed from Father's care for the requisite time period mandated by Indiana Code section 31-35-2-4(b)(2)(A)(iii).

Indiana Code section 31-35-2-4(b)(2)(A)(iii) provides that a petition to terminate a parent-child relationship "must . . . allege that one of the following *exists*: . . . (iii) the child has been *removed from the parent* [here, Father] and . . . 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,* beginning with the date the child was removed from *the home* as a result of the child being alleged to be a child in need of services. . . ." Id. (Emphasis added). Clearly, A.O.S. could not have been removed from Father at the time of the filing of the initial termination petition in January 2009, as the record makes clear DCS removed A.O.S. from Mother and T.S., and DCS was not even aware of Father's possible involvement in this case until May 2009. Likewise, A.O.S. still had not been removed from Father's care when DCS filed its amended termination petition in June 2009. Indeed, as the majority acknowledges, removal from Father did not occur until paternity was established in September 2009. See slip op. at 8. Even assuming, *arguendo,* that the time requirements of Indiana Code section 31-35-2-4(b)(2)(A) need only be established by the time of the termination hearing, rather than by the time of the filing of the termination petition, these time requirements still had not

been satisfied in this case, as the termination hearing was held in October 2009, only four months after the filing of the amended termination petition and four weeks after Father's paternity was established.

The majority imputes to Father the time A.O.S. was removed from Mother and T.S. during the CHINS case, stating "option (iii) does not calculate the requisite time by way of computing how long the child has been removed from the parent, but rather requires that the child be removed from its *home* for fifteen of the last twenty-two months." Id. at 7. To the contrary, I believe a plain reading of subsection (A)(iii) requires DCS to first establish that the child has been removed from the care and custody of *the parent named* in the involuntary termination petition for the statutorily specified period of time before termination of that parent's parental rights may occur. The balance of this subsection explains that the period of removal is to be calculated beginning with "the date the child was removed from the home as a result of the child being alleged to be a child in need of services." Ind. Code § 31-35-2-4(b)(2)(A)(iii). Read as a whole, as the statute must be read, this subsection does not mean that a trial court may calculate the period of removal of the child from the parent by using the date of removal from the home of a *different* parent, who may or may not even be subject to the termination petition.

It is important to note that this court has previously concluded, in certain limited situations, that a removal time period may be imputed to a non-custodial, incarcerated parent from the date of the child's removal from the custodial parent. *See Perry v. Elkhart Office of Fam. & Children*, 688 N.E.2d 1303, 1305 (Ind. Ct. App. 1997); *Wagner v. Grant County*

Dept. of Public Welfare, 653 N.E.2d 531, 533 (Ind. Ct. App. 1995); and *Tipton v. Marion County Dept. of Public Welfare*, 629 N.E.2d 1262, 1266 (Ind. Ct. App. 1994). The majority and I agree that these cases are distinguishable from the facts before us, most notably, because in each of these cases, the non-custodial biological parent had "some sort of established relationship with the child at the time of removal . . . ." Slip op. at 8. In the case before us, not only had Father not established any relationship with the child, he wasn't even suspected to be the child's biological father, for a substantial period of time because a third party innocently, but falsely, claimed to be the child's father throughout the entire CHINS case.

Simply said, both law and equity bring me to the opposite conclusion about the time imputation that the majority makes. I must admit to some discomfort in my dissent, however, for it is hard to conceive of more objectionable facts than those before us today. The record makes clear that, as of the time of the termination hearing, Father had consistently engaged in a criminal lifestyle littered with violent and drug-related offenses and thus was unfit to parent A.O.S. Meanwhile, A.O.S. had been living and thriving in a loving, pre-adoptive foster home with three of her half-siblings. Clearly, termination of Father's parental rights under these circumstances would likely be in A.O.S.'s best interests.

Finally, I am afraid the bad facts in this case are creating a precedent that will hinder, and perhaps even prevent, reunification with fathers in future, meritorious circumstances. Although Mother euphemistically (and sadly) describes her relationship with Father as a "drive-by" encounter, in today's mobile society it is relatively easy to conceive of factual

scenarios that are far less objectionable. Appellant's Appendix p. 10. For example, a father might well be transferred to another state in the course of his employment soon after a one-night encounter with the child's mother, yet desirous and able to provide his child a loving home once he learns of his paternity. Or the father might be a college student, remaining unidentified as the child's father for a similarly long period of time. The majority's holding leaves no room for such very real possibilities, or for others of equal merit, that could well make reunification with a father in the child's best interests.

Here, a simple continuance to increase Father's period of knowledge of his paternity beyond the minimum six months is all that would have been required. See I.C. § 31-35-2-4(b)(2)(A)(i). But, as it stands, I would hold that DCS failed to establish A.O.S. was removed from Father in accordance with Indiana Code section 31-35-2-4(b)(2)(A)(iii) and I would reverse and remand this matter for a new termination hearing that fully comports with Indiana Code section 31-35-2-4.