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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF: L.D.	)	
	)	
Minor Child,	)	
	)	
JOHN DOWNES,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 45A03-0804-JV-213
	)	
LAKE COUNTY OFFICE OF FAMILY AND CHILDREN,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Mary Beth Bonaventura, Judge
Cause No. 45D06-0606-JT-541

November 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

John Downes ("Father") appeals the order involuntarily terminating his parental rights to his minor child, L.D. We affirm.

Issues

Father raises four issues, which we restate and consolidate as follows:

I. Whether his due process rights were violated because the juvenile court provided his counsel with insufficient time to prepare for the factfinding hearing;

II. Whether his counsel was ineffective; and

III. Whether the Lake County Office of Family and Children, now called the Lake County Department of Child Services ("the DCS"), established by clear and convincing evidence the statutory requirements to involuntarily terminate his parental rights.

Facts and Procedural History

The facts most favorable to the judgment follow. On July 1, 2005, L.D. was born to Shannon Simms ("Mother") and Father. On May 19, 2006, the DCS received a referral indicating that Mother went to a hospital complaining of stomach pains, was diagnosed with alcohol abuse, and left the hospital after an unsuccessful attempt to locate an inpatient detox facility that would accept both her and L.D. The referral also disclosed that Mother reported that Father "had been arrested for a DWI" and that "there was domestic violence" between her and Father. Tr. at 23.

On May 22, 2006, DCS assessment worker Arlene Nunez investigated the referral by visiting Mother and Father's home. Mother informed Nunez that Father was at a bar and would return soon. Mother stated that she had had an alcohol problem for some years and

was taking prescription medication for her bipolar, personality, and schizoaffective disorders. She also told Nunez that Father abused alcohol. *Id*.

Nunez noted that the home "exceeded standards" and that safety gates had been installed. *Id*. at 25. She observed that L.D. was "fine" and playing on the floor. *Id*. Nunez observed some signs of fetal alcohol syndrome, such as a large forehead, but that diagnosis was never substantiated.[1]

Nunez went outside to discuss the case with her supervisor. They decided that L.D. should be taken into DCS custody to allow Mother to complete detox on her own. *Id*. at 26. Nunez returned to the home, and shortly thereafter Father arrived on his bicycle. He said that bicycling was "his normal means of transportation after he got his DUI, so he wouldn't get another DUI." *Id*. at 27, 33-34. Father informed Nunez that he had sustained a very serious closed head injury in 1992. Nunez thought Father "appeared intoxicated[,]" but "[s]ome of it might be due to his injury." *Id*. at 33. She thought he was intoxicated because "he stated he had been drinking and he had come from the neighborhood bar." *Id*.[2] Nunez explained to Mother and Father that the DCS was taking custody of L.D. to allow them to receive treatment for their alcohol abuse. *Id*. at 27.

At the temporary detention hearing on May 23, 2006, L.D. was declared a CHINS and made a temporary ward of the DCS, and Father and Mother were "ordered to complete parenting classes, substance abuse evaluations with treatment, counseling, and to have home

[1] At the factfinding hearing on the termination of Father's parental rights, L.D.'s foster parent testified that L.D. has no medical problems or behavioral issues. Tr. at 89.

bound services at the point that [L.D.] was to be returned home." *Id*. at 28; Appellant's App. at 80; State's Ex. 7. On July 17, 2006, the juvenile court held a dispositional hearing. Father and Mother admitted to the allegations in the CHINS petition, and the juvenile court granted the DCS's formal CHINS petition. State's Ex. 7.

L.D.'s case was then transferred to DCS caseworker Natasha Cortez. At that point, Father was in compliance with the case plan. He was compliant with his drug screens, therapy and counseling, and visitation. He was unemployed because he was disabled as a result of his head injury and was receiving Supplemental Security Income ("SSI"). He was living with a group of friends in a home in which he had no property interest. Cortez described Father's progress as "moderate." Tr. at 39.

On December 4, 2006, the juvenile court ordered overnight visitations to begin after background checks of Father's housemates were completed. However, on January 23, 2007, Father tested positive for cocaine. On March 20, 2007, Father tested positive for marijuana. Also in 2007, L.D. "would be dirty" when he returned to his foster parents after visitation with Father. *Id*. at 43. Further, Father used an unusual method to potty train eighteen-month old L.D. before L.D. had shown any signs that he was ready to be potty trained. Cortez discussed age-appropriateness and alternative training methods with Father, but he was resistant to modifying his approach.

At a hearing on April 11, 2007, Cortez recommended that Father submit to additional parenting classes, counseling, psychological evaluations, and hair follicle testing. Father

[2] Nunez also testified that the "Hobart Police had reported to us that they had a run-in with [Father] previously where he had like a pocket knife, so they were concerned about him, but he was no threat, he

expressed his frustration with the DCS and stated that he wanted to terminate his parental rights. *Id*. at 49. The juvenile court ordered a new permanency plan calling for termination of Father's parental rights. The juvenile court ordered Father to submit to hair follicle testing and supervised visitation until he was in compliance with the case plan and had a negative hair follicle test. Believing that Father's desire to terminate his parental rights was due to the stress inherent in the CHINS process, Cortez made referrals for the services that Father needed for reunification with L.D. However, Father never complied with the parenting classes, drug screens, psychological evaluations, counseling, or visitation.

On October 11, 2007, the DCS filed petitions to involuntarily terminate Father's and Mother's parental rights to L.D. At the initial hearing on December 27, 2007, the Court Appointed Special Advocate ("the CASA") suggested that the juvenile court appoint counsel to represent Father because of his head injury. The juvenile court appointed Nick Perko to represent Father and set February 19, 2008, as the date for Perko and Father to meet. The juvenile court scheduled the factfinding hearing for February 26, 2008. Perko moved for a continuance, which was granted, and the factfinding hearing was rescheduled for March 12, 2008.

At the close of the factfinding hearing on March 12, 2008, the juvenile court took the matter under advisement and issued an order terminating Mother and Father's parental rights. The order provided in relevant part:

> There is a reasonable probability that the conditions resulting in the removal of the child from his parents' home will not be remedied in that: A referral was made to the [DCS] on May 19, 2006 after [M]other went to the

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wasn't hostile or upset." Tr. at 27.

hospital for alcohol abuse. Both parents had alcohol problems and had domestic violence issues. The parents had previous contact with the [DCS] in 1997 for lack of supervision of a child and in 2000 for medical neglect, both of which were substantiated. The child was removed in May of 2006 and made a ward of the [DCS]. The parents were offered reunification services pursuant to a case plan which included parenting classes, counseling, and substance abuse evaluations and to follow all recommendations, random drug screen and visitations. Mother did not complete the case plan. …. Father became the custodial parent in 2006. Father participated in the parenting classes. Father participated in visitations with the child and eventually had day visits. Overnight visitations could not be effectuated due to [F]ather having a criminal history. The child was returning from visitations dirty. Father had a positive drug screen for cocaine and the visits had to be shortened and supervised. Father had an additional positive drug screen for marijuana which he claimed was from herbal remedies. Father was using strange techniques to try to potty train the child when the child was very young. Father was [o]rdered to participate in additional parenting classes, a psychological evaluation and submit to a hair follicle test. In April 2007, Father wanted to voluntarily relinquish his parental rights so that a relative could adopt the child. Father refused to cooperate with the additional services. Relative placement was explored, but was never effectuated. The [F]ather changed his mind and wanted to maintain his parental rights, but did not participate in the services. In fact, [F]ather has moved to Tennessee making compliance impossible. Father's case was eventually closed due to non-compliance.

Mother has voluntarily relinquished her parental rights which was admitted as State's Exhibit [10].

The child has been in placement since May 2006 and has not been returned to parental care. The Father is not providing any emotional or financial support for the child. Father has not complied with the case plan. Father has made no progress toward reunification with the child. The child bonded with the foster parents and has been in the home since 2006. It would be detrimental to the child's well-being for the child to be removed from the home.

It is in the best interest of the child and his health, welfare and future that the parent-child relationship between the child and his parents be forever fully and absolutely terminated.

….

The [DCS] has a satisfactory plan for the care and treatment of the child which is Adoption by the foster parents [].

Appellant's Br. at 3-4. Father appeals.

Discussion and Decision

I. Due Process

Father contends that the juvenile court only gave his counsel seven to sixteen days to prepare for the factfinding hearing and thereby violated his due process rights. The Fourteenth Amendment to the United States Constitution prohibits state action that deprives a person of life, liberty, or property without due process of law. *Thompson v. Clark County Div. of Family & Children*, 791 N.E.2d 792, 794-95 (Ind. Ct. App. 2003), *trans. denied*. The termination of the parent-child relationship must be accomplished consistent with the requirements of due process. *Lawson v. Marion County Office of Family & Children*, 835 N.E.2d 577, 579 (Ind. Ct. App. 2005). "'The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Thompson*, 791 N.E.2d at 795 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

Due process in a termination of parental rights proceeding rests 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. *A.P. v. Porter County Office of Family & Children*, 734 N.E.2d 1107, 1112 (Ind. Ct. App. 2000) (citing *Santosky v. Kramer*, 455 U.S. 745, 754 (1982)), *trans. denied* (2001). "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 particular situation demands.'"

Thompson, 791 N.E.2d at 795 (quoting *Mathews*, 424 U.S. at 334).

Here, both the private interests and the countervailing governmental interests are of great consequence. A parent's interest in the care, custody, and control of his children is one of the most valued relationships in our society. *Lawson*, 835 N.E.2d at 580. On the other hand, the State has a compelling interest in protecting the welfare of children. *Matter of E.M.*, 581 N.E.2d 948, 952 (Ind. Ct. App. 1991), *trans. denied* (1992). Further, delays in judicial proceedings impose significant costs upon the government as well as intangible costs to the lives of the children involved. *Lawson*, 835 N.E.2d at 580.

As to the risk of error created by the State's chosen procedure, Father insists that giving counsel two weeks to prepare for the factfinding hearing "is inherently unfair" and that "the lack of preparation that naturally follows" resulted in "a fundamentally unfair trial." Appellant's Br. at 15. Initially, we reject Father's claim that his attorney had only seven to sixteen days to prepare for the factfinding hearing. Father's claim assumes that his counsel could not begin any preparation until meeting with him. We find this assumption invalid and observe that Father's counsel had approximately two and one-half months to prepare. While a longer time to prepare might have been desirable, we cannot say that the time given to Father's counsel gave rise to an unreasonable risk of error. Furthermore, as we discuss in the following section, we find that Father received a fundamentally fair trial. Accordingly, we conclude that Father was not denied due process.

II. Ineffective Assistance of Counsel

Father asserts that he received ineffective assistance of counsel at the factfinding hearing.[3] In reviewing his assertion, we observe that

> [w]here parents whose rights were terminated upon trial claim on appeal that their lawyer underperformed, we deem the focus of the inquiry to be whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination. The question is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest.

Baker v. Marion County Office of Family & Children, 810 N.E.2d 1035, 1041 (Ind. 2004).[4]

Specifically, Father asserts that Perko was ineffective based upon the following: he failed to obtain the CHINS file and transcripts; he failed to investigate Father's disability resulting from his head injury; he failed to obtain Father's criminal and driving records; and he failed to present opening or closing argument. While, as a general matter, counsel in termination proceedings would be well advised to engage in the preparations that Father's counsel failed to make, our focus here is on whether the factfinding hearing was conducted such that the facts demonstrate an accurate determination. *See id*. We find that it was.

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[3] In this section of his appellant's brief, Father cites *In Re M.Y.*, 882 N.E.2d 297 (Ind. Ct. App. 2008). This is an unpublished memorandum decision and therefore has no precedential value. *See* Ind. Appellate Rule 65(D) (providing that memorandum decisions shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case).

[4] Thus, the test for ineffectiveness of counsel in termination of parental rights cases is not the same as the inquiry set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), that is used in criminal cases.

Moreover, we note that Father has failed to establish how he was prejudiced by his counsel's alleged inadequacies.

In the present case, counsel met with Father before the factfinding hearing. At the factfinding hearing, counsel cross-examined the State's witnesses. Our review of the record reveals that Father's counsel understood the salient features of the case such that he was able to engage in effective cross-examination. For example, when counsel cross-examined Cortez, the following colloquy took place:

> Q You had testified that you believe that there is a strong – that the child had a strong bond with the foster parents, is that correct?
>
> A Yes.
>
> Q And is that something – is that something that you're taught in your training as a case worker or how did you determine that?
>
> A Yes. Well, things that are characteristic of the parent/child bond. That I am trained on, yes.
>
> Q Did you observe the interaction between [L.D.] and his father?
>
> A No, I don't believe so.
>
> Q So, it's quite possible he could've had a strong bond with his father, is that correct?
>
> A Yes.

Tr. at 73-4.

Here is another example:

> Q …. Outside discussions you had with the mother, there was no other kind of documentation or verification you had that there was any kind of drug history or substance abuse history that was involving, you know, several years or many, would that be accurate.

A Yes, I just knew that he was getting [court-ordered] therapy for substance issues.

….

Q Okay, so he was trying to follow what the case plan was at the time, is that right?

A Yes.

Id. at 76.

Perko also presented evidence, consisting of Father's own testimony. Our review of the transcript reveals that Perko ably questioned Father regarding his view of the CHINS proceedings as well as the reasons he failed to participate in services after the April 11, 2007, hearing. In termination proceedings, a parent is entitled to: (1) cross-examine witnesses; (2) obtain witnesses or tangible evidence by compulsory process; and (3) introduce evidence on his behalf. Ind. Code § 31-32-2-3(b). Given the circumstances present here, we conclude that Father had an opportunity to be heard at a meaningful time and in a meaningful manner. *See Thompson*, 791 N.E.2d at 795 (observing that opportunity to be heard at a meaningful time and in a meaningful manner is fundamental requirement of due process). Thus, Father received a fundamentally fair hearing whose facts demonstrate an accurate determination. Accordingly, we reject Father's claim that he received ineffective assistance of counsel.

III. Sufficiency of the Evidence

Finally, Father challenges the sufficiency of the evidence supporting the termination of his parental rights to L.D. Before turning to the merits of his claim, we note that

> [t]he Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. A parent's interest in the care, custody, and control of his or her children is perhaps the oldest of the fundamental liberty interests. Indeed the parent-child

> relationship is one of the most valued relationships in our culture. We recognize of course that parental interests are not absolute and must be subordinated to the child's interests in determining the proper disposition of a petition to terminate parental rights. Thus, parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities.

Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005) (citations, quotation marks, and brackets omitted).

The purpose of terminating parental rights is not to punish the parents but, instead, to protect their children. *In re L. S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied* (2000). Termination is intended as a last resort, available only when all other reasonable efforts have failed. *Id*. 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). When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility. *Id*. We consider only the evidence and reasonable inferences that are most favorable to the judgment. *Bester*, 839 N.E.2d at 147.

To accomplish the involuntary termination of parental rights, Indiana Code Section 31-35-2-4(b)(2) requires that the DCS establish a reasonable probability that "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* that "the continuation of the parent-child relationship poses a threat to the well-being of the child[.]" The burden of proof in termination proceedings is clear and convincing evidence. Ind. Code § 31-37-14-2.

Specifically, Father argues that the DCS failed to prove that the conditions that resulted in L.D.'s removal or the reasons for placement outside his home would not be remedied. In making this determination, the juvenile court must judge a parent's fitness to

care for a child 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), *trans. denied* (2002). The juvenile court must evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future negative behaviors. *J.K.C. v. Fountain County Dep't of Pub. Welfare*, 470 N.E.2d 88, 92 (Ind. Ct. App. 1984). Additionally, the juvenile court may consider the services offered as well as the parent's response to those services. *M.B. v. Delaware County Dep't of Welfare*, 570 N.E.2d 78, 82 (Ind. Ct. App. 1991). The juvenile 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 W.B.*, 772 N.E.2d 522, 529 (Ind. Ct. App. 2002).

The record before us reveals that L.D. was removed from Father's home at the end of May 2006. For approximately six months, Father complied with his case plan, and in December 2006, the juvenile court authorized overnight visitations to begin as soon as background checks were completed on the individuals living with Father. However, in January 2007, Father tested positive for cocaine, and in March 2007, he tested positive for marijuana. The DCS also had some concerns regarding Father's parenting skills. However, after the April 2007 hearing, Father completely refused to comply with drug screens, counseling, or even visitation. Father essentially gave up all efforts toward reunification with

L.D. He thereafter had no contact with L.D.[5] A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, will support a finding that there exists no reasonable probability that the conditions will change. *Matter of D.B.*, 561 N.E.2d 844, 848 (Ind. Ct. App. 1990). We therefore conclude that the DCS presented clear and convincing evidence that there was a reasonable probability that the conditions that led to the removal of L.D. from Father's home or the reasons for L.D.'s placement outside Father's home would not be remedied.[6] Accordingly, we affirm the termination of Father's parental rights to L.D.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.

[5] Since his removal, L.D. had been placed with the same foster parents who wished to adopt him. "'It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty.'" *Baker*, 810 N.E.2d at 1040 (quoting *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 513 (1982)).

[6] Because we reach this conclusion, we need not address Father's argument that the DCS failed to prove that there was a reasonable probability that the continuation of the relationship between Father and L.D. posed a threat to L.D.'s well being.