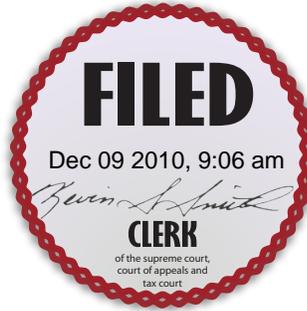


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF B.D., a Child Alleged to be a)
Child in Need of Services,)
)
S.D.,)
)
Appellant,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD SERVICES,)
)
Appellees.)

No. 49A02-1005-JC-630

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
Cause No. 49D09-0912-JC-58400

December 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

S.D. (“Mother”) appeals the trial court’s order finding that, pursuant to Indiana Code Section 31-34-21-5.6(b), reasonable efforts to reunify her with her son B.D. are not required. Mother also appeals the trial court’s order changing the permanency plan for B.D. from reunification to adoption.

We affirm.

FACTS AND PROCEDURAL HISTORY

S.D. gave birth to B.D., her tenth child, on December 22, 2009. At that time, S.D., who suffers from schizoaffective disorder, bipolar type, was unemployed and living in an adults-only homeless shelter. On December 29, the Indiana Department of Child Services (“DCS”) filed a petition alleging that B.D. was a child in need of services (“CHINS”). The petition stated in relevant part as follows:

The child is a Child in Need of Services as defined in IC [§] 31-34-1 in that: the child’s physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of a parent, guardian or custodian to supply the child with necessary food, clothing, shelter, medical care, education or supervision; and the child needs care, treatment or rehabilitation that the child is not receiving and is unlikely to be provided or accepted without the coercive intervention of the Court, as shown by the following, to wit:

(A) On or about December 28, 2009, the Department of Child Services (DCS) determined, by its Family Case Manager (FCM) Julie Jensen, the child to be a child in need of services because the child’s mother, [S.D.], is unable to provide the child with a safe, stable, and appropriate living environment. [S.D.] has extensive history with the DCS in both Indiana and Alabama and has had her rights terminated as to nine (9) other children. [S.D.] failed to successfully complete services in those cases to remedy the reasons for the DCS’[s] involvement and/or to have the children returned to her care. In addition, [S.D.] lacks stable housing and is unemployed and is therefore unable to provide the child with basic care and necessities. Due

to the foregoing reasons, the coercive intervention of the Court is necessary to ensure the child's safety and well being.

Appellant's App. at 22-23. On December 23, DCS placed B.D. with N.B., a licensed foster parent and the adoptive parent of B.D.'s older half-sibling, E.D.

On February 24, 2010, B.D. was hospitalized after he exhibited difficulty breathing. He was diagnosed with an airway obstruction and "issues with his heart[.]" Transcript at 6. On February 25, he was admitted to the intensive care unit after emergency measures were needed to help him breathe. B.D. was also unable to swallow food due to the airway obstruction, so his treating physician ordered that a feeding tube be placed through B.D.'s nose and down his esophagus to his stomach.

B.D. was still hospitalized and awaiting surgery on the date of the factfinding hearing on March 1. Following that hearing, the trial court found that B.D. was a CHINS, that the goal was reunification of Mother and B.D., and that Mother would have supervised visitation with B.D. In particular, the trial court gave Mother permission to be at the hospital when B.D. had his surgery, and the court ordered DCS to give Mother bus passes so that she could get to the hospital. But Mother did not go to the hospital when B.D. had his surgery, and she did not otherwise exercise her supervised visitation with B.D. after the factfinding hearing.¹

On March 26, DCS filed its "Motion for Hearing on Reasonable Efforts Exception," which sought a court order that reasonable efforts to reunify Mother and

¹ The evidence shows that Mother did not visit B.D. after February 16, 2010. On February 24, Mother called the DCS case manager and "stated that she broke her ankle and she needed to cancel visits henceforth and then she would let [the case manager] know when she was ready to do visits again." Transcript at 56. Thereafter, Mother scheduled a visit with B.D. for March 24, but she canceled that visit and did not attempt any further visits.

B.D. would not be required under Indiana Code Section 31-34-21-5.6(b). Mother failed to appear for the disposition hearing on March 30, and the trial court rescheduled the disposition hearing for April 20 and ordered that DCS's motion would be heard the same day. Following the April 20 hearing, the trial court issued the following order:

[Mother] last saw [B.D.] on Feb. 16, 2010. Mother has not seen her child for the last 2 months because she has lacked transportation. Mother denies ever being offered bus tickets. Mother is unemployed. She last worked at a Steak and Shake back in 2006. She supports herself through various government assistance programs. Mother receives disability for her condition of schizo-affective disorder. Mother lives at 931 Woodlawn Ave., Indianapolis. It is a homeless shelter run through Midtown. She has lived there since May of 2009. Mother can live there for a total of 2 years. Mother is currently trying to find housing. Mother's current housing does not allow children. Mother takes Haldol and Cogenten. Staff at First Homes ensures that she is taking her meds. If Mother did not take her meds she thinks she would still be able to live there. Mother is under the care of a psychiatrist and she sees the doctor at Midtown. Mother was unsure of her child's special needs and could only detail the basics of what every child needs. She is unfamiliar as to what her child will need. Mother has no training that has been designed to assist her in meeting her child's special needs. Again, the Court notes that she has not seen this child since Feb. 16, 2010.

Court admits Petitioner's exhibits 1-9 over objection.

Mother has been receiving counseling every month. Mother hears voices and sees strange objects as a result of her mental illness. The meds she takes reduces the symptoms.

Mother has been previously incarcerated. Mother has received mental health treatment previously and it has been unsuccessful to the extent that her rights have been terminated as to 9 prior children.

Mother is looking for housing but has not found any. Mother plans to seek housing if she is able to work but she notes that she receives SSI. Mother's goal is to reunify but she acknowledges the many difficulties she has now. Mother admits that previously she had been non-med compliant and stopped taking her meds because she didn't feel like she needed it. Mother acknowledges that she forgets a lot and she thinks it's because of the meds she is currently taking.

The Court notes that there has been a prior Reasonable Efforts Waiver regarding [E.D.] And in reviewing the exhibits, the Court finds that prior courts have made findings that [“]mother has a chronic mental illness of such nature and duration that it substantially impairs the mother’s ability to care for herself as well as for[”] minor children.

The Court takes testimony from the current foster mother, [N.B.] [N.B.] also has in her care [E.D.] who is the half-sibling of [B.D.] [B.D.] has been in her care since 24 hours after birth. The child has been in and out of Riley [Hospital for Children] since birth. The child has many medical needs and had a G-tube placed and had surgery to repair breathing issues. [N.B.] has undergone medical training. The child is on a breathing machine, a heart monitor, a lung monitor and a feeding pump. This child has severe medical needs and must have an adult who is medically trained by Riley pursuant to doctors’ orders. Foster Mother details the overwhelming issues that this child presents with and now it is believed that the child has a hole in his heart. The daily regime she outlines leaves the Court with the finding that only a medically proficient adult with NO mental health issues would be able to care for this child.

Dr. Madni does feel that Mother could, with proper training, perhaps care for the child but she acknowledges that she does have concerns for the safety of the child and these concerns about Mother’s deficiencies could result in the death of the child. Mother’s appointments with Dr. Madni were increased as a result of an increase in Mother’s symptoms and resulted in higher med levels. The Court finds that although Dr. Madni is a champion for her client, she has concerns for the ability of Mother to parent this child. Dr. Madni acknowledges that auditory hallucinations can affect thought process but they are not command hallucinations directing her to take an action.

The Court also hears testimony from Mr. Lake who has been working with Mother since June of 2009. He usually sees her monthly and is her care coordinator through First Homes. Mr. Lake has attempted to assist Mother, . . . but she remains searching for housing.

GAL is in agreement with the DCS’s position of reasonable efforts waiver being granted. GAL states that due to the child’s medical needs and mother’s forgetfulness the safety of the child would be greatly compromised if in Mother’s care. GAL recommends that services to Mother discontinue and the child’s plan be changed to adoption.

Comes now the Court, having considered the above and the exhibits[,] now finds that DCS has met its burden and shown that Pursuant to Ind. Code [§] 31-34-21-5.6(b)(4)(A) reasonable efforts to reunify this child with the Mother . . . should NOT be required. The Court orders that NO SERVICES BE OFFERED OR AVAILABLE TO MOTHER THAT ARE DESIGNED TO FACILITATE REUNIFICATION. The Court further orders NO VISITS occur between [B.D.] and Mother [].

Court sets permanency hearing.

The Court finds that reasonable efforts have been offered and available to prevent or eliminate the need for removal from the home. After reviewing the reports and information from the Office of Family and Children, service providers and other sources, which the Court now incorporates into this order (see Court file), the Court also finds that the services offered and available have either not been effective or been completed that would allow the return home of the child without Court intervention.

The Court finds that it is contrary to the health and welfare of the child to be returned home and that reasonable efforts have been made to finalize a permanency plan for the child.

The Court hears evidence on the issue of whether or not reasonable efforts should be required to reunify the children with parents. The Court finds that the Marion County Office of Family and Children's Petition filed for an exception to the reasonable efforts requirement be granted. Guardian Ad Litem is in agreement with MCOFC. The Court finds it is not in the child's best interest that the plan of permanency for the child be reunification. The Court finds:

The child is a child in need of services.

The parental rights of a parent with respect to the parent's biological or adoptive child have been involuntarily terminated by Marion County Superior Court, Juvenile Division; Circuit Court for the County of Tuscaloosa, Alabama, Sixth Judicial Circuit Court under cause number 49D090710JT042460 and prior terminations from the State of Indiana. Indiana Code [§] 31-34-21-5.6(b)(4).

The parent(s) do not have a reasonable plan for the safety and well being of the child. The Court finds that the Marion County Office of Family and Children is not required to offer reasonable efforts to the family for reunification. MCOFC is ordered to present an alternative plan of permanency at the next hearing.

The Court orders the child to be a ward of the Marion County Office Of Family and Children. The Court orders that the responsibility for placement and care of the child is ordered to the Marion County Office of Family and Children, with placement at: continued in foster care.

The Court, having considered the question of access to these juvenile proceedings, now finds that it is in the best interests of the child or the safety and welfare of the community to deny access, and, therefore, orders that the general public and the media shall not be allowed access to any of the proceedings under this cause, pending further Order of the Court.

The Plan for permanency: Reunification with parent(s).^[2]

Appellant's App. at 15-18 (emphasis added). Following the subsequent permanency hearing, the trial court changed the permanency plan from reunification to adoption. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Reasonable Efforts Exception

Mother first contends that the evidence is insufficient to support the trial court's order that reunification efforts cease. Further, Mother maintains that the denial of reunification services coupled with the denial of visitation is tantamount to the termination of her parental rights in violation of her right to due process. We address each contention in turn.

Indiana Code Section 31-34-21-5.6(b) provides in relevant part that reasonable efforts to reunify a child with his parent are not required if the court finds that the parental rights of that parent with respect to a biological sibling of the child who is a CHINS have been involuntarily terminated by a court. Here, Mother does not deny that the uncontroverted evidence shows that her parental rights with respect to at least one of

² Neither party addresses the apparent inconsistency in the trial court's order both terminating reunification efforts and keeping the permanency plan as reunification.

B.D.'s biological siblings had been involuntarily terminated. Indeed, Mother's rights have been terminated as to nine other children. But Mother contends that the statute should be interpreted as follows:

The plain language of I.C. [§] 31-34-21-5.6(b)(4)(A) does not require the cessation of all efforts at reunifying the parent and child, including all services to the parent. Instead, that statute merely provides that such services "are not necessary." Stating that efforts at reunification "are not necessary" is quite different from mandating the cessation of all efforts at reunification.

Brief of Appellant at 11 (emphasis original).

In essence, then, Mother contends that the statute gives the trial court discretion to order the cessation of reunification efforts under certain circumstances, but that such is not required under the statute. And Mother maintains that in light of the "dramatic" improvement in her mental illness since she began treatment in 2009, the trial court should have ordered reunification services for Mother. But Mother's argument amounts to a request that we reweigh the evidence, which we cannot do. The evidence clearly supports the trial court's order that reunification efforts should cease.

Mother also maintains that she should be permitted to visit B.D. despite the cessation of reunification efforts. She asserts that her inability to exercise visitation with B.D. all but guarantees that her parental rights will be terminated. Mother contends that the trial court's order denies her the right to due process in terminating her parental rights. We cannot agree.

In G.B. v. Dearborn County Division of Family and Children, 754 N.E.2d 1027, 1032 (Ind. Ct. App. 2001), this court addressed the issue of whether the reasonable efforts

exception statute violated parents' rights to due process "by infringing upon their fundamental right to family integrity." We held:

We have previously found that a parent's fundamental right to raise his or her child without undue interference from the state is not unlimited because the state has a compelling interest in protecting the welfare of children. When parents neglect, abuse, or abandon their children, the state has the authority under its *parens patriae* power to intervene. This statute serves that compelling interest.

Further, the challenged statute is not more intrusive than necessary to protect the welfare of children. Specifically, the statute is narrowly tailored to include only those parents who have had at least one chance to reunify with a different child through the aid of governmental resources and have failed to do so. As the California Court of Appeals has pointed out, "[e]xperience has shown that with certain parents . . . the risk of recidivism is a very real concern. Therefore, when another child of that same parent is adjudged a dependent child, it is not unreasonable to assume that reunification efforts will be unsuccessful." In re Baby Boy H., 63 Cal. App. 4th 470, 478 (1998), review denied.

Because Indiana Code Section 31-34-21-5.6 serves a compelling state interest and is narrowly tailored to serve that interest, it does not violate substantive due process under the Indiana and United States Constitutions.

(Some citations omitted). And we noted that all of the procedural safeguards of a parental rights termination action were still required despite the cessation of reunification efforts. See id.

Here, Mother attempts to distinguish her due process argument from that made in G.B. by asserting that G.B. does not "appear[] to involve a cessation of all parental contact contemporaneous to the cessation of reunification efforts[.]" Brief of Appellant at 17. She maintains that without visitation, "[t]ermination of her parental rights is a foregone conclusion[.]" Id. at 19. But, as we stated in G.B., "Indiana Code Section 31-34-21-5.6 does not relieve [DCS] of [the] statutory burden" to establish by clear and

convincing evidence that Mother's parental rights should be terminated. G.B., 754 N.E.2d at 1033. While Mother will face a more difficult challenge in overcoming DCS's evidence against her at a termination hearing without being permitted to visit with B.D. in the interim,³ we are convinced that her due process rights are not impacted for the reasons stated in G.B.

Issue Two: Permanency

Mother next contends that the trial court erred when it changed the permanency plan for B.D. from reunification to adoption. But Mother's argument on this issue rests on her assumption that the evidence was insufficient to support the trial court's order ceasing reunification efforts. Because we hold that the trial court did not err when it ordered reunification efforts to cease, Mother cannot show that the court erred when it changed the permanency plan to adoption.

Affirmed.

DARDEN, J., and BAILEY, J., concur.

³ We note that Mother missed several opportunities to visit with B.D. when supervised visitation was in place.