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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF Z.C., J.C., AND C.C., MINOR CHILDREN, AND THEIR FATHER, JOSHUA CHURCH,	)	
JOSHUA CHURCH, Appellant/Respondent,	)	
vs.	)	No. 49A02-0707-JV-628
MARION COUNTY DEPARTMENT OF CHILD SERVICES Appellee/Petitioner,	)	
and	)	
CHILD ADVOCATES, INC. Appellee/Guardian ad Litem.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Larry Bradley, Magistrate
The Honorable Marilyn A. Moores, Judge
Cause No. 49D09-0607-JT-27381

January 31, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Respondent Joshua Church appeals from the juvenile court's order terminating his parental rights to Z.C., J.C., and C.C. ("minor children"). Church alleges that (1) the Marion County Department of Child Services ("MCDCS") did not provide sufficient evidence to support the termination of his parental rights; and (2) due process violations and ineffective assistance of counsel deprived him of a fair hearing. Concluding that the evidence was sufficient to support the juvenile court's order terminating Church's parental rights and that Church was not deprived of a fair hearing before the juvenile court, we affirm.

FACTS AND PROCEDURAL HISTORY

Joshua Church was involved in a nine-year relationship with Heidi James. Church and James never married, but are the parents of three minor children, Z.C., born March 30, 1999; J.C., born November 19, 2002; and C.C., born July 15, 2005. On June 8, 2005, MCDCS filed a petition alleging that Z.C. and J.C. were Children In Need of Services ("CHINS") because their parents had failed to provide them with a sanitary home free from drug use and domestic violence. Shortly thereafter, on July 20, 2005, MCDCS filed a petition alleging that C.C. was a CHINS because James tested positive for cocaine upon giving birth.

In January 2006, the minor children were returned to James's care on a temporary in-home trial visitation. On April 11, 2006, MCDCS requested that the children be removed from the temporary in-home visitation with their mother because there had been another episode of domestic violence, witnessed by the children, which resulted in the hospitalization of James with a head injury that required two staples.

On July 3, 2006, MCDCS filed a petition to involuntarily terminate Church's parental rights.[1] On July 9, 2007, the juvenile court held a termination hearing at which Church appeared telephonically and was represented by counsel. On July 11, 2007, the juvenile court issued an order terminating Church's parental rights to Z.C., J.C., and C.C. This appeal follows.

DISCUSSION AND DECISION

While we acknowledge that the parent-child relationship is "one of the most valued relationships in our culture," we also recognize that "parental interests are not absolute and must be subordinated to the child's best interests in determining the proper disposition of a petition to involuntarily terminate one's parental rights." *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005) (internal quotations omitted). The involuntary termination of one's parental rights is the most extreme sanction a court can impose because termination severs all rights a parent has with regard to his or her children. *See In re T.F.*, 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), *trans. denied*. As such, termination is intended as a last resort, available only

[1] James agreed to voluntarily terminate her parental rights to Z.C., J.C., and C.C., and thus the termination of her parental rights is not at issue on appeal.

when all other reasonable efforts have failed. *Id*. The purpose of terminating one's parental rights is not to punish the parent, but rather to protect the child. *Id*.

I. Sufficiency of the Evidence

Church contends that MCDCS failed to present sufficient evidence to support the juvenile court's order terminating his parental rights to his minor children. In reviewing termination proceedings on appeal, this court will not reweigh the evidence or assess the credibility of the witnesses. *In re Involuntary Termination of Parental Rights of S.P.H.*, 806 N.E.2d 874, 879 (Ind. Ct. App. 2004). We only consider the evidence that supports the juvenile court's decision and reasonable inferences drawn therefrom. *Id*. Where, as here, the juvenile court includes findings of fact and conclusions thereon in its order terminating parental rights, our standard of review is two-tiered. *Id*. First, we must determine whether the evidence supports the findings, and, second, whether the findings support the legal conclusions. *Id*.

In deference to the juvenile court's unique position to assess the evidence, we set aside the juvenile court's findings and judgment terminating a parent-child relationship only if they are clearly erroneous. *Id*. A finding of fact is clearly erroneous when there are no facts or inferences drawn therefrom to support it. *Id*. A judgment is clearly erroneous only if the legal conclusions made by the juvenile court are not supported by its findings of fact or the conclusions do not support the judgment. *Id*.

In order to involuntarily terminate Church's parental rights, MCDCS must establish by clear and convincing evidence that:

(A) one (1) of the following exists:

(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; or
(iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22);

(B) there is a reasonable probability that:
(i) 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
(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(C) termination is in the best interest of the child; and

(D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b) (2005). Specifically, Church claims that MCDCS failed to prove that the conditions resulting in the minor children's removal from his care would not be remedied, the continuation of the parent-child relationship poses a threat to the minor children's well-being, and that termination of his parental rights is in his minor children's best interests.

A. Conditions Unlikely to be Remedied/Relationship Poses a Threat to Minor Children

Church first claims that MCDCS failed to show that there was a reasonable probability that the conditions resulting in the minor children's removal are unlikely to be remedied and that the continuation of the parent-child relationship poses a threat to his minor children. However, because Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive, the juvenile court need only find one of the two elements by clear and convincing evidence. *Bester*, 839 N.E.2d at 148 n.5. To determine whether there is a

reasonable probability that the conditions will not be remedied or that the continuation of the parent-child relationship poses a threat to the minor children, the juvenile court must examine Church's fitness to care for the minor children as of the time of the termination hearing, taking into account any evidence of changed conditions. *See In re S.P.H.*, 806 N.E.2d at 881. At the same time, the juvenile court must evaluate Church's pattern of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id*. When making its determination, the juvenile court need not wait until the child is irreversibly harmed so long as clear and convincing evidence exists that the shortfalls of the parents' ability are not likely to be remedied. *In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000).

Here, MCDCS presented ample evidence to support a finding of a substantial probability that the conditions warranting the removal of the minor children will not be remedied and that the continuation of the parent-child relationship poses a threat to the minor children. According to the June 8, 2005 and June 20, 2005 CHINS petitions, Z.C. and J.C., and C.C. were removed from their parents' home because the home was dirty and in a state of disarray, the home was unfit and unsafe for children, drug paraphernalia which suggested the use of crack cocaine or methamphetamine was located in the family home, and an investigation conducted by MCDCS revealed a significant history of domestic violence.[2] MCDCS presented substantial evidence of Church's significant

[2] C.C. was automatically removed from James's and Church's care at birth because James tested positive for cocaine upon giving birth to C.C.

history of domestic violence, including James's testimony that Church had physically abused her multiple times, including an incident in 2006 after which she was hospitalized with a head injury which required that two staples be placed in the back of her head. James also expressed her concern that the children had seen and heard too much and they may have been emotionally damaged by what they had witnessed. MCDCS also presented evidence relating to Church's drug use. Even though Church claimed to have been drug free, he nevertheless tested positive for cocaine metabolite, and hydrocodone after a drug test that was administered as part of the parenting assessment ordered by the CHINS court. Additionally, Church was ordered to complete an array of services, including an intensive drug treatment program, anger management classes, and a domestic violence treatment program.[3] Furthermore, at the time of the termination hearing, Church was incarcerated awaiting trial for multiple charges stemming from the above-mentioned 2006 domestic incident. Because Church was unable to predict the outcome of his pending criminal trial, he had no way of approximating how long he would continue to be incarcerated. Therefore, it was reasonable for the juvenile court to determine either that it was unlikely that the conditions resulting in the minor children's removal from Church's care would be remedied or that the continuation of the parent-child relationship posed a threat to the minor children.

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[3] Church claims that he had enrolled in and was nearing completion of an intensive drug treatment program prior to his current incarceration, but he has presented no evidence that he has since completed the program. Additionally, Church claims that he has worked with members of the clergy to learn how to manage his anger, but he has provided no evidence that the CHINS court would accept his work with the clergy as a suitable substitute for the court ordered anger management classes.

B. Minor Children's Best Interests

Church next claims that MCDCS failed to establish that the termination of his parental rights was in his minor children's best interests. We disagree. In response to questioning by MCDCS counsel, Donna Lewis, at the hearing, Angela Nok Christian, the MCDCS case manager, testified that:

> Q: Is it DCS's opinion that absent the completion of these services the children would be at risk if placed back with Mr. Church?
> A: Yes.
> Q: Why is that?
> A: Because services have not been completed successfully. And due to the repeated incidences of domestic violence in the home.
> ….
> Q: How are they [minor children] doing there [foster home]?
> A: They're doing well.
> Q: Would you define well?
> A: Lets see. J.C. and C.C. are very bonded with their foster mother and father. When I go to visit them they are usually interacting and playing with other children … C.C. has really thrived.… So she's actually interacting a lot better. But they're doing really well. They're thriving, they're healthy. They seem very happy. Z.C. … he's an overall happy kid.
> Q: Do you believe it's in the children's best interest to give Mr. Church additional time to complete services upon his release?
> A: No.
> Q: Why not?
> A: Well I feel this case has been going on for two years and … he's not been able to demonstrate that he is able to make good choices and be able to provide for his children.
> ….
> Q: What do you believe is in the best interest of the children today?
> A: For them to be adopted by their current foster parents that have them.

Tr. pp. 74-76, 78. In addition, Joyce Bansch, the guardian ad litem, similarly testified in response to questioning by MCDCS counsel Donna Lewis that:

> Q: Do you think it's in the best interests of the children to be reunified with their father?

A: No.
Q: And why not?
A: I think his history of domestic violence is definitely a factor.
Q: Do you believe that it would be in the best interest of the children to give their father additional time to complete services?
A: No I do not.
Q: And why not?
A: I think he's had plenty of time. I think in this period of time he should've at least completed some of the services.

Tr. p. 85. In terminating, the trial court found the testimony of these witnesses reliable, and we do not reassess their credibility. In light of the testimony of the MCDCS case manager and the guardian ad litem, we conclude that the evidence is sufficient to satisfy MCDCS's burden of proving that termination of Church's parental rights is in the minor children's best interests.

III. Due Process/Ineffective Assistance of Counsel

Church next contends that he was denied a fair trial because of violations of his due process rights and ineffective assistance of counsel. We disagree.

A. Due Process

When MCDCS seeks to terminate a parent-child relationship, it must do so in a manner that meets the requirements of the Due Process Clause. *Tillotson v. Clay County Office of Family & Children*, 777 N.E.2d 741, 745 (Ind. Ct. App. 2002), *trans. denied*. While an incarcerated parent does not have an absolute right to be physically present at a termination hearing, such parent does have the right to be heard at a meaningful time and in a meaningful manner. *Id*. The decision whether to permit an incarcerated parent to physically attend such a hearing rests within the sound discretion of the trial court. *In Re S.P.H.*, 806 N.E.2d at 879. Although due process has never been precisely defined, the

phrase embodies a requirement of fundamental fairness. *Tillotson*, 777 N.E.2d at 745. The nature of the process due in parental rights termination proceedings turns on a balancing of three factors: (1) the private interests affected by the proceedings; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting the use of the challenged procedure. *In re E.E.*, 853 N.E.2d 1037, 1043 (Ind. Ct. App. 2006), *trans. denied*; *Tillotson*, 777 N.E.2d at 745.

In termination cases, both the private interests and the countervailing governmental interests that are affected by the proceeding are substantial. 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. *See In re E.E.*, 853 N.E.2d at 1043. 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. *Id*. As such, a parent's interest in the accuracy and justice of the decision is commanding. *Id*. On the other hand, the State's *parens patriae* interest in protecting the welfare of a child is also significant. *Id*. 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 child involved. *Id*.

When balancing the competing interests of a parent and the State, we must consider the risk of error created by the challenged procedure. *Id*. In this case, Church claims that the risk of error is great because during the termination hearing, at which he appeared telephonically, he was unable to hear some of the testimony as was evidenced by his frequent requests for the speaker to repeat what was said. The evidence established that Church appeared telephonically and testified on his own behalf during

the July 9, 2007 termination hearing, allowing Church a meaningful time and a meaningful manner in which to be heard. *See Tillotson*, 777 N.E.2d at 775. Even though Church claimed that his rights were violated because he, at times, had difficulty hearing what was being said, we are unable to determine how Church was harmed because each time Church expressed that he was having difficulty hearing the speaker's testimony, the statements in question were immediately repeated by the speaker. In addition, Church was represented by counsel throughout the entire proceeding and was afforded numerous opportunities to discuss his representation in confidence with his counsel during the hearing. Furthermore, Church's counsel was able to subject MCDCS's case to full adversarial testing, as is evidenced by the fact that his counsel cross-examined MCDCS's witnesses and objected to testimony and exhibits presented by MCDCS.

Again, we note that Church does not have a constitutional right to be physically present at the termination hearing. *See id*. Here, we observe that Church's attorney represented him and cross-examined MCDCS's witnesses during the termination hearing, Church appeared telephonically at the hearing and testified on his own behalf. Furthermore, Church failed to complete any of the services ordered by the CHINS court prior to his current incarceration. We therefore conclude that the risk of error caused by Church's difficulty hearing portions of the testimony and the need for such testimony to be repeated so Church could hear what had been said was minimal. *See In re E.E.*, 853 N.E.2d at 1044. After balancing the substantial interest of Church with that of MCDCS and in light of the minimal risk of error created by the challenged procedure, we conclude

that Church was not denied due process of law by his telephonic appearance at the July 9, 2007 termination hearing. *See id*.

B. Ineffective Assistance of Counsel

Finally, Church claims that he was denied a fair trial because his counsel was ineffective during the termination hearing. Specifically, Church claims that his counsel was ineffective because she failed to raise an objection to his continued presence at the hearing via telephone after it became clear that the speakerphone was not adequately picking up the proceedings in the courtroom or make an effort to gain Church's physical presence in the courtroom. Indiana Code section 31-32-2-5 (2005) provides that: "[a] parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship." In cases where, on appeal, a parent whose rights were terminated claims that his counsel underperformed, the Indiana Supreme Court has held that:

> the focus of the inquiry [is] 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 the termination is in the child's best interest.

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

Applying the *Baker* standard to the present case, we conclude that Church's claim is untenable. Church's counsel subjected MCDCS's case to full adversarial testing as is evidenced by counsel's cross-examination of MCDCS's witnesses and her objection to

certain testimony offered by MCDCS, and she requested time to speak confidentially with her client regarding the cross-examination of various MCDCS witnesses. Counsel also inquired as to whether Church could hear what was being said, which resulted in the juvenile court instructing the parties to speak louder. Any time a statement was made which Church claimed he could not hear, the statement was repeated by the speaker and there is no indication that Church could not then hear the statements. Moreover, Church has made no showing as to how the outcome of the termination hearing could have come to a more favorable result had Church been physically present in the courtroom or the parties not needed to repeat certain statements so that Church could hear what had been said. *See Lang v. Starke County Office of Family & Children*, 861 N.E.2d 366, 376 (Ind. Ct. App. 2007). We therefore conclude that Church's counsel's failure to object to Church's continued presence at the hearing via telephone and counsel's failure to make an effort to gain Church's physical presence at the termination hearing does not affect our confidence that termination of the parent-child relationship is in the children's best interests or that the reasons for which the children were removed will not be remedied. *See id*.

In sum, we conclude that MCDCS presented sufficient evidence to support the juvenile court's order terminating Church's parental rights to Z.C., J.C., and C.C., and that Church was not denied a fair hearing.

The judgment of the juvenile court is affirmed.

BAKER, C.J., and DARDEN, J., concur.