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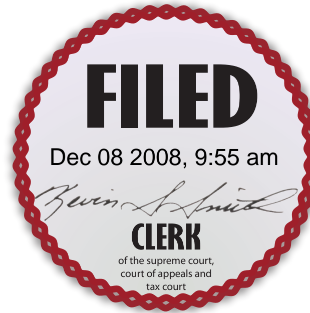

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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP OF D.H., Minor Child, and	)	
Montrell Harris, Father,	)	
Appellant-Respondent,	)	
vs.	)	No. 49A04-0805-JV-298
MARION COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner,	)	
and	)	
CHILD ADVOCATES, INC.,	)	
Appellee-Guardian Ad Litem.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Danielle Gaughan, Magistrate
Cause No. 49D09-0708-JT-34817

December 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Montrell Harris appeals a trial court order terminating his parental rights to his child, D.H. We reverse and remand.

Issue

The sole issue, as restated, is whether the trial court erred in terminating Harris's parental rights.

Facts and Procedural History

In 2000, Harris had a relationship with Ivette Beltran. On August 14, 2001, Beltran gave birth to D.H. Harris was serving a prison term for cocaine possession at that time. Two and a half years later, Harris discovered that D.H. had been born and that he was D.H.'s father. Meanwhile, on August 18, 2002, Beltran gave birth to D.B., whose father was Timothy Campbell. Between 2004 and 2006, Beltran often dropped off both boys at Harris's home, and while D.B. would generally stay for short periods, D.H. would stay for extended periods of one to two weeks. Between visits, the following pattern developed: Beltran would disappear for a while, Harris would make numerous unsuccessful attempts to reach her, and she would call and offer him the opportunity to spend time with D.H.

On June 7, 2006, the Department of Child Services ("DCS") initiated a Child in Need of Services ("CHINS") action that resulted in the removal of D.H. and D.B. from Beltran's Indianapolis home and placement in foster care. Harris was living in Kentucky at the time. In July 2006, Harris's family informed him of the removal and of the children's placement with foster parent Angela Paige. Shortly thereafter, Harris sought to obtain custody of both boys. Because he was living in Kentucky and because one of the children was not his own,

he had to submit to a home study and obtain an interstate compact. Following the home study, the Kentucky evaluator denied the interstate compact, concluding that Harris was unqualified to parent D.H. and D.B. due to a lack of money, credit, and medical insurance and due to his status as a convicted felon.

On October 16, 2006, social worker Megan Letourneau of the Indiana Children's Bureau conducted a parenting and substance abuse assessment on Harris and his live-in girlfriend (now fiancée), Angela Bokedon. As part of the assessment, Letourneau observed Harris and Bokedon interacting with the boys at an Indianapolis Dairy Queen. She found the relationships to be comfortable, "light hearted," not strained, and "very healthy." Tr. at 110, 127. She observed nothing inappropriate between Harris and D.H. and later testified that D.H. hugged Harris and appeared happy when Harris picked him up at the daycare facility. *Id*. at 128.

At the time of Letourneau's assessment, Harris was living in Kentucky with Bokedon's family and working part-time at Burger King. As part of the assessment, Harris underwent parenting tests. He informed Letourneau of his criminal history, which included the cocaine conviction, numerous traffic violations, which resulted in the suspension of his license, and a juvenile assault and battery conviction. He also explained his probation violations and his return to Michigan to turn himself in on an outstanding probation violation warrant.[1] Letourneau recommended an intensive outpatient drug program, weekly telephone contact, and less crowded housing arrangements. Harris and Bokedon secured their own home in November 2006. In March 2007, they moved with Bokedon's parents to a five-

bedroom home in Michigan. In December 2007, they moved in with Harris's parents. Pursuant to Letourneau's recommendation, Harris attempted to enroll in Care, a Michigan drug treatment program. He contacted DCS caseworker Katie Carlisle in an effort to obtain a referral, but he never received the referral due to a communication breakdown.

As of September 2006, Harris had been allowed telephone contact with the boys via Paige's cell phone. Initially, he spoke with them weekly; however, after about three months, his calls became more sporadic. Paige then refused to take his calls, and DCS's Carlisle intervened. After about four months, the calls resumed on an inconsistent basis, and Harris was allowed unsupervised visits when he traveled to Indianapolis.

On August 20, 2007, DCS filed a petition for involuntary termination of parental rights against Beltran, Harris, and Campbell. Beltran signed adoption consents, and the juvenile court conducted a hearing on April 2, 2008. Harris was the only parent to appear at the hearing. Although he initially sought custody of both D.H. and D.B., he ultimately realized that his living arrangements would accommodate only D.H. At that time, he was participating in a Michigan job-training program through which he earned $596 per month plus food stamps, and he, Bokedon, and their two children were living with his parents. On May 8, 2008, the trial court issued an order terminating Harris's parental rights to D.H. and Campbell's rights to D.B.

Discussion and Decision

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[1] Harris served two weeks in jail in August 2006.

On appeal, Harris contends that the trial court erred in terminating his parent-child relationship with D.H. In *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143 (Ind. 2005), our supreme court stated,

> The 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.

Id. at 147 (citations, quotation marks, and alteration omitted). In recognition of the seriousness with which we address these cases, Indiana has adopted a clear and convincing evidence standard when terminating a parent-child relationship. *Castro v. State Office of Family & Children,* 842 N.E.2d 367, 377 (Ind. Ct. App. 2006), *trans. denied*. Because involuntary termination of parental rights is the most extreme measure that a court can impose, it is a last resort when all other reasonable efforts have failed. *In re A.I.*, 825 N.E.2d 798, 805 (Ind. Ct. App. 2005), *trans. denied.*

On review, we typically apply a clearly erroneous standard to parental termination orders. *Castro*, 842 N.E.2d at 372. However, in this case, neither of the appellees has filed a brief. When the appellee fails to file a brief, we apply a less stringent standard of review. *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006). In such cases, the judgment may be reversed if the appellant's brief presents a prima facie case of error. *Id*. "Prima facie error is error at first sight, on first appearance, or on the face of it." *Id*.

To obtain a termination of the parent-child relationship, DCS 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) months;
>
> (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 interests 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)(2).

Harris asserts that the trial court placed undue emphasis on keeping D.H. and D.B. together and that, in doing so, it erroneously tied its decision to terminate his parental rights to his child, D.H., to the fate of D.H.'s half-brother D.B., who had a different biological father. Although Harris initially sought to gain custody of both boys, financial and residential constraints led him to seek custody of only D.H. Harris argues that because he cannot accommodate both boys, he is being deprived of his own son. In its order, the trial court repeatedly emphasized that it was in the best interests of the two boys to remain together. *See* Appellant's App. at 15-16. The trial court went on to conclude:

> 4. Termination of the parent-child relationship between D.H. and D.B. and their fathers, Montrell Harris and Timothy Campbell respectively, is in the best interests of the children. Both D.H. and D.B. need permanency in a

> stable home and they need to stay together. Neither Montrell Harris nor Timothy Campbell can provide the stability that either of these boys need.

Id. at 16. Harris does not dispute the fact that "[a]s brothers, D.H. and D.B. have destinies which are appropriately intertwined." Appellant's Br. at 29. What he disputes is the court's decision to treat the boys as a *package deal*. We agree that the trial court improperly assessed Harris's suitability to parent D.H. based, at least partly, on his inability to adopt D.H.'s half brother.

Moreover, the best interest of the child is but one of the required showings under the parental termination statute. DCS also must prove, by clear and convincing evidence, that a reasonable probability exists that the conditions causing removal will not be remedied. Ind. Code § 31-35-2-4(b)(2)(B)(i). In this vein, the trial court found as follows:

> 12. There is [a] reasonable probability that the conditions that resulted in [D.H.'s] removal will not be remedied. At the time that [D.H.] was removed, Montrell Harris was not available to parent. He was in prison, having been convicted of Possession of Cocaine. Since that time, he has not completed any services, and he has not maintained stable housing or employment. Not only has he been unable to consistently visit with [D.H.], he could not even call him on the phone once a week on a consistent basis. Montrell Harris obviously loves his son but he is unable to follow through in anyway [sic] to provide for or to demonstrate the ability to take care of him.

Appellant's App. at 14.

Harris challenges the trial court's finding that the conditions resulting in D.H.'s removal are unlikely to be remedied. We conclude that Harris has demonstrated prima facie error. Initially, we note that D.H. was never removed *from Harris* in the first place. Rather, D.H. was removed from his mother, Beltran, who later signed a consent to adopt. We also note a factual inaccuracy in the trial court's finding that states that Harris was in prison at the

time of D.H.'s removal from Beltran.[2] Next, contrary to the trial court's finding that Harris completed no services, the record indicates that Harris completed a parenting assessment with Letourneau and that, based on Letourneau's observation, Harris and D.H. seemed happy to be together. As part of the assessment, he underwent parenting tests, the results of which indicated "nothing … to cause [Letourneau] great concern that he would not be able to parent [D.H.]." Tr. at 130.

In addition, Harris attempted to apply for a drug treatment program, and it was a communication breakdown involving DCS caseworker Carlisle that caused Harris's failure to complete that particular service. With regard to communication breakdowns, Harris alleges that DCS caseworker Carlisle not only failed to follow-up on his request for a referral to the drug treatment program, but also failed to provide his contact information to the boys' therapist, Sylvia Fernandez, who ended up making her recommendations without ever having contacted Harris. He also alleges that Carlisle excluded him from the July 6, 2007, termination hearing. Although the testimony is conflicting, we take these allegations seriously.

> The procedural safeguards contained in Indiana's termination statutes are designed to ensure that parents receive a full and fair hearing before a termination of their parental rights may occur. [DCS] plays an integral part in ensuring that such procedural safeguards are strictly followed and may not simply wash its hands of a case even after a court has determined that reunification services are no longer required.

In re C.T., slip op. at *18 (No. 49A02-0803-JV-231 Nov. 18, 2008).

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[2] Harris was in prison at the time of D.H.'s birth in 2001 and for two weeks in August 2006, but not at the time of his removal from Beltran in June 2006. The reason for Harris's alleged unavailability to parent at that time was not imprisonment but, according to trial court's own words, was "the fathers of the children were unknown." Appellant's App. at 13.

With regard to the likelihood of remedied conditions, we note the following efforts on the part of Harris. Over the two-year period during which the CHINS and termination proceedings were pending, he attended nearly all of the required hearings. He did so despite the fact that attendance at hearings required him to travel several hours to Indianapolis and despite the fact that he had to secure transportation due to his suspended license. He also made efforts to visit D.H. each time he came to Indianapolis to attend hearings. He admits that his phone calls to D.H. have been sporadic and recognizes his need for improvement in that area. Moreover, the record indicates that he stopped smoking marijuana in the fall of 2006 in an earnest effort to gain custody of D.H. He also has avoided recent criminal activity. His current living arrangements with his fiancée and his two other children in his parents' Michigan home enable him to use the money he earns from his job-training program to purchase food for his family, while not being shouldered with mortgage or rent payments. Finally, he has submitted at least 150 job applications and, due to Michigan's economic slow-down, has explored employment options in Kentucky.

In sum, we conclude that Harris has demonstrated prima facie error in the trial court's application of the best interests requirement, as well as its conclusion that the conditions that caused D.H.'s removal will not be remedied. While we are mindful of Harris's past frailties, we are also mindful of the sweeping and permanent effect of a parental termination order. Accordingly, we reverse the trial court's termination order and remand to the trial court for further proceedings consistent with this decision.

Reversed and remanded.

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