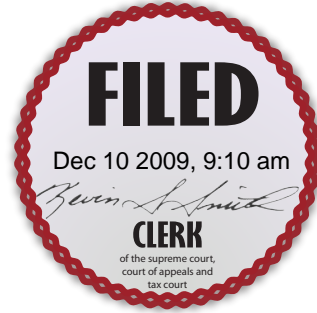


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE INVOLUNTARY)
TERMINATION OF PARENT-CHILD)
RELATIONSHIP OF K.P., MINOR CHILD)
AND HIS FATHER B.S.,)

B.S.,)
Appellant-Respondent,)

vs.)

MARION COUNTY DEPARTMENT OF)
CHILD SERVICES AND CHILD ADVOCATES)
INC.,)

Appellees-Petitioners.)

No. 49A02-0905-JV-418

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Larry E. Bradley, Magistrate
Cause No. 49D09-0804-JT-014343

December 10, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

B.S. (“Father”) appeals the termination of the parent-child relationship with his son, K.P. We affirm.

Issue

Father raises four issues, which we consolidate and restate as whether there is sufficient evidence to support the termination of the parent-child relationship.

Facts

Father’s son, K.P., was born on December 1, 2001. Father knew K.P.’s mother was pregnant when they separated in 2001. Father was incarcerated from December 2001 until October 1, 2008, for Class B felony carjacking and Class C felony robbery convictions. On June 5, 2007, K.P. was adjudicated a child in need of services (“CHINS”). While incarcerated, Father was informed of the CHINS proceedings. On April 1, 2008, the Department of Child Services (“DCS”) filed a petition to terminate the parent-child relationship.

When Father was released from prison, he contacted the DCS case manager. Father indicated he wanted to get custody of K.P., but he would not participate in services until K.P.’s paternity was established. During the first week of December 2008, a DNA test confirmed that K.P. was Father’s son. On December 12, 2008, a team meeting was held, and Father was informed of his obligations pursuant to the participation decree.

On January 14, 2009, the trial court continued the termination hearing so that Father could have additional time to complete various services. On March 9, 2009, Father met K.P. for the first time. Visitation was suspended, however, because of Father's failure to fully participate in services. On March 26, 2009, Father completed a substance abuse assessment. On March 30, 2009, Father had a positive drug screen.

On April 13, 2009, the termination hearing was held. At the time of the hearing, Father had failed to participate in the home-based counseling for several weeks and had just begun the intensive out-patient substance abuse treatment. Although Father had had two jobs since his release from prison, he had been unemployed for at least five weeks. Father was living in a two-bedroom apartment with his father and Father's sister.

On April 20, 2009, the trial court issued an order terminating Father's parental rights. Father now appeals.¹

Analysis²

Father argues there is insufficient evidence to terminate his parental rights. "When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility." Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005). "We consider only the evidence and reasonable inferences that are most favorable to the judgment." Id. Where a trial court enters findings and

¹ K.P.'s mother consented to his adoption.

² In his statement of issues, Father asserts that he was denied due process when the trial court denied his motion for a continuance. Father, however, does not make this assertion in the argument section of his brief. This issue is waived. See Hay v. Hay, 885 N.E.2d 21, 23 n.2 (Ind. Ct. App. 2008); Ind. Appellate Rule 46(A)(8)(a) (requiring each of the appellant's contentions to be supported by cogent reasoning and citation to authority).

conclusions granting a petition to terminate parental rights, we apply a two-tiered standard of review. Id. First, we determine whether the evidence supports the findings. Id. Then we determine whether the findings support the judgment. Id. We will set aside a judgment that is clearly erroneous. Id. A judgment is clearly erroneous when the findings do not support the trial court's conclusions or the conclusions do not support the judgment. Id.

A petition to terminate the parent-child relationship must allege:

(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) (2008).³

The DCS had the burden of proving these allegations by clear and convincing evidence. See Bester, 839 N.E.2d at 148. Clear and convincing evidence need not show that the continued custody of the parent is wholly inadequate for the child's very survival. Id. Instead, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development is threatened by the parent's custody. Id.

Father argues there is insufficient evidence that the conditions resulting in K.P.'s placement outside the home would not be remedied and that the continuation of the parent-child relationship poses a threat to the well-being of the child. Because the statute is written in the disjunctive, however, the DCS was not required to prove both. Id. at 148 n.5. As such, we address the trial court's finding that the continuation of the parent-child relationship poses a threat to K.P.

The trial court found:

20. [K.P.] has extensive special needs. He has been diagnosed with Post Traumatic Stress Disorder due to suffering from neglect, and sexual and physical abuse. He has been diagnosed with Mood Disorder, N.O.S. and Attention Disorder, Hyperactivity Disorder.

21. [K.P.] takes medication for his diagnoses and requires continued therapy. His aggressive behavior and anxiety have decreased since his removal in February 2007.

³ Effective July 1, 2009, subsection (b)(2)(A)(iii) of this statute was reworded slightly. See P.L. 131-2009 § 65. We quote the version of the statute in effect at the time of the proceedings in this case.

22. Claudia Dominik had been [K.P.'s] counselor since March of 2007. She explained [K.P.'s] need for consistency within a nurturing, loving and structured environment as the result of his special needs. He has developed over the time he has been in the care of his current therapeutic foster family and is still developing. She feels if moved, it would be a loss he does not need and would have to redevelop.

23. [K.P.] has been placed with the same therapeutic foster family for approximately two years. This placement is pre-adoptive. The foster parents are well adapted to provide for [K.P.'s] needs. They provide the intensive level of care, in an environment of consistency, nurturing and structure, which [K.P.] requires to develop. [K.P.] is very bonded into the foster family.

24. The continuation of the parent-child relationship poses a threat to the well-being of [K.P.]. Although [K.P.] has special needs that require therapy and medications, [Father] does not appreciate [K.P.'s] condition even though explained to him. The lack of appreciation coupled with [Father's] instability in housing and income would create a neglectful environment if [K.P.] was to be returned to his father at this time. [K.P.] is seven years old and knows his permanency is not settled at this time which adds to his anxiety. To allow the parent-child relationship to continue would deny [K.P.] a much needed permanency.

App. p. 19.

Father argues that “continuing the relationship while the parent completes services is not going to change the status quo for the child who is in a preadoptive foster home.”

Appellant's Br. p. 11. Contrary to Father's argument, the fact that K.P. is thriving in a preadoptive home does not require the continuation of the parent-child relationship.

Following his October 2008 release from prison, Father waited until paternity was established in December 2008 to begin services. Father participated in some home-based therapy, but did not complete it. Father did not have steady employment and had been

unemployed for at least five weeks prior to the hearing. From his release to the time of the termination hearing, Father was living with his father and Father's sister in a two bedroom apartment.

As for his substance abuse treatment, in 2002, during his incarceration, Father completed substance abuse treatment. However, in 2006, while still incarcerated, Father tested positive for marijuana. Father then participated in additional substance abuse classes in prison but did not complete them. Father waited until March 2009 to complete a substance abuse assessment. Father explained that his delay in starting a substance abuse program was his inability to provide the case manager with his certificate of completion from the Department of Correction. The only drug screen to which Father submitted after his release was positive for marijuana. A week prior to the April 2009 termination hearing, Father finally began an intensive out-patient substance abuse program.

Regarding his criminal history, Father testified that he was incarcerated from 1993 until 1999 and incarcerated again from 2001 until 2008. K.P.'s mother testified that prior to his incarceration in 2001, he physically abused her.

When informed of K.P.'s needs, Father was dismissive of the home-based care manager's concerns. Father told the home-based care manager that all K.P. needed was the love of his father and that once K.P. was with Father, K.P. would no longer need therapy. Father testified, "all the information I had been getting . . . I took it all in and I met my son, and from what I, what I took from the meeting, I know it was only one meeting, was that he needs a father. He needs his real father." Tr. p. 178. Father was

also told not to take a wrestling picture to his meeting with K.P. and not to discuss K.P.'s mother at the meeting. Father did both things during the meeting.

The initial termination hearing was scheduled for January 2009, but it was continued to give Father additional time to complete services. Although Father participated in some services, his participation was sporadic, and he did not complete any of the services. This is not a situation where a parent's rights were terminated without giving the parent an adequate opportunity to complete services. Cf. In re H.T., 901 N.E.2d 1118, 1122 (Ind. Ct. App. 2009) (reversing termination of parental rights where continuation of the CHINS wardship would have no negative impact on the child and the trial court found that Father was willing and able to complete any services and become the custodial parent); Rowlett v. Vanderburgh County Office of Family and Children, 841 N.E.2d 615, 619-20 (Ind. Ct. App. 2006) (concluding that where children had been in grandmother's custody and would be adopted by grandmother upon termination, trial court abused its discretion by denying father's motion for continuance without giving father a sufficient period to demonstrate his willingness and ability to assume parental responsibilities), trans. denied. Given K.P.'s needs and Father's failure to fully participate in services, the DCS has established that the continuation of the parent-child relationship poses a threat to K.P.'s well-being.

Father also argues there is insufficient evidence to support the conclusion that termination is in K.P.'s best interests. Regarding K.P.'s best interests, the trial court found:

25. Termination of the parent-child relationship is in [K.P.'s] best interests. Termination would provide an opportunity for [K.P.] to be adopted into a nurturing, consistent, and loving family with which he has become bonded. It would also provide [K.P.] with a sense of knowing he was now in a permanent environment where he will be staying and have his needs met throughout childhood.

* * * * *

27. Based on [K.P.'s] wishes, his need to be settled, the positives of the pre-adoptive placement and [Father's] lack of progress in services, Guardian ad Litem Manning-Dudley agrees with the plan of the [DCS] and feels it is [K.P.'s] best interests that termination be granted to allow adoption.

App. p. 19.

Father argues that this case is like In re G.Y., 904 N.E.2d 1257, 1266 (Ind. 2009), in which our supreme court reversed the termination of a mother's parental rights. In that case, at the time of the January and February 2008 termination hearings, Mother was incarcerated and scheduled to be released in May 2010. In determining whether termination was in G.Y.'s best interests, our supreme court considered several factors. During her incarceration, Mother had completed an eight-week drug rehabilitation program and was on a waiting list for the next phase of the program, she had completed a fifteen-week parenting class, and she was participating in several education programs. Mother had also obtained suitable housing and gainful employment upon her release. Mother also "maintained a consistent, positive relationship with G.Y." G.Y., 904 N.E.2d at 1264. Finally, the high quality of G.Y.'s foster care arrangement would have little, if any, negative impact on his well-being.

The case before us today is much different from G.Y. Here, Father's drug treatment, therapy, and participation in educational programs while incarcerated was not nearly as extensive as G.Y.'s mother's was. Further, during the six months from his release to the termination hearing, Father had not maintained steady employment and his housing was not ideal. Moreover, although Father participated in services after his release, he did not complete any services and delayed the start of other services. Also, unlike G.Y.'s mother, Father had no relationship with K.P. Since he was born in 2001, Father had met K.P. once and does not appear to have had any other contact with him. In fact, the counselors involved in the case recommended that visitations be suspended until Father committed to participating in services. Finally, permanency is an issue in this case. The evidence shows that K.P. has anxiety about where he is going to live and who he will be living with and that he is aware he is in limbo. There is also evidence that K.P. wants to be adopted and that not terminating Father's parental rights could result in significant harm to K.P. Cf. G.Y., 904 N.E.2d at 1265 (agreeing with Mother that there was no evidence presented to show that permanency through adoption would be beneficial to G.Y. or that remaining as a foster care ward until he could be reunited with his mother would be harmful to G.Y.).

This is not a case in which Father was not given an opportunity to "prove himself" because of his incarceration. Father was given six months following his incarceration to participate in services, and Father's participation was inconsistent at best. There is clear and convincing evidence that terminating the parent-child relationship was in K.P.'s best interests.

Conclusion

There is sufficient evidence to support the termination of the parent-child relationship. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.