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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF E.K., minor child,	)	
ISAIAH KNIGHTEN,	)	
Appellant-Respondent,	)	No. 49A04-0704-JV-222
vs.	)	
MARION COUNTY DEPARTMENT OF CHILD SERVICES, and CHILD ADVOCATES, INC.,	)	
Appellees-Petitioners.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Larry Bradley, Magistrate
Cause Nos. 49D09-0506-JT-24755; 49D09-0411-JC-1612

November 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Isaiah Knighten appeals from the involuntary termination of his parental rights as to his minor child, E.K., in an action initiated by the Marion County Department of Child Services (DCS). Specifically, Knighten argues that (1) he was denied due process during the child in need of services (CHINS) and termination proceedings; (2) the evidence DCS presented was insufficient to terminate his parental rights; and (3) the guardian ad litem (GAL) failed to represent E.K.'s best interests. Finding no error, we affirm the judgment of the trial court.

FACTS

Lakeisha Evans gave birth to E.K. on November 2, 2004. E.K. tested positive for marijuana at birth, and DCS filed a petition alleging that E.K. was a CHINS on November 4, 2004. Specifically, the petition alleged that Evans uses marijuana on a regular basis and that she had previously given birth to a child who was subsequently made a ward of the State. E.K.'s father was unknown at the time the petition was filed. The trial court granted temporary custody of E.K. to DCS, which placed E.K. in a pre-adoptive foster home.

An initial hearing was held on November 5, 2004, and Evans told the trial court that Knighten, who was incarcerated, was E.K.'s father. DCS amended the CHINS petition to add Knighten, and the trial court postponed the hearing. Knighten attended a hearing on November 17, 2004, and admitted the allegations in the CHINS petition.

Knighten has a lengthy criminal history and has been incarcerated since E.K.'s birth. As a juvenile, Knighten was convicted of what would be a class D felony auto theft if committed by an adult. As an adult, Knighten has been convicted of resisting law enforcement, class A misdemeanor battery, class C misdemeanor operating a vehicle without a license, class D felony residential entry, class D felony resisting law enforcement, class A misdemeanor resisting law enforcement, and class C felony auto theft/receiving stolen parts. Knighten has also been found to be a habitual offender. Most recently, on May 13, 2005, Knighten was sentenced to an aggregate term of sixteen years imprisonment for the resisting law enforcement and auto theft convictions, and the trial court ordered that sentence to run consecutively to a three-year sentence Knighten had previously received for an unrelated conviction.

DCS filed a petition to involuntarily terminate Knighten's parental rights on June 28, 2005. A hearing was held on March 13, 2007, and Knighten participated telephonically. The trial court subsequently issued findings of fact and conclusions of law, terminating Knighten's parental rights as to E.K. Knighten now appeals.

DISCUSSION AND DECISION

I. Procedural Irregularities

Knighten argues that there were many procedural irregularities during the CHINS and termination proceedings that, in the aggregate, deprived him of due process in the termination of his parental rights. Specifically, Knighten argues that he was not transported to some of the hearings from jail, DCS did not consider placing E.K. with his relatives, DCS failed to

establish paternity in a timely matter, and Knighten failed to receive requested visitation with E.K.

The Fourteenth Amendment to the United States Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law." As we explained in A.P. v. Porter County Office of Family and Children, "[c]hoices about marriage, family life, and the upbringing of children are among associational rights the United States Supreme Court has ranked as of basic importance in our society and are rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." 734 N.E.2d 1107, 1112 (Ind. Ct. App. 2000). Accordingly, the Due Process Clause protects the right of a parent to raise his children. Id.

It is well established, however, that a party may waive a constitutional claim by raising it for the first time on appeal. In re S.P.H., 806 N.E.2d 874, 877 (Ind. Ct. App. 2004). Because Knighten challenges the alleged procedural irregularities that occurred during the CHINS proceedings for the first time on appeal, he has waived the issue. Nonetheless, Knighten requests that we address the merits of his claim, and we accept his invitation because of our penchant for deciding issues on the merits. See, e.g., id.; McBride v. Monroe County Office of Family & Children, 798 N.E.2d 185, 195-98 (Ind. Ct. App. 2003).

Waiver notwithstanding,[1] we have previously explained the relationship between CHINS and termination proceedings:

[1] DCS filed a motion to strike various portions of Knighten's appendix that involved the CHINS proceedings. Because we reach the merits of Knighten's arguments, we enter an order denying DCS's motion contemporaneously with this decision.

> [P]rocedural irregularities in a CHINS proceedings may be of such import that they deprive a parent of procedural due process with respect to the termination of his or her parental rights. It would be incongruous to hold that a county, with the assistance of a juvenile court, may commence CHINS proceedings for a child and remove a child from his or her home, yet disregard various portions of the CHINS and termination statutes on several occasions and still terminate parental rights following the passage of time after a CHINS dispositional decree and a child's removal from the home.

McBride, 798 N.E.2d at 195. In A.P., we analyzed "a record replete with procedural irregularities throughout the CHINS and termination proceedings that [were] plain, numerous, and substantial"[2] and concluded that the irregularities, taken together, required reversal. 734 N.E.2d at 1117-18.

We first address Knighten's argument that he was denied his right to due process because he was not transported to some of the hearings. Knighten admits that "the court was cognizant of [the necessity of his presence] for the most part and continued a hearing if Mr. Knighten was not transported for the hearing." Appellant's Br. p. 20. And an examination of the record reveals that Knighten's interests were represented by counsel at the few hearings at which he was not present. Furthermore, Knighten's counsel was responsible for his client's absence because he had not processed the requisite transport forms—a fact counsel admitted to the trial court. Tr. p. 158. Based on these circumstances, we cannot conclude that Knighten's absence requires reversal. The trial court was mindful of Knighten's

[2] The irregularities at issue in A.P. were as follows: (1) DCS admittedly failed to provide the parents with some, and perhaps all, of the case plans; (2) the termination petition did not comply with Indiana Code section 31-34-2-4; (3) the original CHINS petition was unsigned and unverified; (4) no permanency hearing was ever held as required by Indiana Code section 31-34-21-7; (5) several of the trial court's CHINS orders contained no written findings and conclusions as required by Indiana Code section 31-34-19-10; (6) the trial court entered a no-contact order against the father without following statutory requirements; and (7) father was deprived of his right to be present at the CHINS hearing. 734 N.E.2d at 1112-19.

presence and Knighten's interests were represented by counsel at all times he was not present. Because Knighten fails to establish that he was prejudiced by his absence, his claim fails.

Knighten also argues that DCS failed to consider his relatives for placement, which he argues rendered DCS's case plan defective. We first note that Knighten has not included the case plan in the record and, thus, has failed to carry his burden of presenting us with an adequate record to support his claims. Ramsey v. Madison County Dep't of Family & Children, 707 N.E.2d 814, 817-18 (Ind. Ct. App. 1999). Furthermore, what little evidence the record contains demonstrates that DCS did consider some of Knighten's relatives for placement. At the January 10, 2007, placement hearing, the case manager informed the trial court that Knighten's sister and maternal aunt and uncle had been "checked out" but that "the staffing team went with the foster parents for preadoptive placement." Tr. p. 142-44. Additionally, Knighten's sister, Mary, testified at the termination hearing that DCS had contacted her for placement but that she was not chosen because she had previously "had [her own] kids taken [from her] . . . in the past." Id. at 296. Based on the evidence in the record, we conclude that DCS considered Knighten's relatives for placement but, ultimately, decided to pursue another option. Thus, Knighten was not denied due process.[3]

Finally, Knighten argues that DCS "ignored its duty to provide Mr. Knighten with the opportunity for visits with [E.K.]" Appellant's Br. p. 19. While Knighten argues that DCS's

[3] Knighten makes a related argument that "[c]ontributing to the failure to investigate family members may well have been incompetence shown by the juvenile court in getting paternity established." Appellant's Br. p. 17. Notwithstanding our conclusion that the evidence shows that DCS investigated Knighten's relatives,

failure to initiate visitation violates his right to due process, we have previously held that a father's "inability to bond and visit with [his child] is due more to his own actions, which resulted in his incarceration . . . . Individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." Matter of A.C.B., 598 N.E.2d 570, 572 (Ind. Ct. App. 1992). Knighten's right to due process was not violated simply because he chose to engage in criminal activity that resulted in his incarceration. Because there is nothing in the record that shows that DCS stood in the way of Knighten's visitation, Knighten's argument fails.

In sum, unlike the substantial procedural irregularities we found in A.P., the alleged deficiencies Knighten complains of do not rise to the level of a constitutional violation. Therefore, we will not reverse the termination of Knighten's parental rights on this basis.

II. Sufficiency of the Evidence

Knighten argues that DCS failed to prove the statutory factors required to terminate his parental rights to E.K. Specifically, Knighten argues that DCS failed to prove by clear and convincing evidence that the conditions resulting in E.K.'s placement outside the home would not be remedied and that termination is in E.K.'s best interests.

When reviewing termination of parental rights proceedings on appeal, 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). We neither reweigh the

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Knighten fails to cogently argue how any alleged delay in establishing paternity prejudiced him and denied him due process.

evidence nor judge the credibility of witnesses. Id. We consider only the evidence that supports the trial court's decision and the reasonable inferences that may be drawn therefrom. Id. If the evidence and the inferences support the trial court's decision, we must affirm. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999).

We acknowledge that the involuntary termination of parental rights is the most extreme sanction a court can impose on a parent because termination severs all rights of a parent to his or her children. Id. Therefore, termination is intended as a last resort, available only when all other reasonable efforts have failed. Id. The purpose of terminating parental rights is not to punish the parents but, instead, to protect their children. Id. Thus, although parental rights are of a constitutional dimension, the law provides for the termination of these rights when the parents are unable or unwilling to meet their parental responsibilities. Id.

To effect the involuntary termination of a parent-child relationship, the State must present clear and convincing evidence establishing the elements of Indiana Code section 31-35-2-4(b)(2):

> (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).

In construing this statute, this court has held that when determining whether certain conditions that led to the removal of the children will be remedied, the trial court must judge the parent's fitness to care for the children 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). A parent's habitual pattern of conduct must also be evaluated to determine the probability of future negative behavior. Id. The trial 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. Id.

Additionally, the trial court may consider the services offered as well as the parent's response to those services. Id. Parental rights may be terminated when parties are unable or unwilling to meet their responsibilities. Ferbert v. Marion County OFC, 743 N.E.2d 766, 776 (Ind. Ct. App. 2001). Also, when determining what is in the best interests of the children, the interests of the parents are subordinate to those of the child. Id. at 773. Thus, parental rights

will be terminated when it is no longer in the child's best interests to maintain the relationship. In re B.D.J., 728 N.E.2d 195, 200 (Ind. Ct. App. 2000).

A. Conditions Resulting in Placement Outside Home

Knighten argues that there was insufficient evidence for the trial court to conclude that the conditions resulting in E.K.'s placement outside the home would not be remedied. While Knighten acknowledges that he will not be eligible for parole until 2013, he argues that he currently has three petitions for post-conviction relief pending and that he could be immediately released if one of those petitions is granted.

It is well established that the trial court "is to assess the parent's fitness to care for the child[] as of the time of the termination hearing." In re B.D.J., 728 N.E. at 202 n.1. At the time of the termination hearing, Knighten was incarcerated, had not been granted post-conviction relief,[4] and would not be released from prison for approximately six more years. Thus, it was proper for the trial court to consider Knighten's incarceration as a condition that would not be remedied.

Knighten's assertion that a grant of post-conviction relief would result in his immediate release is pure speculation, and the notion that a child should have to wait indefinitely for a parent to become ready for the immediate responsibilities that accompany parenthood violates well-settled law. Furthermore, Knighten has a lengthy criminal history, including at least three felony convictions, and has been adjudged a habitual offender. Despite numerous opportunities to reform, Knighten has continued to engage in unlawful

[4] The current status of Knighten's post-conviction petitions is unknown.

conduct. Therefore, we conclude that DCS presented sufficient evidence at the termination hearing that the conditions that led to E.K.'s placement outside the home would not be remedied.[5]

B. E.K.'s Bests Interests

Knighten contends that DCS failed to present clear and convincing evidence that terminating his parental rights was in E.K.'s best interests. However, "[a] parent's historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child's best interests." Castro v. State Office of Family and Children, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006), trans. denied. In other words, "[a]lthough parental rights have a constitutional dimension, the law allows for their termination when parties are unable or unwilling to meet their responsibility as parents." Id. (emphasis in original). Like the father in Castro, Knighten has been incarcerated since E.K.'s birth and, thus, has a historical inability to provide adequate housing, stability, and supervision for his son. Therefore, the trial court's finding that terminating Knighten's parental rights was in E.K.'s best interests was not clearly erroneous.

III. Guardian ad Litem

Knighten argues that he was denied due process because E.K.'s GAL failed to fulfill her duty to independently represent E.K.'s best interests. Specifically, Knighten contends that the GAL "did not speak with Mr. Knighten or any member of Mr. Knighten's family"

[5] Knighten reasserts his argument regarding DCS's alleged failure to consider his relatives for placement. We have already rejected that argument and need not address it further.

and "only investigated whether the current situation [E.K.] was in was satisfactory, not whether a better placement existed." Appellant's Br. p. 23.

A GAL is appointed by the court to "represent and protect the best interests of a child." Ind. Code § 31-9-2-50. This duty includes researching, examining, advocating, facilitating, and monitoring "the child's situation." Id. Here, the GAL visited E.K.'s foster home five times and interviewed the case manager and foster mother. Tr. p. 225. She observed E.K.'s "very loving" relationship with his foster mother and concluded that "he's doing very well." Id. at 227.

The GAL admitted at the termination hearing that she did not attempt to contact Knighten or his family. Id. at 233-34. Knighten argues that we should vacate the trial court's judgment terminating his parental rights because of this failure. In Wagner v. Grant County Department of Public Welfare, an incarcerated father argued that the GAL's performance was deficient because she had not contacted him. 653 N.E.2d 531, 534 (Ind. Ct. App. 1995). However, we held that it was proper for the GAL to "base[] her recommendation that [the father's] parental rights be terminated on his repeated incarceration and resulting lack of contact [because, c]learly, these are not misstatements or assumptions but facts which could easily be confirmed." Id.

While we do not condone the GAL's decision not to contact Knighten, she was aware that Knighten was incarcerated and that E.K. had "had no contact with" his father—facts that could easily be confirmed. Id. at 230. Furthermore, because Knighten would not be released from prison until 2013 and DCS had already determined that relative placement was not a

viable option, any resulting error was harmless. Therefore, Knighten cannot show that he was prejudiced by the GAL's failure to contact him, and his argument fails.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.