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.

FILED
Jan 13 2011, 8:26 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

HUGH N. TAYLOR
Hugh N. Taylor, P.C.
Auburn, Indiana

ATTORNEYS FOR APPELLEE:

SHARON A. FLORES
Department of Child Services,
Steuben County Office
Angola, Indiana

ROBERT J. HENKE
DCS Central Administration
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF H.C. AND T.C., MINOR CHILDREN, AND THEIR FATHER, J.C.,	)	
J.C.	)	
Appellant/Respondent,	)	
vs.	)	No. 76A03-1006-JT-374
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee/Petitioner.	)	

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause Nos. 76C01-0907-JT-250, 76C01-0907-JT-251

January 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Respondent J.C. ("Father") appeals the juvenile court's order terminating his parental rights to H.C. and T.C. Father alleges that the trial court erred in terminating his parental rights to H.C. and T.C. because it abrogated its responsibility to ensure that his due process rights were protected by permitting the termination hearing to continue after his telephonic presence at the hearing was severed. Concluding that Father has waived this issue for consideration on appeal, we affirm.

FACTS AND PROCEDURAL HISTORY

Father has two children, H.C. and T.C. (collectively "the children") at issue in this appeal.[1] H.C. was born on July 11, 2001, and T.C. was born on October 8, 2002. Father has not seen the children since 2005, and has been incarcerated in Florida since the "beginning of 2006" after he was convicted of kidnapping and attempted kidnapping, with the intent to do bodily harm or terrorize. Tr. p. 188. Father is from Guatemala, and will be deported to Guatemala upon his release from prison in Florida.

On October 28, 2008, the Department of Child Services ("DCS") removed the children from Mother's care due to Mother's state of extreme intoxication and ensuing arrest for a probation violation. The children were subsequently determined to be Children in Need

[1] The trial court's order terminated both Father's and T.D.'s ("Mother") parental rights to the children. The termination of Mother's parental rights is not at issue in this appeal.

of Services ("CHINS"). On July 24, 2009, DCS filed a petition to involuntarily terminate Father's and Mother's (collectively "Parents") parental rights to the children.[2] Father filed a motion for a transport order on April 13, 2010. The trial court denied Father's motion, but ruled that Father could appear telephonically for the scheduled fact-finding hearing.

On May 5, 6, and 7, 2010, the trial court held a fact-finding hearing on DCS's termination of parental rights petition. Father was represented by counsel throughout the fact-finding hearing. Near the end of the second day of the fact-finding hearing, the trial court was notified that the correctional officers at the penal facility in Florida in which Father was incarcerated would be disconnecting Father's telephonic access to the proceedings for the day.

Upon learning that Father's telephonic access to the proceedings was about to be disconnected, the trial court discontinued Father's counsel's cross-examination of the DCS case manager assigned to the case until Father could be present telephonically the next day. The trial court allowed various witnesses whose testimony related to Mother to testify or clarify their prior testimony after Father's telephonic access was disconnected. In addition, the trial court granted Father's counsel's request to allow one of Father's witnesses to testify after Father's telephonic access had been disconnected because the witness was scheduled to return to California before the termination proceedings could continue with Father present. This witness testified in support of Father's preferred placement for the children. The trial court then suspended the fact-finding hearing for the day. The fact-finding hearing resumed

[2] The original petition seeking to terminate Father's parental rights was amended on November 5, 2009.

the next day, and Father was present telephonically. On May 21, 2010, the trial court issued an order terminating Parents' parental rights to the children.

DISCUSSION AND DECISION

The Fourteenth Amendment to the United States Constitution protects the traditional right of a parent to establish a home and raise his children. *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 145 (Ind. 2005). Further, we acknowledge that the parent-child relationship is "one of the most valued relationships of our culture." *Id*. However, although parental rights are of a constitutional dimension, the law allows for the termination of those rights when a parent is unable or unwilling to meet his responsibility as a parent. *In re T.F.*, 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), *trans. denied*. Therefore, parental rights are not absolute and must be subordinated to the children's interest in determining the appropriate disposition of a petition to terminate the parent-child relationship. *Id*.

The purpose of terminating parental rights is not to punish the parent but to protect the children. *Id*. Termination of parental rights is proper where the children's emotional and physical development is threatened. *Id*. The juvenile court need not wait until the children are irreversibly harmed such that their physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id*.

I. Due Process Concerns

Initially, we note that Father does not challenge the sufficiency of the trial court's findings in support of termination under Indiana Code section 31-35-2-4 (2009). Rather, Father argues that his due process rights were violated by the trial court's decision to allow

the termination proceedings to continue after the correctional officers at the penal facility in Florida in which he is incarcerated disconnected him for the day from the proceedings. The DCS argues that Father waived any argument that he was deprived of his constitutional due process rights during the termination proceedings.

"It is well established that we may consider a party's constitutional claim waived when it is raised for the first time on appeal." *Hite v. Vanderburgh Cnty. Office of Family & Children*, 845 N.E.2d 175, 180 (Ind. Ct. App. 2006) (citing *McBride v. Monroe Cnty. Office of Family & Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003)). Our review of the record reveals that neither Father nor his counsel requested a continuance of the termination hearing until Father could be telephonically present the next day or objected to the trial court's decision to continue with day two of the termination proceedings. Moreover, Father's counsel even specifically requested permission to call a witness after Father had been disconnected from the proceedings. Thus, Father's argument regarding the alleged due process violation is waived on appeal. *See id*. (providing that father waived his argument that his due process rights were violated during the termination proceedings); *In re S.P.H.*, 806 N.E.2d 874, 877-78 (Ind. Ct. App. 2004) (providing that father waived his argument that his due process rights were violated during the involuntary termination proceeding); *McBride*, 798 N.E.2d at 195 n.4 (providing that "[t]o preserve her constitutional claim for appeal, McBride could and should have raised her due process argument during the termination proceedings"); *In re K.S.*, 750 N.E.2d 832, 834 n.1 (Ind. Ct. App. 2001) (providing that mother's alleged violations of her due process rights because of the trial

court's non-compliance with statutory requirements governing pre-termination proceedings was waived because a party may not raise an issue for the first time on appeal).

Waiver notwithstanding, Father may be entitled to relief on appeal if the trial court's action amounted to fundamental error. *S.M. v. Elkhart Cnty. Office of Family & Children*, 706 N.E.2d 596, 599 (Ind. Ct. App. 1999) (providing that "[t]here is, however, an exception to the waiver requirement: if the ruling at issue was fundamental error, this court must reverse the trial court regardless of the lack of objection"). The fundamental error doctrine applies to egregious trial errors. *Id*. at 600. "In order for this court to overturn a trial court ruling based on fundamental error, the error must have been 'a clearly blatant violation of basic and elementary principles, *and* the harm or potential for harm therefrom must be substantial and appear clearly and prospectively.'" *Id*. (quoting *Reynolds v. State*, 460 N.E.2d 506, 508 (Ind. 1984)) (emphasis in original). The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule. *Purifoy v. State*, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005), *trans. denied*.

The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. *In re E.E.*, 853 N.E.2d 1037, 1043 (Ind. Ct. App. 2006), *trans. denied*. It is well-settled that the right to raise one's own children is an "essential, basic right that is more precious than property rights." *In re In re C.C.*, 788 N.E.2d 788 N.E.2d 847, 852 (Ind. Ct. App. 2003), *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. *Tillotson v. Clay Cnty. Dept. of Family & Children*, 777 N.E.2d 741, 745 (Ind. Ct. App. 2002), *trans. denied*. Thus, when a state seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of the due process clause. *Lawson v. Marion Cnty. Office of Family & Children*, 835 N.E.2d 577, 579 (Ind. Ct. App. 2005). The nature of the process due in a termination of parental rights proceeding turns on the balancing of three factors: (1) the private interests affected by the proceeding, (2) the risk of error created by the State's chosen procedure, and (3) the countervailing governmental interest supporting use of the challenged procedure. *In re C.G.*, 933 N.E.2d 494, 502 (Ind. Ct. App. 2010).

In this case, 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 children, which, again, has been recognized as one of the most valued relationships in our culture. *Id.* Moreover, it is well-settled that the right to raise one's children 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 the children 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 children involved. *Id*. Because both parties have substantial interests in the proceeding, we will focus our review on the third factor, which is the risk of error created by the trial court's actions.

Here, even assuming that the trial court's decision to continue the termination proceedings after Father was disconnected from the proceedings amounted to error, the harm from such error was not substantial enough to rise to the level of fundamental error. The record reveals that the trial court, upon learning that Father's telephonic access to the proceedings was about to be disconnected, discontinued Father's counsel's cross-examination of the DCS case manager assigned to the case until Father could be present telephonically the next day. Father's counsel was present for the remaining portion of day two of the termination proceedings, during which the trial court allowed various witnesses to either testify or clarify their prior testimony as it related to Mother. Father's counsel then requested permission to question one of Father's witnesses who was scheduled to return to California before the termination proceedings could continue with Father present. This witness testified in support of Father's preferred placement for the children. In the end, only one witness testified regarding Father after his telephonic access to the proceedings was disconnected, and the witness in question testified on Father's behalf at Father's counsel's request. Furthermore, it would have arguably been more prejudicial to Father for the trial court to deny Father's witness the opportunity to testify on Father's behalf. Because none of the testimony put forward during the short period in which Father was unable to access the proceedings was prejudicial to Father or put him at risk of substantial harm, we conclude that the alleged harm arising from the trial court's decision to continue with day two of the termination proceedings after Father's telephonic access to the proceedings was disconnected was not substantial enough to be deemed fundamental error. *See S.M.*, 706 N.E.2d at 600

(providing that given that the children's testimony reiterated other evidence presented to the trial court, the harm arising from the procedural error in presenting their testimony without Mother present in the room was not substantial enough to be deemed fundamental error). As such, Father waived the error by failing to object at trial. *See id*.

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.