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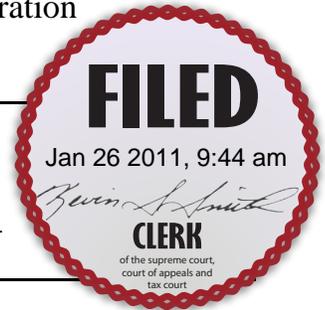
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**IN THE
COURT OF APPEALS OF INDIANA**



IN THE MATTER OF THE INVOLUNTARY)
TERMINATION OF THE PARENT-CHILD)
RELATIONSHIP OF: T.T. and C.T., MINOR)
CHILDREN,)
)
and,)
)
A.T., Mother,)
)
Appellant-Defendant,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES,)
)
Appellee-Plaintiff.)

No. 29A05-1008-JT-475

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Paul Felix, Judge
The Honorable Todd L. Ruetz, Master Commissioner
Cause No. 29C01-1003-JT-481 AND 29C01-1003-JT-482

January 26, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

A.T. (“Mother”) appeals the termination of the parent-child relationship with her two children, T.T. and C.T.¹ We affirm.

Issues

Mother raises two issues, which we restate as:

- I. whether she was denied due process by the manner in which the children were removed from her custody; and
- II. whether there is sufficient evidence to support the termination of her parental rights.

Facts

In January 2008, Mother and her five children, including her two sons, T.T. and C.T., and her three daughters, lived with Mother’s mother and stepfather and Mother’s sister and her two children in Carmel. At that time, T.T. was three years old, and C.T.

¹ The pleadings and orders for T.T.’s and C.T.’s CHINS and termination proceedings are substantially similar. We note, however, that Mother’s arguments regarding the findings of fact seem to be based on the termination order relating to T.T. because that order includes an additional finding.

was approximately three months old. On January 24, 2008, the Department of Child Services (“DCS”) received a report that Mother’s home was “disgusting.” App. p. 222.

During DCS’s investigation, family case manager Jessica Sherman initially noted that Mother had a past substantiated history with DCS involving an unsanitary environment and medical neglect. On January 31, 2008, Sherman made an unannounced visit to the home. Mother, her mother, her sister, and T.T. were present. Mother informed Sherman that the entire family was leaving the home that evening and was scheduled to move to Florida in the morning. Sherman noticed a strong odor of cat urine upon entering the residence and saw a large amount of clothing on the floor throughout the home, a piece of pizza on the kitchen floor, and dirty dishes piled in the sink. Although the family stated that they were packing for their move, Sherman observed many unpacked items. Sherman reported dirty diapers throughout the home, feces in a child’s training toilet, and dirt or feces on the laundry room floor. Sherman observed an inadequate number of bedrooms for the eleven residents.

At that point, a supervisor instructed Sherman to advise Mother to clean the home and to inform them that she would return the next day. Mother’s mother became upset and told Sherman that the children would be staying at a hotel that night and the family was leaving for Florida the next day. The family did not agree to allow Sherman to see the children at the home and insisted she “track them down herself if interested in finishing the investigation.” Id.

After reviewing photographs and family history with her supervisors, Sherman was instructed to take protective custody of Mother’s children. With the assistance of

law enforcement officers and over Mother's objections, the children were removed from Mother's custody and placed in foster care. During the children's removal from the home, DCS learned that Mother's mother and stepfather had guardianship of the Mother's three daughters.

On February 4, 2008, DCS filed a request to file petitions alleging the children were children in need of services ("CHINS"). Following a hearing, the trial court found that detention was essential to protect the children. That day, the trial court also authorized the filing of CHINS petitions. The children were later determined to be CHINS.

Although Mother initially remained in Indiana, she eventually moved to Florida to live with her mother and stepfather. During the course of the CHINS proceedings, Mother was ordered to comply with the Florida agencies responsible for completing a home study, cooperate with a parenting assessment and complete any recommended services, obtain and maintain stable housing that met the health and safety requirements determined by DCS or the Florida agencies, notify DCS of any change in her living situation, ensure the interior of her home remained free of cigarette smoke and lice, and establish paternity of C.T. On June 25, 2008, Mother's visitation with the children was suspended because of her failure to appropriately address her continued lice infestation.

As of February 2009, Mother had completed parenting classes, a mental health assessment, and a substance abuse assessment. Mother was also participating in intensive home based services and was living with her mother and stepfather.

In August 2009, a Florida agency informed DCS that it had conducted a home study of Mother. It concluded that Mother was unemployed, living with her mother and stepfather, not financially able to care for the children, and not taking medication prescribed for depression, anxiety, and panic attacks. It noted that two of Mother's three references voiced concerns about her parenting and that issues arose in Mother's background screen. Based on those circumstances, the Florida agency was unwilling to approve placement of the children with Mother and recommended that DCS send a new request asking the children to be placed with Mother's mother and stepfather. DCS did not make such a request regarding T.T. and C.T.

In an October 2009 order, the trial court approved a concurrent plan for reunification and termination. Mother then returned from Florida and was observed in several supervised visitations with the children. A bonding assessment was completed.

Following a December 2009 hearing, the trial court determined that Mother's reunification with T.T. and C.T. could not be pursued and recommended a permanency plan of adoption. The trial court also approved the reunification of the three girls with their guardians, Mother's mother and stepfather, in Florida.

On March 25, 2010, DCS filed a petition for the involuntary termination of Mother's parental rights to T.T. and C.T. The petition alleged in part that the conditions that resulted in the children's removal or the reasons for placement outside the home of the parents would not be remedied or that the continuation of the parent-child relationship posed a threat to the well-being of the children. On June 3, 2010, a final hearing on the

termination petition was conducted. On July 7, 2010, the trial court entered its order terminating Mother's parent-child relationship with T.T. and C.T. Mother now appeals.

Analysis

I. Due Process

Mother contends the decision terminating her parental rights must be vacated because she was denied due process when DCS removed the children from her home as she was moving. Mother claims, "the allegedly negligent housekeeping did not create an emergency situation sufficient to justify removal of the children on the day when the family was leaving their poorly kept home for a new and distant location." Appellant's Br. p. 30. She goes on to argue, "Once her children were taken, Mother was placed in an untenable position of having to choose between her own survival, which depended upon the shared resources of her parents, and maintaining physical proximity of her children."

Id.

Mother acknowledges that she raises this issue for the first time on appeal. We have previously held that a due process claim may be waived by failing to timely raise it. In re A.P., 882 N.E.2d 799, 805 (Ind. Ct. App. 2008) (citing Troxel v. Troxel, 737 N.E.2d 745, 752 (Ind. 2000) (waiving a due process claim by raising it for the first time in a motion to correct error)). Accordingly, this issue is waived. Nevertheless, in an apparent attempt to avoid waiver, Mother mentions the doctrine of fundamental error. Even assuming Mother adequately asserts fundamental error, she has not established error, let alone fundamental error.

In addition to various statutory protections afforded parents, the Due Process Clause of the United States Constitution prohibits state action depriving a person of life, liberty, or property without a fair proceeding. In re A.B., 922 N.E.2d 740, 744 (Ind. Ct. App. 2010). 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. “Thus, when the State seeks to terminate a parent-child relationship, it must do so in a manner that meets the constitutional requirements of the due process clause.” Id.

The phrase due process, although not precisely defined, embodies a requirement of “fundamental fairness.” Id. Assessing whether a parent in a termination proceeding received due process 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. Id. “The balancing of these factors recognizes that although due process is not dependent on the underlying facts of the particular case, it is nevertheless ‘flexible and calls for such procedural protections as the particular situation demands.’” Id. (quoting Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 902 (1976)).

It is settled that, in termination cases, both the private interests of the parent and the countervailing governmental interests that are affected by the proceeding are substantial. Id. Thus, the analysis turns on the risk of error created by the challenged procedure. Id. at 745.

Mother contends that, because the children were not in imminent danger, DCS’s intervention was unwarranted and unlawful. To the contrary, Sherman prepared a

lengthy report documenting her investigation. The document explained that the family was previously involved with DCS under similar circumstances, that the condition of the house was unacceptable, and that the family was moving and unwilling to allow her to follow up. Only after Sherman consulted with her supervisors were the children removed from the home. The resulting CHINS and termination proceedings apparently have continued in accordance with the statutory process. Moreover, Mother's other three children were eventually returned to their guardians' custody, making it improbable that the emergency removal necessarily resulted in the eventual termination of Mother's parental rights. We are not convinced that the emergency removal of the children created a risk of error in the outcome of the proceedings so as to deny Mother due process.

II. Sufficiency of the Evidence²

Mother argues there is insufficient evidence to support the termination of her parental rights. "When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility." *In re I.A.*, 934 N.E.2d 1127, 1132 (Ind. 2010). We consider only the evidence and reasonable inferences that are most favorable to the judgment and give "due regard" to the trial court's unique opportunity to judge the credibility of the witnesses. *Id.* (quoting Ind. Trial Rule 52(A)). When, as it did here, the trial court enters findings of fact and conclusions, we apply a two-tiered standard of review. *Id.* "First, we determine whether the evidence supports the findings, and second

² After the close of evidence at the termination hearing, the trial court stated that DCS presented clear and convincing evidence to support the termination of the parent-child relationships and that findings and conclusions would be forthcoming. At that point, another case worker testified regarding the ongoing placement of the other children with Mother's mother and stepfather. Because that testimony did not involve T.T.'s or C.T.'s CHINS or termination proceedings, we will not consider it for purposes of this appeal.

we determine whether the findings support the judgment.” Id. We will set aside the trial court’s judgment only if it is clearly erroneous, which occurs when the findings do not support the trial court’s conclusions or the conclusions do not support the judgment. Id.

Effective March 12, 2010, a petition to terminate the parent-child relationship must allege:

(A) that one (1) of the following is true:

(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.

(iii) The child has been removed from the parent and has been under the supervision of a county office of family and children or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child;

(B) that one (1) of the following is true:

(i) There is a reasonable probability that the conditions that resulted in the child’s removal or the reasons for placement outside the home of the parents will not be remedied.

(ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.

(iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;

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

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

I.C. § 31-35-2-4(b)(2). DCS has the burden to prove these allegations by clear and convincing evidence. I.A., 934 N.E.2d at 1133.

Mother argues that there is insufficient evidence to support the trial court's findings and conclusions that the conditions resulting in the children's removal or the reasons for placement outside the home will not be remedied or that the continuation of the parent-child relationship poses a threat to the well-being of the children.³ Because the statute is written in the disjunctive, we only address whether DCS proved there is a reasonable probability that the conditions resulting in the children's removal or the reasons for placement outside Mother's home will not be remedied. See Bester, 839 N.E.2d at 148 n.5.

Mother specifically challenges many of the trial court's findings and the resulting conclusions. For example, Mother asserts that she had income and housing while she lived with her parents, that she participated in parenting classes and completed substance abuse and mental health evaluations, that her criminal history is minor, that she was not

³ The statute was amended effective March 12, 2010, to include the language regarding two prior CHINS adjudications. See I.C. § 31-35-2-4(b)(2)(B)(iii). In its March 25, 2010 petition, DCS alleged that the conditions that resulted in the children's removal or reasons for placement outside the home of the parents will not be remedied or that the continuation of the parent-child relationship poses a threat to the well-being of the child. The petition did not reference any prior CHINS adjudications. On appeal, DCS argues that the newly amended statute is applicable. See Appellee's Br. p. 21 n.1. Mother's entire reply brief is devoted to the applicability of the amended statute. Even assuming that the amendment applies, because the statute is written in the disjunctive, DCS was only required to plead and prove one of the three elements. The pleading and proving of the third factor is not dispositive of the outcome of this appeal.

referred for additional mental health services, that the trial court focused only on negative comments she made during the 2009 visitations, that she did her best to maintain proximity to her children during the case, and that she should not be blamed for T.T.'s pre-existing neurological problem. Mother's challenges, however, are requests to reweigh the evidence, which we cannot do.⁴ See I.A., 934 N.E.2d at 1132.

Mother repeatedly asserts that she now lives with her other three children in her home. To be clear, however, at the time of the termination hearing, Mother's other three children lived in a home with Mother's mother and stepfather, under their guardianship. It was unclear whether Mother lived in that home. According to the case manager's testimony, it had been relayed to her that Mother was not in the home and that her location was unknown, and Mother had not informed DCS where she was residing.

Mother suggests that the situation that resulted in the removal of the children was remedied the next day when the family moved to Florida. The fact remains, however, that the children were placed outside of the home based on their living conditions. At the time of the termination hearing, Mother had not obtained a home of her own. Even if her mother and stepfather's home was appropriate for the boys,⁵ it was not clear whether Mother was even living there. Further, although Mother's mother and stepfather may

⁴ Mother also points out that only T.T. was home when DCS investigated the report and that only he was actually "removed" from the home. To the extent she argues that C.T. was not removed from the home because he was not at home during the DCS investigation, we believe this too literal a reading of the word "removal."

⁵ At the March 29, 2010 initial hearing, a family case manager indicated a Florida caseworker's concerns about the conditions of the home, including dog feces on the floor throughout the home and dried food, dirty dishes, and dirty clothes on the floor. The Florida caseworker's concerns about the conditions were "significant." Tr. p. 118. Mother's mother was at the hearing and acknowledged that the house was "pretty bad" that morning. Id. at 119.

have been suggested as possible guardians for the children, Florida could not approve the placement of the children with Mother. Finally, Mother was unemployed and not independently able to support herself or to provide a home.

This evidence, taken with the fact that DCS had previously removed T.T. from Mother's home for almost two years based in part on poor living conditions, supports the trial court's findings and conclusions that the conditions that resulted in the children's removal or the reasons for placement outside Mother's home would not be remedied. There is sufficient evidence to support the termination of Mother's parental rights.

Conclusion

The emergency removal of the children from Mother's home did not violate her due process rights. There is sufficient evidence to support the termination of her parental rights. We affirm.

Affirmed.

BAKER, J., and VAIDIK, J., concur.