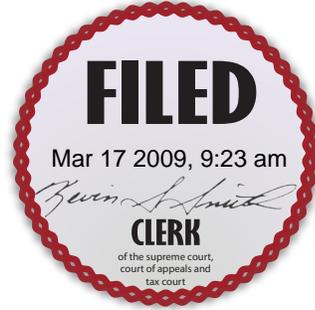


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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE INVOLUNTARY)
TERMINATION OF PARENT-CHILD)
RELATIONSHIP OF J.F. and D.F., Minor)
Children, and D.M, Father of D.F.,)

D.M.,)
Appellant-Respondent,)

vs.)

No. 49A02-0808-JV-713

MARION COUNTY DEPARTMENT OF)
CHILD SERVICES,)
Appellee-Petitioner,)

CHILD ADVOCATES, INC.,)
Co-Appellee-Guardian ad Litem.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary Chavers, Judge Pro Tem
The Honorable Larry Bradley, Magistrate
Cause Nos. 49D09-0608-JT-33157

March 17, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Dwayne M. (“Father”) appeals the juvenile court’s order terminating his parental rights to his child D.F. On appeal, Father argues that the termination of his parental rights should be set aside due to the lack of reasonable efforts on the part of the Marion County Department of Child Services (“DCS”) to preserve and reunify the family. We affirm.

Facts and Procedural History

On May 7, 2005, Justina F. (“Mother”) gave birth to D.F.¹ Mother alleged that Father was D.F.’s biological father, and a DNA test later established this in April 2007. At the time D.F. was born, both Mother and D.F. tested positive for opiates. On May 15, 2005, DCS entered into an informal adjustment with Mother. Under the informal adjustment, Mother was required to undergo drug testing and would receive home-based counseling and assessments. On May 25, 2005, Mother tested positive for cocaine use. On July 13, 2005, DCS filed a petition alleging that D.F. was a child in need of services (“CHINS”). In the petition, DCS alleged that Father’s whereabouts were unknown. DCS eventually learned that Father was incarcerated in Marion County. On August 31, 2005, Father admitted that D.F. was a CHINS, and D.F. was placed in foster care, where he remained until the termination of parental rights hearing.

In November 2005, Father was convicted in Marion County of theft and auto theft. Father was not released from prison until February 2007. While he was incarcerated, DCS had no contact with Father. Father did not request any services from DCS while he was incarcerated, and there is no evidence that Father participated in any services provided by the prison.

In February 2007, DCS began providing services to Father. A parenting assessment was completed. Father was also referred to substance abuse treatment, but did not participate in that

¹ During the termination of parental rights hearing, Mother consented to the adoption of D.F. Therefore, her rights are not at issue in this appeal.

program. From the time D.F. was placed in foster care in 2005 until the termination hearing in 2008, Father visited D.F. once in February 2007.

Between March 2007 and January 2008, DCS had no contact with Father and no services were provided to him. Between June 27, 2007 and December 21, 2007, Father was incarcerated, having again been convicted of theft and auto theft. In January 2008, Father participated in an interview with DCS regarding allegations that he had molested D.F.'s sister, J.F. Thereafter, DCS had no further contact with Father. On April 15, 2008, Father was convicted of two counts of auto theft and one count of resisting law enforcement. At the time of the termination of parental rights hearing, Father was incarcerated, and his projected release date was in November 2010.

On August 11, 2006, DCS filed a petition to involuntarily terminate Mother's and Father's parental rights to D.F. The juvenile court held hearings on the petition on June 16 and July 1, 2008. During the hearings, testimony was given indicating that D.F. suffers from fetal alcohol syndrome, which can cause learning disabilities and problems processing language. D.F. also has sensory integration problems, which means that he has problems processing information from his senses.

On July 15, 2008, the juvenile court issued an order terminating Father's parental rights to D.F. In the order, the juvenile court made the following relevant findings:

4. [Father's] participation in the CHINS and termination proceedings consisted of attending a few court appearances, and only two between November of 2006 and January of 2008. He has not maintained contact with his family case managers.
5. [Father's] participation in services toward reunification amounted to completing a parenting assessment and visiting [D.F.] approximately one time. A referral to a substance abuse treatment program was not attended. [DCS] did not refer additional services and no documentation was presented that [Father] completed programs while incarcerated.

6. [Father] is currently incarcerated on convictions of Resisting Law Enforcement and two convictions for Auto Theft, Receiving Stolen Auto Parts. His projected release date is November 17, 2010. During the time since the CHINS was filed, [Father] was convicted of at least two other crimes of Theft, Receiving Stolen Property.

7. There is a reasonable probability that the conditions that resulted in the child's removal and placement outside the home will not be remedied. [Father's] whereabouts were unknown at the time of the filing of the CHINS and he was therefore unavailable to parent. By his own actions and choices, he will remain unavailable until November of 2010. In looking at [Father's] criminal history, there is a reasonable probability that he will remain unavailable to parent by becoming re-incarcerated. Further, [Father] failed to participate in services beyond a parenting assessment. His lack of participation and lack of effort at visiting [D.F.] exhibits an unwillingness to be an appropriate parent.

8. [D.F.] has been diagnosed with Fetal Alcohol Syndrome and as a result, has special needs and received developmental therapy. He has a neurological sensory integration problem which results in behavior that must be understood and supervised vigilantly. He requires a routine, constant environment in a trusting environment.

9. [D.F.] has resided with his sibling in foster care since he was two months old. This placement is pre-adoptive. The foster parents have provided [D.F.] with therapy and medical attention to meet his special needs.

10. Continuation of the parent-child relationship poses a threat to the well being of the child. [Father] cannot meet [D.F.'s] needs while incarcerated.

11. Termination of the parent-child relationship is in the best interests of the child. Termination, providing the opportunity for adoption, would provide [D.F.] with permanency and stability with parents who understand and meet his special needs.

Appellant's App. pp. 18-19. Father now appeals.

Discussion and Decision

Father argues that the juvenile court erred when it terminated his parental rights to D.F. Under the Fourteenth Amendment to the United States Constitution, parents have the right to establish a home and raise their children. In re B.D.J., 728 N.E.2d 195, 199 (Ind. Ct. App. 2000). However, the law allows for the termination of these rights when an individual is unable or unwilling to fulfill his or her responsibilities as a parent. Id. at 199-200. This policy balances a

parent's constitutional rights to the custody of their children with the State's limited authority to interfere with this right. Id. at 200. "Because the ultimate purpose of the law is to protect the child, the parent-child relationship will give way when it is no longer in the child's interest to maintain this relationship." Id.

In reviewing termination proceedings on appeal, this court will not reweigh the evidence or assess the credibility of the witnesses. In re L.B., 889 N.E.2d 326, 336 (Ind. Ct. App. 2008). We only consider the evidence that supports the juvenile court's decision and reasonable inferences drawn therefrom. Id. Where, as here, the juvenile court includes findings of fact and conclusions thereon in its order terminating parental rights, our standard of review is two-tiered. Id. First, we must determine whether the evidence supports the findings, and, second, whether the findings support the legal conclusions. Id.

In deference to the juvenile court's unique position to assess the evidence, we will not set aside the court's findings and judgment unless they are clearly erroneous. Id. A finding of fact is clearly erroneous when there are no facts or inferences drawn therefrom to support it. In re Involuntary Termination of Parental Rights of S.P.H., 806 N.E.2d 874, 879 (Ind. Ct. App. 2004). A judgment is clearly erroneous only if the legal conclusions made by the juvenile court are not supported by its findings of fact, or the conclusions do not support the judgment. Id.

Father specifically contends that the juvenile court's order terminating his parental rights should be reversed because DCS did not provide him with any family services. He notes that under Indiana Code section 31-34-21-5.5, DCS is obligated to "make reasonable efforts to preserve and reunify families[.]" He concludes that "making no efforts to provide family services to an incarcerated parent, as occurred in this case, cannot constitute 'reasonable efforts' on the part of DCS." Appellant's Br. p. 9.

Contrary to Father's assertion, DCS did in fact provide services to Father. In February 2007, during the brief period that Father was not incarcerated, DCS performed a parenting assessment. DCS also referred Father to substance abuse treatment, but he chose not to participate in that program. During the time that Father was incarcerated, he never contacted DCS to request services, and there is no evidence that he participated in any services provided in prison. "[A] parent may not sit idly by without asserting a need or desire for services and then successfully argue that he was denied services to assist him with his parenting." In re B.D.J., 728 N.E.2d at 201. Therefore, because DCS provided services to Father, it satisfied its obligation under Ind. Code § 31-34-21-5.5 to "make reasonable efforts to preserve and reunify families[.]"

Even if DCS had provided no services to Father, the juvenile court could still have properly terminated Father's parental rights. This Court has previously stated:

[T]he law concerning termination of parental rights does not require [DCS] to offer services to the parent to correct the deficiencies in childcare Rather, while a participation plan serves as a useful tool in assisting parents in meeting their obligations, and while county departments of public welfare routinely offer services to assist parents in regaining custody of their children, termination of parental rights may occur independently of them, as long as the elements of Ind. Code § 31-35-2-4 are proven by clear and convincing evidence.

In re B.D.J., 728 N.E.2d at 201.

Here, DCS presented sufficient evidence to prove the elements of Ind. Code § 31-35-2-4. Under Ind. Code § 31-35-2-4, to involuntarily terminate a parent-child relationship, DCS must establish 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;
- ***
- (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) (1998 & Supp. 2006). These elements must be proved by clear and convincing evidence. Ind. Code § 31-34-12-2 (1998).

The evidence introduced at the termination of parental rights hearing indicated that D.F. was removed from Mother and Father's care in 2005 and remained in foster care at the time of the hearing. Thus, D.F. had been removed from Mother and Father's care for at least six months. Additionally, DCS case manager Erma Watson testified that DCS' plan for the future care and treatment of D.F. was adoption.

The trial court found that there was a reasonable probability that the conditions that resulted in D.F.'s removal and placement outside the home would not be remedied. In order to determine whether there is a reasonable probability that the conditions that resulted in the removal of the child will not be remedied, the juvenile court should judge a parent's fitness to care for his or her child at the time of the termination hearing, taking into consideration evidence of changed conditions. A.F. v. Marion County Office of Family & Children, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), trans. denied. However, the juvenile court must also evaluate the parent's habitual patterns of conduct. Id. "Such an evaluation assists in determining the probability of future neglect or deprivation of the child, as well as remedial possibilities." Id. Pursuant to this rule, courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment. Id. Additionally, the juvenile court can properly consider the services offered by DCS to the parent and the parent's response to those services as evidence

of whether conditions will be remedied. Id. In order to carry its burden, DCS “need establish only that there is a reasonable probability that the parent’s behavior will not change.” In re Kay. L., 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In this case, Father’s criminal history is of particular concern. At the time the CHINS petition was filed, Father was unavailable to parent D.F. because he was incarcerated. Father was released from prison in February 2007, but was later convicted of theft and auto theft in June 2007. Father was incarcerated on those convictions until December 21, 2007. Thereafter, on April 15, 2008, Father was convicted of two counts of auto theft and one count of resisting law enforcement. At the time of the termination hearing, Father was still incarcerated and, thus, unavailable to care for D.F. Father is not scheduled to be released from prison until November 2010. The evidence supports the juvenile court’s finding that given Father’s criminal history “there is a reasonable probability that [Father] will remain unavailable to parent by becoming re-incarcerated.” Appellant’s App. p. 19.

Additionally, Father did not participate in the substance abuse treatment program that he was referred to by DCS, did not request any services from DCS while in prison, did not participate in any services provided by the prison, and has only visited D.F. once. This evidence supports the juvenile court’s finding that Father’s “lack of participation and lack of effort at visiting [D.F.] exhibits an unwillingness to be an appropriate parent.” Id. Sufficient evidence was presented to support the juvenile court’s finding that there is a reasonable probability that the conditions that resulted in the removal of D.F. from Father’s care will not be remedied.

The juvenile court also found that termination of the parent-child relationship was in D.F.’s best interests. In determining what is in the best interests of the child, the trial court is required to look at the totality of the evidence. A.F., 762 N.E.2d at 1253. “In doing so, the trial court must subordinate the interests of the parents to those of the children involved.” Id. A trial

court need not wait until the children are irreversibly influenced such that their physical, mental and social growth is permanently impaired before terminating the parent-child relationship. Id. “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 continuation of the parent-child relationship is contrary to the child’s best interest.” In re B.D.J., 728 N.E.2d at 203 (quoting Matter of Adoption of D.V.H., 604 N.E.2d 634, 638 (Ind. Ct. App. 1992), trans. denied).

At the time D.F. was placed in foster care, Father was unable to provide D.F. with housing, stability, or supervision because he was incarcerated. This situation had not changed by the time of the termination hearing. At that time, Father remained unable to care for D.F. because he was incarcerated, and was not scheduled for release until November 2010. This evidence supports the juvenile court’s finding that termination of Father’s parental rights is in D.F.’s best interests.

Additionally, because he has been diagnosed with Fetal Alcohol Syndrome and neurological sensory integration problems, D.F. has special needs. While he remains incarcerated, Father cannot provide for D.F.’s special needs. Given his limited contact with D.F., Father lacks the necessary skills and experience to meet D.F.’s special needs. Sufficient evidence supports the juvenile court’s finding that termination of the parent-child relationship is in D.F.’s best interests.

Under these facts and circumstances, DCS presented sufficient evidence to prove the elements of Ind. Code § 31-35-2-4 by clear and convincing evidence.

Conclusion

DCS provided services to Father and, thus, satisfied its obligation under Ind. Code § 31-34-21-5.5 to “make reasonable efforts to preserve and reunify families[.]” Sufficient evidence was presented to support the juvenile court’s termination of Father’s parental rights to D.F.

Affirmed.

BAILEY, J., and BARNES, J., concur.