

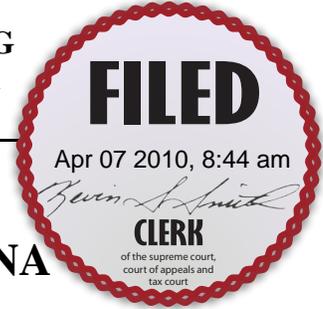
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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF:)
The Involuntary Termination of the)
Parent-Child Relationship of the Minor)
Children S.S., A.S., and C.S. and the Father, J.S.)
)
Father, J.S.,)
)
Appellant-Respondent,)
)
vs.)
)
DEPARTMENT OF CHILD SERVICES,)
)
Appellee-Petitioner,)
)
and)
)
CHILD ADVOCATES, INC.,)
)
Co-Appellee-Guardian ad Litem)

No. 49A02-0909-JV-901

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Larry E. Bradley, Magistrate
Cause Nos. 49D09-0903-JT-12107, 49D09-0903-JT-12108, and 49D09-0903-JT-12109

April 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

J.S. (“Father”) appeals three juvenile court judgments involuntarily terminating his parental rights to S.S., A.S., and C.S. We affirm.

Issues

Father raises the following issues for review:

- I. Was Father denied his due process rights based on the alleged failure of the Department of Child Services (“DCS”) to notify him or refer him for court-ordered services?
- II. Is the evidence sufficient to support the juvenile court’s judgments terminating his parental rights?

Facts and Procedural History

Father and F.S. (“Mother”)¹ are the parents of S.S., born June 27, 2003, A.S., born November 12, 2004, and C.S., born December 30, 2005. On August 23, 2007, DCS received a report of medical neglect regarding C.S.’s untreated seizures. During the investigation, on September 20, 2007, Father was arrested for domestic battery. As a result, he was placed under a criminal no-contact order with regard to Mother and the children. DCS removed the children from Mother’s care the next day. On September 25, 2007, DCS filed a petition alleging that S.S., A.S., and C.S. were children in need of services (“CHINS”) based on their parents’ failure to provide them with adequate and necessary food, clothing, shelter, medical care, education, and supervision. Petitioner’s Ex. 2. The CHINS petition further alleged that the parents

have failed to protect/inflicted physical injury to one of the children in the

¹ Mother filed adoption consents for all three children and is not a party to this appeal.

form of serious marks and bruises. The parents have failed to adequately address the medical needs of [C.S.] and have exposed the children to ongoing domestic violence. The children appear neglected, the parents are not attentive to their needs, and [A.S.] has sustained injuries consistent with physical abuse.

At this time, the children are endangered in the care of the parents and the children and family are in need of services.

Id.

On the date of the filing, Father was incarcerated. Mother submitted an agreed entry to the CHINS petition, and a factfinding hearing ensued as to Father on April 22, 2008. Father failed to attend the hearing, and the children were found to be CHINS. On June 10, 2008, the juvenile court entered a participation order, requiring Father to maintain contact with DCS and to complete numerous services, including home-based counseling, a parenting assessment, a domestic violence program, and a comprehensive family profile. Pet. Ex. 13.

Father was incarcerated off and on throughout the CHINS proceedings: from September 20 to December 10, 2007; March 23 to March 26, 2008; and May 28 to November 21, 2008. He completed a parenting assessment in November 2007, while incarcerated. During the times he was not incarcerated, Father did not maintain contact with his DCS family case manager (“FCM”), Brian Jensen. In December 2008, Father appeared in court, and the juvenile court ordered him to participate in services. Shortly thereafter, FCM Jensen sent a letter to Father’s last known address. In February 2009, Father contacted Jensen, who referred him for another parenting assessment to gauge progress.

On March 16, 2009, DCS filed a termination petition. The juvenile court held a hearing on July 29, 2009. On August 21, 2009, the court entered findings of fact and conclusions thereon terminating Father’s parental rights to S.S., A.S., and C.S. This appeal

ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Due Process

Father asserts that he was denied his constitutional due process rights based on DCS's alleged failure to provide the services required by the CHINS participation order. "The nature of 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." *Lawson v. Marion County Office of Family & Children*, 835 N.E.2d 577, 580 (Ind. Ct. App. 2005). A parent's interest in the accuracy and justice of the termination decision is commanding. *Id.*

The law concerning termination of parental rights does not contain a requirement that DCS prove that it offered services. *Jackson v. Madison County Dep't of Family & Children*, 690 N.E.2d 792, 793 (Ind. Ct. App. 1998), *trans. denied*. Nonetheless, when considering a parent's fitness to care for his children, the trial court may reasonably consider both the services offered and the parent's response to those services. *In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000).

[W]hile 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. Therefore, 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.

Id. (citation omitted).

Father argues that he did not sit idly by, but instead sought services from DCS. He relies on our decision in *A.P. v. Porter County Office of Family & Children*, 734 N.E.2d 1107 (Ind. Ct. App. 2000), *trans. denied* (2001), in which we reversed a termination judgment on procedural due process grounds even where the father did not actively seek services from the DCS. However, in *A.P.*, we were careful to point out that we were not adding an additional element to the termination statute requiring the DCS to prove referral for services; instead, we held that where the “record is replete with procedural irregularities throughout CHINS and termination proceedings that are plain, numerous, and substantial, we are compelled to reverse a termination judgment on procedural due process grounds.” *Id.* at 1118. In contrast to the present case, in *A.P.*, we enumerated seven procedural errors which, taken together, resulted in a deprivation of the father’s due process rights. *Id.* at 1117. We were careful to note, however, that

although we are not convinced that any one of the above irregularities by itself substantially increased the risk of error in the termination proceeding to the extent that appellants were deprived of due process, there is such an inherent increased risk of error because of the multiplicity of procedural irregularities.

Id. at 1118.

Here, Father claims that he sought services, believed that he was doing what he needed to do in order to receive services and achieve reunification, and was never notified of the circumstances that would result in termination of his parental rights. Father argues that he was waiting for DCS to provide the referrals for the services listed in the CHINS order.

Father completed two parenting assessments. The record indicates that Father's failure to complete any other services was due in part to his incarceration and in part to his own failure to appear and to keep DCS updated on the status of the no-contact order between him and the children. The two-year no-contact order was issued on September 21, 2007, in conjunction with Father's domestic battery charge. Father completed the parenting assessment portion of the comprehensive family profile, but because of the no-contact order, DCS could not proceed with the bonding assessment portion. When the criminal court lifted the no-contact order on June 17, 2008, DCS was not notified of the change. When Father appeared at the December 2, 2008 CHINS hearing, the juvenile court noted that a year had passed and ordered a new comprehensive family profile. Again, operating under the belief that the two-year no-contact order was still in force, FCM Jensen did not proceed with the bonding assessment portion. Even as of July 7, 2009, when the CHINS court sought and received the recommendation of the children's therapist that a bonding assessment was not advisable, Father failed to appear at the hearing on the matter.

In sum, any lack of services afforded to Father resulted as much from his own failure to appear and to keep DCS notified of both his whereabouts and the status of his no-contact order as from any procedural deficiency on the part of DCS. Thus, Father has failed to demonstrate that he was denied his right to procedural due process.

II. Sufficiency of Evidence

Father challenges the sufficiency of evidence supporting the juvenile court's judgment terminating his parental rights to S.S., A.S., and C.S. When reviewing a juvenile court's

order terminating a parent-child relationship, we neither reweigh evidence nor judge witness credibility; rather, we consider only the evidence and inferences most favorable to the judgment. *In re A.I.*, 825 N.E.2d 798, 805 (Ind. Ct. App. 2005), *trans. denied*. Here, the juvenile court entered extensive findings of fact and conclusions thereon. Thus, we apply a two-tiered standard of review and will not set aside the findings or judgment unless they are clearly erroneous. *Parmeter v. Cass County Dep't of Child Servs.*, 878 N.E.2d 444, 450 (Ind. Ct. App. 2007). First, we consider whether the evidence supports the factual findings. *Id.* Then, we consider whether the findings support the judgment. *Id.* “Findings are clearly erroneous only when the record contains no facts to support them either directly or indirectly.” *Id.* (citation and quotation marks omitted). A judgment is clearly erroneous if it relies on an incorrect legal standard. *Id.*

In *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143 (Ind. 2005), our supreme court stated,

The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. A parent’s interest in the care, custody, and control of his or her children is perhaps the oldest of the fundamental liberty interests. Indeed the parent-child relationship is one of the most valued relationships in our culture. We recognize of course that parental interests are not absolute and must be subordinated to the child’s interests in determining the proper disposition of a petition to terminate parental rights. Thus, parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities.

Id. at 147 (citations, quotation marks, and alteration omitted). In recognition of the seriousness with which we address parental termination cases, Indiana has adopted a clear

and convincing evidence standard. *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 377 (Ind. Ct. App. 2006), *trans. denied*.

To obtain a termination of the 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;
- (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) (emphasis added).

Father claims that the evidence is insufficient to support the juvenile court's findings and conclusions regarding the reasonable probability of remedied conditions and the threat to the children's well-being. We note, however, that subparagraph (b)(2)(B) is written in the disjunctive. Thus, DCS was required to establish, by clear and convincing evidence, only one of the two requirements of subsection (B). *In re I.A.*, 903 N.E.2d 146, 154 (Ind. Ct. App. 2009). Nonetheless, we will address both requirements.

When assessing whether there is a reasonable probability that the reasons for placement outside the parent's home will not be remedied, juvenile courts must consider the

parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. In this regard, courts have properly considered evidence concerning the parent's history of criminal conduct, substance abuse, neglect, and lack of adequate housing and employment. *Id.* A parent's failure to appear at court hearings reflects ambivalence toward changing the existing conditions. *A.F. v. Marion County Office of Family & Children*, 762 N.E.2d 1244, 1252 (Ind. Ct. App. 2002), *trans. denied*. In making its case, the "DCS need not rule out all possibilities of change; rather, [it] 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).

Here, the juvenile court entered the following findings relevant to this element:

3. [Father] has not demonstrated his ability or willingness to appropriately parent his children.
4. The children were found to be in need of services after a fact-finding hearing on April 22, 2008. [Father] was not incarcerated at the time of the fact-finding but failed to appear at the fact-finding hearing.
-
6. Due to an incident a week prior to the CHINS filing [Father] was incarcerated from September 20, 2007 to December 11, 2007. He had hit his wife in front of the children, knocking her into twenty-one month old C.S., who then hit a file cabinet. As a result, [Father] pled guilty to a Class D felony conviction for Domestic Battery.
7. [Father] has a six year history of anger and domestic violence against his wife in the presence of his children, and has been convicted three times for Battery or Domestic Battery. He has also abused drugs including Xanax, Klonopin, crack, and methamphetamine.

8. The CHINS Court ordered [Father] to participate in certain services, including completing a Comprehensive Family Profile and follow recommendations, complete home based counseling, and domestic violence classes. In addition, [Father] was to obtain and maintain suitable housing and secure a stable source of income to support the children.
9. At the time the services were ordered, [Father] was re-incarcerated for violating probation on the September 2007 Domestic Violence conviction. He was incarcerated from May 28, 2008 to November 21, 2008 on this violation. He had violated his probation once before which resulted in his incarceration from March 23, 2008 to March 26, 2008.
10. [Father] completed the first part of his Comprehensive Family Profile in late 2007 while in jail. The assessor recommended [Father] undergo a substance abuse program in addition to the other services ordered by the Court.
11. The second part of the Comprehensive Family Profile consisted of a bonding assessment between [Father] and his children. This assessment was not completed as a result of a two year no contact order between [Father] and the children that was issued on September 21, 2007. The no contact order was lifted on June 17, 2008, over a year prematurely. [DCS] was not notified of the no contact order being vacated, and if [Father] was notified, he did not inform [DCS].
12. There was no contact between [DCS] and [Father] from October 2007 until [Father] appeared at a court hearing on December 2, 2008, at which time a new assessment was ordered for [Father] since it had been over a year since the first Comprehensive Family Profile was done.
13. [Father] did the new assessment in March 2009 without the bonding assessment since [DCS] was unaware of the no contact order being vacated.
14. The CHINS Court sought out the recommendation of [S.S.'s] and [A.S.'s] therapist, Natalie Lantz, as to whether [Father should] be allowed to have a bonding assessment with the children. Based on Ms. Lantz[']s recommendation, the Court denied [Father's] request at a hearing on July 7, 2009 to see his children. [Father] failed to appear at the hearing to determine contact with his children.

....

19. There is a reasonable probability that the conditions that resulted in the removal and continued placement of the children outside the home will not be remedied by their father. [Father] has demonstrated a history of not being able or willing to participate in the children's lives and the CHINS case. Prior to December 2009, he did not contact [DCS] or participate in court proceedings during the periods when he was not incarcerated. He violated his probation twice during the CHINS proceedings which resulted in being placed back in jail and unavailable. After first appearing in court on December 2, 2008, it was not until late February 2009 that [Father] contacted family case manager Jensen although given contact information. He then failed to appear at important CHINS hearings on March 3, 2009 and July 7, 2009, and as accurately noted in this Court's file, [Father] has failed to attend two hearings in this termination case.

20. [N]ot terminating parental rights would also forestall the goal of providing permanency to the children given [Father's] lack of participation in the first fifteen months of the CHINS proceeding, and his inconsistent participation thereafter. [Father] concedes he is not ready at this time to have the children as he lacks housing and enough money, and family case manager Brian Jensen noted that significant services would be needed to achieve reunification.

Appellant's App. at 26-28.

Based on the foregoing, the juvenile court entered the following conclusion:

2. [DCS] has proved by clear and convincing evidence that there is a reasonable probability that conditions that resulted in the children's removal and placement outside the home will not be remedied by [Father]. It has been almost two years since the CHINS was filed and concerns of substance abuse, domestic violence and safety have not been addressed. Given [Father's] minimal efforts when not incarcerated and since first appearing in the CHINS matter, it is not reasonable to foresee the consistent compliance that would be needed to remedy conditions in the future.

Id. at 29.

Here, the record indicates that, although Father has completed two parenting assessments, he failed to stay in contact with DCS as ordered and has failed to complete

services aimed at addressing his substance abuse and his violent propensities. These activities also resulted in his accumulation of a criminal record that even he described as “so many cases it’s hard for me to remember.” Tr. at 160. His probation violations, which indicate his failure to respond to the penal system’s rehabilitation efforts, also demonstrate a lack of willingness or ability to remedy these conditions in order to be reunited with his children. Even when he was not incarcerated, he failed to attend more than one hearing during the pendency of the CHINS and termination proceedings. As such, the record supports the trial court’s finding that a reasonable probability exists that the conditions that led to the children’s removal and continued placement outside the home will not be remedied.

As for whether the continuation of the parent-child relationship poses a threat to the children’s well-being, the juvenile court need not wait until the children are irreversibly influenced by a deficient lifestyle before terminating the relationship. *In re E.S.*, 762 N.E.2d 1287, 1290 (Ind. Ct. App. 2002). Instead, “[w]hen the evidence shows that the emotional and physical development of child[ren] in need of services is threatened, termination of the parent-child relationship is appropriate.” *Id.*

Here, the juvenile court made the following finding regarding the threat to the children’s well-being:

20. The continuation of the parent-child relationship poses a threat to the well-being of the children. To reunite the children with their father at this time would put at risk the stability they have found Concerns of substance abuse, domestic violence and the children’s safety have yet to be addressed. [Father] completed domestic violence classes and anger management in 2004 as part of a plea agreement, but did not think the

classes were helpful. He was convicted of Domestic Battery afterward. He also did not find anger management classes to be beneficial, but more of a hindrance. He failed to complete a twenty-six week domestic violence program in 2007 because of a probation violation, and “did not know if he learned anything”. Since living with his parents in 2009, [Father’s] mother has not observed any drug usage but admits her son has made mistakes by drinking.

Appellant’s App. at 28. The record indicates that Father has a history of abusing both drugs and alcohol in his home. He also has a history of domestic violence against Mother in the presence of the children, and has struck one of the children on at least one occasion. In September 2007, DCS filed the CHINS petition based in part on A.S. sustaining injuries consistent with physical abuse and C.S. not receiving proper medical care. During the pendency of the CHINS proceedings, Father was incarcerated three different times, at least one of which was due to a probation violation, and he admitted that he had an extensive criminal history. Tr. at 160. Moreover, therapist Natalie Lantz testified that S.S. and A.S. feared Father and might relapse if reunified with him. *Id.* at 119, 123, 126. In sum, the record is replete with circumstances indicating that the children’s well-being would be threatened by continuing the parent-child relationship. Accordingly, we affirm.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.