

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.

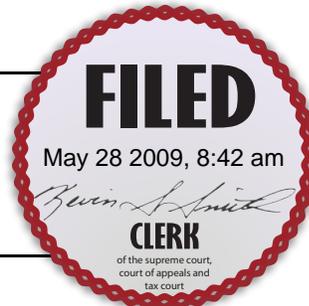
ATTORNEY FOR APPELLANT:

DANIEL B. SCHUETZ
Columbus, Indiana

ATTORNEY FOR APPELLEE:

HEATHER H. KESTIAN
Indiana Department of Child Services
Columbus, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



IN THE MATTER OF TERMINATION)
of the PARENT-CHILD RELATIONSHIP)
of T.M.,)
)
N.M.,)
)
Appellant-Respondent,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES, BARTHOLOMEW COUNTY)
OFFICE,)
)
Appellee-Respondent.)

No. 03A01-0903-JV-131

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
The Honorable Heather M. Mollo, Referee
Cause No. 03C01-0703-JT-553

May 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

N.M. (“Mother”) appeals the trial court’s involuntary termination of her parent-child relationship with B.M., her minor son. On appeal, Mother raises one issue, which we restate as whether the trial court improperly permitted an Indiana Department of Child Services (“DCS”) caseworker to testify to observations in a former co-worker’s written notes and, if so, whether the error warrants a new termination hearing. Concluding that any error in permitting the caseworker to so testify was harmless, we affirm.

Facts and Procedural History

In March 2005, DCS received information that B.M., who was eight years old at the time, was left to fend for himself for hours on end, including preparing his own meals and getting himself to school, because Mother would lock herself in her bedroom with friends to use illegal drugs. On April 5, 2005, DCS filed a petition to have B.M. adjudicated a child in needs of services (“CHINS”). The initial information received by DCS was at least partially substantiated, as Mother admitted during a July 19, 2005, hearing on the CHINS petition that she would regularly lock B.M. out of her bedroom so she could discuss using and selling illegal drugs. Given Mother’s admission, the trial court adjudicated B.M. to be a CHINS and ordered, among other things, that Mother participate in DCS-sponsored parenting services, which included visitation with B.M.; abstain from drugs; seek drug abuse treatment therapy; submit to random drug screens; and obey the law.

Over the next year, Mother’s compliance with the trial court’s orders was marginal.

On three occasions in June 2005, DCS caseworker Deanna Gamroth requested that Mother submit to a drug screen; Mother refused on two of those occasions and claimed she could not produce a urine sample on the third. When a hair follicle test was offered in lieu of the urine sample, Mother refused to comply. Mother refused two more of Gamroth's requests in July 2005, but then tested negative approximately one dozen times from August to October 2005. According to Gamroth, however, these latter tests were not deemed fully compliant because Mother was submitting herself to the tests on her own schedule and still refusing hair follicle tests when requested. Mother's efforts at drug treatment therapy also were less than fully compliant, as she began attending therapy sessions regularly beginning in October 2005, but ultimately was terminated from the program in March 2006 because she missed too many sessions. Gamroth further testified that during visits with B.M. at Mother's home from July to October 2006, Mother would either leave B.M. at her mother's house or at a neighbor's house so she could sleep. Finally, in January 2006, Mother was charged with Class C felony welfare fraud and Class D felony theft and, in December 2006, pled guilty to welfare fraud as a Class D felony. The trial court sentenced Mother to two years with the Indiana Department of Correction, but she was released in December 2007 for good behavior.

Based on the foregoing failures to comply with the trial court's orders, on March 15, 2007, DCS filed a petition to terminate Mother's parental rights. On April 29 and July 22, 2008, the trial court conducted a hearing on the termination petition, at which Gamroth and Mother, among others, testified, and the trial court permitted Gamroth to testify regarding observations that were made in notes prepared by Brian Gooding, who was the DCS

caseworker assigned to the case from November 2006 to February 2008. Based on this evidence, the trial court entered findings of fact and conclusions of law terminating Mother's parental rights to B.M. Mother now appeals.

Discussion and Decision

Mother's sole argument on appeal is that the trial court committed reversible error when it permitted DCS caseworker Gamroth to testify regarding the observations in caseworker Gooding's notes because such testimony was inadmissible hearsay. This court reviews a trial court's decision to admit hearsay testimony for an abuse of discretion. In re A.C., 770 N.E.2d 947, 950 (Ind. Ct. App. 2002). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id. at 950-51. If the trial court abuses its discretion, this court may not reverse unless the appellant demonstrates that the improperly admitted evidence "is inconsistent with substantial justice." D.W.S. v. L.D.S., 654 N.E.2d 1170, 1173 (Ind. Ct. App. 1995). This inquiry turns on whether there is "substantial independent evidence to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the judgment." Id.; see also In re D.H., 859 N.E.2d 737, 741 (Ind. Ct. App. 2007) (observing that any error in the admission of evidence is considered "harmless" if it does not affect the party's substantial rights).

Over Mother's objections, Gamroth was permitted to testify regarding the observations in Gooding's notes. It is undisputed that this testimony was admitted to prove the truth of the matter asserted. Gamroth's testimony therefore constitutes hearsay, see Ind.

Evidence Rule 801(c), which generally is not admissible unless an exception applies, see Ind. Evidence Rule 802. The trial court admitted Gamroth's testimony pursuant to the business records exception, Indiana Evidence Rule 803(6). The rule states that the following types of evidence are admissible hearsay even if the declarant is available as a witness:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Ind. Evidence Rule 803(6). The question becomes whether the trial court abused its discretion when it admitted Gamroth's hearsay testimony pursuant to the business records exception.

We note that it is difficult to determine whether Gamroth's hearsay testimony meets the requirements of the business records exception because there is a near-total lack of foundational testimony regarding whether, among other things, the notes prepared by Gooding were part of DCS's regularly conducted activity. At the outset of her testimony, Gamroth gave a lengthy narrative detailing incidents of Mother's shortcomings, but that narrative failed to specify when the incidents occurred and, more importantly, whether she had personal knowledge of them or whether they were gleaned from Gooding's notes. See Transcript at 21-27. Mother eventually objected based on Gamroth's concession that her

testimony was not based entirely on her personal observations, id. at 27, but the trial court overruled the objection based on DCS's argument that it was proper for Gamroth to testify regarding Gooding's observations because "the case managers keep a file and they are business records," id. at 28. The trial court then overruled each subsequent objection for the same reason. See, e.g., id. at 33, 57.

This court's opinion in Ground v. State, 702 N.E.2d 728, 732 (Ind. Ct. App. 1998), instructs that it is the hearsay proponent's burden to establish that hearsay evidence falls within the business records exception, and absent a proper foundation it is error to admit such evidence. As the foregoing indicates, notably absent from the record is any indication that the notes prepared by Gooding were part of DCS's regularly conducted activity, let alone whether DCS is a "business" within the meaning of the exception. Nevertheless, we need not decide whether the trial court erred in admitting Gamroth's hearsay testimony because even assuming it did, Mother cannot demonstrate a new termination hearing is warranted. Before explaining why any error was harmless, however, we emphasize that the lack of clarity in the record before us could have been avoided if, before ruling on Mother's objection, the trial court first permitted DCS to lay a foundation and then heard argument regarding whether the foundation was adequate. Ground provides additional instruction in this regard. See 702 N.E.2d at 732.

To receive a new hearing, Mother must demonstrate that the improperly admitted evidence is inconsistent with substantial justice. As mentioned above, this inquiry turns on whether there is "substantial independent evidence to satisfy the reviewing court that there is

no substantial likelihood that the questioned evidence contributed to the judgment.” D.W.S., 654 N.E.2d at 1173. In the context of a termination of parental rights proceeding, harmless error review thus involves whether substantial independent evidence permits a finding by clear and convincing evidence of a reasonable probability either that the conditions resulting in the child’s removal or placement outside the home will not be remedied or that continuation of the parent-child relationship poses a threat to the well-being of the child. See Ind. Code § 31-35-2-4(b)(2)(B); In re B.J., 879 N.E.2d 7, 20 (Ind. Ct. App. 2008), trans. denied.

The bulk of time Gooding was the caseworker occurred while Mother was incarcerated. Specifically, Gamroth initially was the caseworker from March 2005 to September 2006, with a transition period in October and November 2006 involving both caseworkers, followed by Gooding from December 2006 to February 2008, and concluding with Gamroth taking over again. Mother was incarcerated from December 2006 to December 2007, or roughly twelve of the fourteen months Gooding was the sole caseworker.

Putting Gooding’s time as sole caseworker to the side, we are left with evidence that Mother was not fully compliant with drug tests in 2005; failed to complete a drug treatment program as ordered by the trial court; chose to leave B.M. at her mother’s a neighbor’s house so she could sleep on several occasions from July to October 2006; and was incarcerated for one year beginning in December 2006. In determining whether the conditions resulting in the child’s removal will not be remedied, this court has observed that the trial court need not wait until the child is irreversibly harmed to terminate the relationship. In re B.D.J., 728

N.E.2d 195, 201 (Ind. Ct. App. 2000); see also R.W., Sr. v. Marion County Dep't of Child Servs., 892 N.E.2d 239, 249 (Ind. Ct. App. 2008) (“[W]here there are only temporary improvements, and the pattern of conduct shows no overall progress, the court might reasonably infer that under the circumstances, the problematic situation will not improve.”); Lang v. Starke County Office of Family & Children, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007) (“A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change.” (citation omitted)), trans. denied. Mother’s refusal to interact with B.M. by as late as October 2006 and her incarceration for Class D felony welfare fraud are particularly damning in this regard, as they indicate that little had changed since the initial incident of neglect in March 2005. Coupling this evidence with her failure to complete or comply with other court-ordered parenting services convinces us there was clear and convincing evidence for the trial court to conclude that B.M. would continue to be neglected if left in her care. Accordingly, we conclude that any error in admitting Gamroth’s hearsay testimony was harmless.

Conclusion

Any error by the trial court when it admitted Gamroth’s hearsay testimony into evidence was harmless.

Affirmed.

DARDEN, J., and BAILEY, J., concur.