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
Jul 08 2009, 8:34 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

DANIEL G. PAPPAS
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

MICHAEL SPECIALE
Indiana Department of Child Services
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF M.R.M., JR., the child, and	)	
M.R.M., SR.,	)	
Appellant-Respondent	)	
vs.	)	No. 02A05-0903-JV-163
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Charles F. Pratt, Judge
The Honorable Lori K. Morgan, Magistrate
Cause No. 02D07-0802-JT-59

July 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

M.R.M., Sr., the alleged father ("Father"), appeals the order terminating his parental relationship with M.R.M., Jr. ("Child").

We affirm.

ISSUES

1. Whether the order must be reversed because the trial court lacked personal jurisdiction over Father.

2. Whether clear and convincing evidence supports the termination order.

FACTS

On November 21, 2006, C.P. ("Mother") gave birth to Child, and she identified Father as her son's father. Child was immediately removed from Mother, based on the knowledge of the Indiana Department of Child Services of Allen County ("DCS") that she was unable to provide parental care for a child.[1] Six days later, on November 27, 2006, the trial court held a hearing – at which Father was present – and found probable cause to believe Child was a Child in Need of services (CHINS).

At the initial CHINS hearing on January 16, 2007, Father was again present and with counsel. Father admitted that he had not provided material or financial support for Child; had a prior criminal history; was serving probation for a marijuana possession conviction in Whitley County; and was unable to provide care for Child at that time. In its "parent participation plan," the trial court ordered Father to refrain from criminal activity; maintain appropriate housing; notify DCS of any change of residence; obtain

[1] Mother is not participating in this appeal.

and maintain employment; undergo a psychological evaluation at Park Center; complete certain home-based services and parenting programs; attend supervised visitation with the child; and commence proceedings to establish paternity. (DCS App. 17). Father was also "ordered to appear without further notice" at the "Fact Finding hearing set for May 9, 2007," and warned that his "[f]ailure to attend may result in a Body Attachment being issued" for his arrest. *Id.* at 19.

Father did not appear at the May 9, 2007, fact-finding hearing; however, his attorney was present. The trial court found that Father was not employed; had not established paternity; had a criminal history and was on probation; had not provided for Child's support needs; was unable to provide safe, stable housing for Child; and had admitted that he was unable to meet Child's needs. It found that Child was a CHINS. Its dispositional decree, entered that same day, repeated the specific parent participation plan orders to Father that had been included in the January 16, 2007, order.[2] It set a permanency plan hearing for November 8, 2007, and ordered Father to attend.

The permanency hearing was held on November 8, 2007. Again, Father failed to appear, but his attorney was present. After hearing evidence, the trial court found that Father had failed to comply with the parent participation plan orders and had "not demonstrated an ability to benefit from services." *Id.* at 26. "[I]n the best interest of the

[2] Thus, Father was again ordered to refrain from criminal activity; maintain appropriate housing; notify DCS of any change of residence; obtain and maintain employment; undergo a psychological evaluation at Park Center; complete certain home-based services and parenting programs; attend supervised visitation with the child; and commence proceedings to establish paternity.

child," it ordered that the permanency plan be the termination of parental rights and Child's adoption. *Id.* at 27.

On February 20, 2008, DCS filed its petition for termination of parental rights against Father and Mother. At the initial hearing on April 8, 2008, Father participated by telephone, and his counsel was present. Father advised that he was in jail but wanted to be present for the termination proceedings. The trial court granted Father's request for a continuance, and advised Father to contact DCS upon his release and to maintain contact with his counsel. The termination hearing was set for August 5, 2008.

Neither Father nor his counsel was present at 2:00 p.m. when the trial court convened the August 5, 2008, termination hearing. A representative for Father's counsel appeared and advised the trial court that Father's counsel had mistakenly believed that the hearing was at 3:30 p.m., not 2:00 p.m.; and that counsel had sent Father a letter indicating that the hearing was at 3:30 p.m. The trial court heard evidence from DCS concerning its efforts to locate Father, and that it did not know Father's whereabouts. DCS further reminded the trial court that at the last hearing, it had explicitly ordered that Father "should receive his notification of [the termination hearing] through his attorney." (Tr. 9). After a recess, the trial court reconvened the hearing at 4:03 p.m. – neither Father nor his counsel had appeared. The trial court then reset the termination hearing for September 30, 2008, and set a status hearing for September 2, 2008.

On August 19, 2008, DCS filed with the trial court its affidavit for diligent search, praecipe for summons by publication, and summons for service by publication. The August 19, 2008, summons for service to Father was published on August 21, August 28,

and September 4, 2008, and it stated that the termination hearing was set for September 30, 2008.

On September 2, 2008, the trial court held the status hearing. Father's counsel was present on his behalf.

On September 30, 2008, the termination hearing was held. Father did not appear, but his counsel was present. The trial court noted that its file contained "a Summons by Publication, Praecipe for Summons by Publication, Affidavit for Diligent Search advising as to the Department's efforts to locate" Father, and the publisher's affidavit of publication in Allen County. (Tr. 36). Father's counsel reminded the trial court that it had been previously advised at the April 8th hearing that Father was incarcerated in the Whitley County Jail, and questioned whether "Allen County is the proper county in which to publish any notice." *Id.* Counsel further stated that Father had provided him with an address in Allen County, but his mail to that address "got returned." (Tr. 37).

Kristie Howard, the DCS case-manager, then testified as follows. In April of 2008, Father had notified DCS by letter that he was being released on July 6, 2008. On July 9th, he contacted Howard at DCS to say that he was staying with a friend but did not provide the address. On July 17th, he contacted her to say that he was "residing with a friend at 1423 S. Harrison Street, here in Fort Wayne," and she heard him confirm the address with someone. (Tr. 39). He also provided a contact phone number. "Shortly after that [Howard] sent [Father] a letter with regard to services," and the letter "c[a]me back stating that that address did not exist." *Id.* When she called the phone number he had given her, it "was no longer valid." *Id.* She drove to the address Father had given

her and verified that it did not exist. After the July 17th contact by Father, there was no further contact from him. Howard then attempted to locate him by twice checking the Department of Correction offender database, by searching "for any warrants that had been issued," and by contacting both the jail and probation departments in Whitley, St. Joseph, and Allen counties. (Tr. 40).

The trial court stated that it was "taking judicial notice of the documents that are in the file and also considering" the case manager's testimony that Father's last address known to DCS was in Allen county, based on information "obtained from the father himself," there was "sufficient proof of service upon" Father. (Tr. 41).

Mother testified that she had seen Father in Fort Wayne as recently as two days before the hearing. Howard testified to the following facts:

> Father attended only a few supervised visitations with Child and had had no contact with him since February 19, 2007 (*i.e.*, for the previous nineteen months, or since Child was three months old).
>
> Father never established his legal paternity, though he had "declared the child to be his own." (Tr. 63).
>
> From the time of Child's birth, Father had never been employed or provided financial support for him.
>
> Father had not complied with any of the parental participation plan requirements in the May 9, 2007, dispositional order; although he was not present at the May 9th hearing, requirements of that order were "identical to the provisional order," where Father was present and ordered to complete the same services. (Tr. 70).
>
> After the May 9th order, no further service referrals for Father were made, because she had no contact information for him <u>and</u> "referrals had already been made and were current and active." (Tr. 71).

> In April of 2008, Father had written to DCS and advised that "he was going to do the services and listing the services," indicating his familiarity with the requirements. (Tr. 80).
>
> Nevertheless, in July of 2008, Father again asked Howard for referrals; she made them. Howard made the referrals, and Father made an appointment at Park Center – but he did not appear for the appointment.

In addition, Howard testified that Father had failed to comply with any of the requirements of the parental participation plan. She further testified that Child was in a licensed foster home. She also testified that her concerns concerning the ability of Father to provide appropriate care for Child had not been remedied, that termination of the parental relationship was in Child's best interest, and that DCS's plan was to "proceed toward adoption to allow him to have a permanent home." (Tr. 67).

The Guardian Ad Litem ("GAL") for Child testified that Father was either "not capable or unwilling to provide for" Child, and opined that termination of Father's parental rights was in Child's best interest. (Tr. 95). The GAL noted that Father had failed "to step forward to take responsibility as a father," and that Father's actions failed to demonstrate that he could parent – "even when he was out [of jail] he didn't demonstrate anything to show that he could do it, . . . he hasn't done anything." (Tr. 96, 103).

On December 29, 2008, the trial court issued its order terminating Father's parental relationship with Child.

DECISION

1. Personal Jurisdiction

Father first argues that the trial court "never obtained personal jurisdiction" over him because he was not "properly served by publication." Father's Br. at 4. Therefore, he concludes, the trial court's "judgment of termination of parental rights" is "void." *Id.* We cannot agree.

The existence of personal jurisdiction is a question of law that we review de novo. *Johnston v. Johnston*, 825 N.E.2d 958, 962 (Ind. Ct. App. 2005). Nevertheless, "personal jurisdiction turns on facts." *LinkAmerica Corp. v. Cox*, 857 N.E.2d 961, 965 (Ind. 2006). Due process requires that a party have adequate notice of the action in order to be subject to the state's personal jurisdiction. *JPMorgan Chase Bank, N.A. v. Desert Palace, Inc.*, 882 N.E.2d 743, 749 (Ind. Ct. App. 2008).

It is undisputed that on April 8, 2008, without objection, Father personally participated (albeit by telephone from jail) in the hearing concerning the initiation of proceedings to terminate his parental rights. Thus, he had actual notice of the pendency of the matter. Further, at that hearing, he was advised that his motion for continuance was being granted, to maintain contact with his counsel and to contact DCS upon his release from jail, and that a new hearing date was set for August 5, 2008. The record establishes that he failed to meaningfully stay in touch with his attorney and DCS regarding the status of his case. Further, the record establishes that his counsel sent him notice of the hearing scheduled for that of August 5, 2008. On August 19, 2008, DCS filed with the trial court necessary documentation to support the publication of notice to Father of the September 30, 2008 termination hearing date, and the record includes proof of such publication. Moreover, Father was continuously represented by counsel

throughout the termination proceedings.[3] We find that Father was properly notified of the proceedings, and the trial court had jurisdiction over Father.

2. Clear and Convincing Evidence

The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution. *In re G.Y.*, 904 N.E.2d 1257, 1259 (Ind. 2009). A parent's interest in the care, custody and control of his or her children is a fundamental liberty interest, and the parent-child relationship is one of the most valued relationships in our culture. *Id.* Nevertheless, we have recognized 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. *Id.* Accordingly, parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. *Id.* at 1259-60.

The purpose of terminating parental rights is not to punish parents but to protect children. *In re R.S.*, 774 N.E.2d 927, 930 (Ind. Ct. App. 2002) (citing *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied, cert. denied*), *trans. denied*. The trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. *R.S.*, 774 N.E.2d at 930. Termination of the parent-child relationship is proper where the child's emotional and physical development is threatened. *Id.* Moreover, the trial court need not wait until the child is irreversibly harmed such that his physical, mental, and social development is

[3] We note that Father presents no assertions whatsoever concerning what evidence he would have presented to the trial court had he attended the September 30th hearing.

permanently impaired before terminating the parent-child relationship. *Id.* The parent's habitual pattern of conduct is relevant to determine whether there is a substantial probability of future neglect or deprivation of the child. *Id.*

When we review the termination of parental rights, we do not reweigh the evidence or judge witness credibility. *G.Y.*, 904 N.E.2d at 1260. We consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.* When we review the trial court's findings of fact and conclusions thereon, we determine first whether the evidence supports the findings, and second we determine whether the findings support the judgment. *Id.* We will set aside the trial court's judgment only if it is clearly erroneous. *Id.* A judgment is clearly erroneous if the findings do not support the trial court's conclusions or the conclusions do not support the judgment. *Id.*

Indiana law requires that when the State seeks to terminate parental rights, it must plead and prove in relevant part that:

> (A) 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 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), 31-35-2-8(a).

The State's burden of proof in termination of parental rights is one of "clear and convincing evidence." *G.Y.*, 904 N.E.2d at 1060 (citing I.C. § 31-37-14-2). Such clear and convincing evidence need not reveal that the continued custody of the parents is

wholly inadequate for the child's very survival, but rather it is sufficient that clear and convincing evidence show that the child's emotional and physical development are threatened by the respondent parent's custody. *Id.* at 1061.

Father first argues that the trial court erred in finding by clear and convincing evidence that there is a reasonable probability that the conditions which resulted in the removal of Child would not be remedied because the removal resulted from Mother's disability and historic inability to parent her children. Presumably, he suggests that the removal was unrelated to anything he did. However, shortly after Child's removal, Father personally admitted to the trial court that he was unable to provide care for his son.

More than twenty-two months after Child's removal, Howard testified that her concerns about Father's ability to provide appropriate care for his son had not been remedied. Similarly, the GAL testified that since his initial admission, Father had failed to "do[] anything" whatsoever to demonstrate his willingness and ability to parent his child. (Tr. 103). The trial court found that since Child's removal, Father had "failed to participate in or benefit from services offered"; "continued in a pattern of criminal activity"; failed to regularly visit Child; failed "to provide material or financial support for" him; and "continue[d] to be unable, refuse[d] or neglect[ed] to provide for the basic necessities of a suitable home for the raising of" Child. (DCS App. 8). Father does not argue that such factual findings are not supported by the evidence, and we find that evidence supports the findings. Accordingly, we find that clear and convincing evidence

supports the trial court's ultimate finding that there was a reasonable probability that the conditions which resulted in Child's removal would not be remedied.

Father asserts that he was "never personally ordered by the Court to participate in services designed to assist him in parenting his child at the time of the dispositional hearing in the [CHINS] case" on May 9, 2007. Father's Br. at 10. However, the reason he was not "personally ordered" to participate in the services was because he failed to appear at the hearing – despite having been ordered to do so at the January 16, 2007 hearing, which he did attend.

Father asserts that he was "not made aware of the services" required. *Id.* However, the record reflects that he wrote DCS in April of 2008 that "he was going to do the services and listing the services." (Tr. 71). This supports the reasonable inference that he was aware of the services required.

Finally, Father argues that DCS failed to facilitate the DNA testing required to establish his paternity after the trial court had ordered same. He directs us to the trial court's order of April 29, 2008, granting Father's motion for DNA testing "while [Father] remain[ed] in custody." (Tr. 72). We note that Father had first been ordered to establish paternity in an order dated January 16, 2007, during a hearing at which he was present, and that the record does not reflect any incarceration of Father for many months thereafter.[4] Further, Howard testified that on four separate occasions (March 16, 2007, April 11, 2007, and July 9 and 17, 2008), she had "advised [Father] on how to contact the

[4] Howard testified that Father had been incarcerated for twelve months of Child's life, thereby providing him ten months when not incarcerated and available to pursue paternity and the other services ordered.

IV Prosecutor's office and the process" for establishing his paternity. (Tr. 65). These conversations occurred when Father was not incarcerated. Howard also testified that after the April 2008 trial court order for DNA testing while Father was incarcerated, she contacted the paternity office and "[t]hey informed [her] that there was nothing they could do in regards to paternity at all until he initiated the case." (Tr. 73).

Clear and convincing evidence supports the trial court's findings that Father had not "regularly visited the child or provided material or financial support for the child or otherwise provided for the basic necessities of a suitable home for the raising of the child"; his "lack of involvement in the child's life"; and his inability "to provide for the basic necessities of a suitable home for the raising of the child." (DCS App. 6, 7). In the face of such substantial evidence, we cannot find that any lack of effort on the part DCS toward assisting Father after April of 2008 to establish his legal paternity of Child was critical, given his failure to act in that regard when not incarcerated or subsequent to his release in July of 2008; or that the single fact of having established paternity after April of 2008 would have been dispositive in the ultimate termination determination five months later.

Affirmed.

BAILEY, J., and ROBB, J., concur.