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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE INVOLUNTARY)
TERMINATION OF PARENT-CHILD)
RELATIONSHIPS OF D.D., K.D., D.J., M.F.)
and M.D., MINOR CHILDREN, and their parents.)

J.D. (MOTHER) and M.F. (FATHER),)
Appellants-Respondents,)

vs.)

MARION COUNTY OFFICE, INDIANA)
DEPARTMENT OF CHILD SERVICES,)
Appellee-Petitioner,)
and)
CHILD ADVOCATES, INC.,)
Appellee-Guardian Ad-Litem.)

No. 49A02-0901-JV-57

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Danielle Gaughan, Magistrate
Cause No. 49D09-0703-JT-10166

July 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellants-Respondents J.D. (“Mother”) and M.F. (“Father”) appeal an order terminating their parental rights, upon the petition of the Appellee-Petitioner Marion County Department of Child Services (“the DCS”). We affirm.

Issues

Mother and Father, in separate briefs, each allege that the DCS failed to establish, by clear and convincing evidence, the requisite statutory elements to support the termination of their parental rights. Additionally, Mother alleges that she was denied due process.

Facts and Procedural History

Mother had six children, five of whom are named in the instant petition for termination of parental rights, specifically, K.D. born in 1997, D.D. born in 1998, D.J. born in 2002, M.F. born in 2004, and M.D. born in 2005 (“the Children”). Father is the biological father of the youngest two of the Children.

Mother was living with M.J., the father of her oldest three children, when the DCS became involved with the family in October of 2005. At that time, the house was being heated with an oven, there was limited food in the house, there were no cribs for the infants, and M.F. had a “raw” diaper rash and no medication. (Tr. 423.) The DCS arranged payment of an outstanding gas bill so that the family residence could be heated with gas.

In January of 2006, a DCS caseworker conducted a home visit and discovered that Mother's house was still heated via an oven. M.F. had suffered a burn from contacting the open stove door, and she was wearing a soiled diaper. Two of the children exhibited severe rashes or skin disorders. It appeared to the caseworker that none of the Children had been bathed recently. One-year-old M.F. was lying unsupervised on an adult-sized bed upstairs. The Children were removed from Mother's home.

On January 25, 2006, the DCS filed a petition alleging that the Children were Children in Need of Services because their parents were unable or unwilling to provide a safe environment and necessities. Mother and Father admitted that the Children were CHINS. Mother was required to complete a parenting assessment and psychological evaluation, to appear for supervised visitation, and to participate in individual therapy and home-based counseling. Father was not provided with similar services, as he had been incarcerated at the time the Children were removed from Mother's and M.J.'s care and remained incarcerated during the majority of the time that the Children were CHINS. Mother and Father were each ordered to pay \$25.00 per week in support of the Children.

On March 14, 2007, the DCS petitioned to terminate Mother's and Father's parental rights.¹ The DCS also petitioned to terminate M.J.'s parental rights, to which he agreed.² On May 29, May 30, July 7, August 19, and August 25 of 2008, the trial court heard evidence. On November 21, 2008, the trial court entered an order terminating Mother's and Father's

¹ The DCS petitioned to terminate Mother's parental rights with regard to five of her children. A sixth child was placed with her biological father.

² M.J. consented to the adoption of his three children by his sister and is not an active party to this appeal.

parental rights. Mother and Father now appeal.

Discussion and Decision

I. Due Process

Mother argues that she was denied due process as a consequence of the failure of the DCS to “comply with statutory requirements in terminating parental rights.” Mother’s Brief at 16. She claims that the DCS did not diligently pursue a familial placement in accordance with a statutory preference for such placement, and further claims that the DCS prevented her from satisfying reunification requirements.

When the State seeks the termination of a parent-child relationship, it must do so in a manner that meets the requirements of the Due Process Clause. Hite v. Vanderburgh County Office of Family and Children, 845 N.E.2d 175, 181 (Ind. Ct. App. 2006). The parent must be afforded the opportunity to be heard at a meaningful time and in a meaningful manner. Id. Due process in parental rights cases involves 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 government interest supporting the use of the challenged procedure. Id.

A parent’s interest in the care, custody, and control of his or her children is a fundamental liberty interest; thus, the private interest involved is substantial. Id. The government’s interest is also substantial, as the State of Indiana has a compelling interest in protecting the welfare of its children. Id. With regard to the factor of the risk of error created by the State’s chosen procedure, Mother argues that DCS decisions during the

CHINS proceedings effectively deprived her of a realistic opportunity for reunification.

Termination proceedings and CHINS proceedings have an interlocking statutory scheme; however, CHINS proceedings are separate and distinct from involuntary termination proceedings because a CHINS cause of action does not necessarily lead to an involuntary termination cause of action. Id. at 182. In order for an involuntary termination decision to be made, it is necessary that the statutory CHINS procedures have been properly followed. Id.

In some cases, procedural irregularities in a CHINS case may be so significant that a parent is deprived of procedural due process with respect to the termination of his or her parental rights. A.P. v. Porter County Office of Family & Children, 734 N.E.2d 1107, 1112-13 (Ind. Ct. App. 2000), trans. denied. In A.P., the record was “replete with procedural irregularities throughout CHINS and termination proceedings” and the irregularities were “plain, numerous, and substantial.” Id. at 1118. This court recognized seven substantial irregularities which, in the aggregate, required reversal of the termination decision. Id. at 1117. These included failure to provide the parents with one or more case plans, a termination petition that did not comply with statutory requirements, the use of an unsigned and unverified CHINS petition, the lack of a permanency hearing, CHINS orders issued without written findings and conclusions, a no-contact order issued absent statutory prerequisites, and the deprivation of the right to be present at CHINS review hearings. Id. However, this court was not persuaded that any one of the deficiencies, standing alone, would have substantially increased the risk of error in the termination proceeding to the extent that there was a deprivation of due process. Id. at 1118.

Here, unlike in A.P., there is no allegation regarding lack of notice or opportunity to be heard. Rather, Mother alleges that the failure of the DCS to aggressively seek placement of the Children with a relative “forced” termination, which is meant to be a “last resort.” Mother’s Brief at 17. She directs our attention to Indiana Code Section 31-34-15-4, which provides in relevant part:

The case plan must include a description and discussion of the following:

- (1) A permanent plan for the child and an estimated date for achieving the goal of the plan.
- (2) The appropriate placement for the child based on the child’s special needs and best interests.
- (3) The least restrictive family-like setting that is close to the home of the child’s parent, custodian, or guardian if out-of-home placement is recommended. If an out-of-home placement is appropriate, the county office or department shall consider whether a child in need of services should be placed with the child’s suitable and willing blood or adoptive relative caretaker, including a grandparent, an aunt, an uncle, or an adult sibling, before considering other out-of-home placements for the child.
- (4) Family services recommended for the child, parent, guardian, or custodian.
- (5) Efforts already made to provide family services to the child, parent, guardian, or custodian.
- (6) Efforts that will be made to provide family services that are ordered by the court.

Mother makes a bald assertion that the DCS failed to comply with the foregoing statutory provision regarding the content of case plans, but does not develop a corresponding argument as to how she was denied due process. Her assertion that a relative placement would have avoided the “last resort” of termination presupposes that such placement would have continued indefinitely without petitions for parental rights termination or petitions for adoption.

Nevertheless, it is uncontroverted that relative placement was considered by the DCS in formulating case plans and, as to three of the Children, relative placement was realized. The three eldest were placed with their paternal aunt, and M.J. signed consents for adoption. The DCS investigated at least two other relatives for possible placement; however, the youngest two siblings were placed together in a foster home. Mother's argument essentially distills to her opposition to placement with an individual other than her sister.³ However, to the extent that she favored one relative over another for placement, Mother was afforded the opportunity to be heard in the CHINS court. Indeed, after a hearing at which placement was contested, the CHINS court determined that the placements of three children with a paternal aunt and two children with a foster parent were more appropriate than placement with Mother's sister. Mother has not established a deprivation of her due process rights in that she was not allowed to unilaterally select her Children's caregiver after their removal from her home.

Mother also argues that the DCS thwarted her potential reunification with the Children when plans for in-home visitation were cancelled. Mother was scheduled to commence in-home visits with the Children when, in February of 2007, M.J. was arrested for child molesting.⁴ This caused cancellation of in-home visits pending the disposition of the charge against M.J. Ultimately, M.J. was convicted and sentenced to fifteen years imprisonment. According to Mother, M.J. never returned to her home yet the DCS refused to consider future

³ According to the Children's caseworker, Shannon Taylor, Mother's sister expressed her intention to return the Children to Mother after allowing Mother approximately one year to "get herself together." (Tr. 305.)

⁴ The victim was M.J.'s niece.

in-home visits. However, Mother ignores testimony that, although the initial reason for cancelling in-home visitation was M.J.'s arrest, the in-home visits were not re-scheduled because Mother failed to maintain contact with the home worker as necessary to re-schedule visits. In short, Mother has not shown procedural irregularities during the CHINS proceedings.

II. Sufficiency of the Evidence

A. Standard of Review

This court will not set aside the trial court's judgment terminating a parent-child relationship unless it is clearly erroneous. In re A.A.C., 682 N.E.2d 542, 544 (Ind. Ct. App. 1997). When reviewing the sufficiency of the evidence to support a judgment of involuntary termination of a parent-child relationship, this Court neither reweighs the evidence nor judges the credibility of the witnesses. Id. We consider only the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. Id.

B. Requirements for Involuntary Termination of Parental Rights

Parental rights are of a constitutional dimension, but the law provides for the termination of those rights when the parents are unable or unwilling to meet their parental responsibilities. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), trans. denied. The purpose of terminating parental rights is not to punish the parents, but to protect their children. Id.

Indiana Code Section 31-35-2-4(b) sets out the elements that the DCS must allege and prove by clear and convincing evidence in order to terminate a parent-child relationship:

(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.

The trial court must subordinate the interests of a parent to those of the child when evaluating the circumstances surrounding the termination. In re A.A.C., 682 N.E.2d at 544. Termination of a parent-child relationship is proper where the child's emotional and physical development is threatened. Id. The trial court need not wait to terminate the parent-child relationship until the child is irreversibly harmed such that his or her physical, mental, and social development is permanently impaired. Id.

C. Analysis

Mother and Father do not challenge the trial court's determinations pursuant to

Indiana Code Section 31-35-2-4(b)(2)(A) (removal from the parents) or (D) (satisfactory plan). However, they challenge the trial court's determinations relating to Indiana Code Section 31-35-2-4(b)(2)(B) (conditions will not be remedied or relationship poses a threat to children's well-being) and (C) (best interests of the child).

It is well-settled that a parent's habitual pattern of conduct is relevant to determine whether there is a substantial probability of future neglect or deprivation of the child. In re M.M., 733 N.E.2d 6, 13 (Ind. Ct. App. 2000). Among the circumstances that a trial court may properly consider are a parent's criminal history, drug and alcohol abuse, historical failure to provide support, and lack of adequate housing and employment. McBride v. Monroe County Office of Family and Children, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). The DCS is not required to 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).

With regard to Mother, the trial court found that she failed to adequately participate in services and to address her mental health issues. Evidence was presented that Mother had been diagnosed as suffering from depression. Caseworker Shannon Taylor testified that three referrals had been made in order for Mother to receive individual and home-based therapy, but none were successfully completed. The home-based counseling was discontinued for lack of contact. Mother had an appointment scheduled at Gallahue Mental Health Center but did not keep the appointment. She saw a therapist at Family Services of Central Indiana for three appointments, made a fourth appointment, and did not show up

thereafter.

With the assistance of a home-based counselor, Mother procured a job at McDonald's. She quit the job later that day or on the following day. Mother admitted that Father had "a long history" of committing batteries upon her and that he used drugs. (Tr. 522.) In August of 2008, Mother moved in with Father, on whom she depended for financial support.

As to Father, the trial court found that he has a long criminal history (including offenses against Mother) and had been incarcerated during most of the pendency of the CHINS case. Consequently, he had not participated in services or maintained contact with the Children's case manager. Father's criminal convictions include 1989 misdemeanor convictions for disorderly conduct and battery, a 1990 misdemeanor conviction for battery, a 1991 misdemeanor conviction for battery, a 1995 misdemeanor conviction for public intoxication, 2001 misdemeanor convictions for criminal trespass, resisting law enforcement, and invasion of privacy, a 2004 misdemeanor conviction for battery, two 2006 misdemeanor convictions for invasion of privacy, a 2006 felony conviction for intimidation, a 2006 misdemeanor conviction for domestic battery, and a 2007 felony conviction for escape. The most recent conviction involved cutting off his electronic monitoring bracelet.

Father testified that he requires medication for the treatment of paranoid schizophrenia and proper medication prevents him from hearing voices. Father has, however, failed to refrain from using illegal substances. Father admitted that he occasionally used marijuana, and he tested positive for the presence of cocaine after his most recent release from incarceration.

The Children's guardian ad litem, Mary Houser, testified that she had visited with each of the Children in their respective placements. In her opinion, "they seem to be very content and happy, finally, especially the older kids." (Tr. 415.) She expressed a belief that it was not in the best interests of the Children to be reunified with Mother and Father.

Accordingly, the DCS presented clear and convincing evidence that the conditions leading to the Children's removal would not, in reasonable probability, be remedied and that termination of Mother's and Father's parental rights was in the best interests of the Children.

Conclusion

Mother has shown no procedural irregularities in the CHINS proceedings amounting to a deprivation of due process. The DCS established by clear and convincing evidence the requisite elements to support the termination of Mother's and Father's parental rights.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.