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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF K.M., Minor Child, and J.M., Father, | ) | |
| J.M., Father, | ) | |
| Appellant-Respondent, | ) | |
| vs. | ) | No. 49A02-0812-JV-1085 |
| MARION COUNTY DEPARTMENT OF CHILD SERVICES, | ) | |
| Appellee-Petitioner, | ) | |
| and | ) | |
| CHILD ADVOCATES, | ) | |
| Appellee-Guardian ad Litem. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT, JUVENILE DIVISION
The Honorable Marilyn Moores, Judge
The Honorable Larry Bradley, Magistrate
Cause No. 49D09-0804-JR-15954

**July 24, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

J.M. ("Father") appeals the termination of the parent-child relationship with his daughter, K.M. He raises three issues:

I. Whether the trial court erred in denying his motion for a continuance of the termination hearing;

II. Whether the trial court denied him his right to cross-examine the caseworker for the Marion County Department of Child Services ("DCS"); and

III. Whether there is sufficient evidence to support the termination.

We affirm.

## FACTS AND PROCEDURAL HISTORY

K.M. was born on November 14, 1998. In March 2007, K.M.'s mother (Mother) gave birth to H.C., who was born with cocaine, methamphetamine, and marijuana in her system. Father is not H.C.'s father. Because of Mother's substance abuse and inability to care for her two children, DCS filed a Child in Need of Services (CHINS) petition regarding both K.M. and H.C. in March 2007.

In April 2007, Children's Bureau Social Worker Barbara Brands performed a parenting assessment on Mother and Father. The assessment was performed at the home of Father's mother, where Father was on house arrest following his release from jail in

late 2006 for a conviction of possession of a controlled substance. Father denied any current drug use but refused a saliva drug test the day of the assessment.

In July 2007, K.M. and H.C. were adjudicated to be CHINS. The court ordered Father to submit to a substance abuse assessment and random drug screens, follow all rules of house arrest, maintain stable employment and housing, and attend supervised visitation with K.M. Father did not comply with the court's orders, and in April 2008 DCS filed a petition to terminate his parental relationship with K.M.

The guardian ad litem (GAL) Renee Fischel asked that the September 2, 2008, termination hearing be rescheduled because there was no pre-adoptive home arranged for K.M. and H.C. The court continued the case to October 9, 2008. On October 2, 2008, the GAL moved for another continuance because, although a pre-adoptive home had been found, the children were not yet placed there. The trial court denied the motion. At the October 9, 2008, hearing, Father's counsel asked for a continuance because Father had been moved to a jail in a different county and was not able to attend the hearing. The trial court denied the motion.

Testimony at the hearing revealed Father did not attend the court-ordered drug and alcohol assessment and refused drug tests on two occasions. Brands testified Father could not safely parent K.M. without completing the court-ordered services because of his substance abuse and the effect of such abuse on a person's ability to make good decisions and maintain a child's safety. There was testimony that K.M. and H.C. were placed with their maternal grandmother in November 2007, and the grandmother planned to adopt them. However, in July 2008, the girls' grandmother asked that the girls be

removed from her home because her husband had relapsed into drinking and she was concerned about the girls' safety.

DCS case worker Lashonda Wilson recommended terminating the parental relationship between Father and K.M. because of Father's repeated incarcerations and history of noncompliance with referrals. She testified Father's grandmother, Ju.M., had expressed an interest in having K.M. placed with her, but she did not want H.C. After initially expressing interest, Ju.M. did not follow up with DCS or get fingerprinted. Wilson testified the two sisters had never been separated, and DCS' focus was maintaining the sibling bond.

The GAL testified Father was consistently 15 to 30 minutes late for supervised visitation with K.M., and that K.M. was very anxious and upset about Father's tardiness. She testified Father had twenty months to participate in services but he refused to do so. She did not support placing K.M. with any of Father's family members because no one had completed the necessary background checks. The GAL emphasized that K.M. and H.C. had always been together and shared a bond, and noted a previous foster mother was now willing to adopt the children.

At the time of the termination hearing, Father was incarcerated in Morgan County for an offense he committed after DCS had filed the petition to terminate his parental rights. On October 15, 2008, the juvenile court issued an order terminating Father's parental relationship with K.M.[1]

[1] Mother's parental relationship with K.M. was also terminated.

## DISCUSSION AND DECISION

The purpose of terminating parental rights is not to punish parents but to protect their children. *In re Termination of the Parent-Child Relationship of D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied*. Although parental rights are of a constitutional dimension, the law allows for the termination of those rights when parties are unable or unwilling to meet their responsibility as parents. *Id.*

The trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. *In re R.S.*, 774 N.E.2d 927, 930 (Ind. Ct. App. 2002), *trans. denied.* Termination of the parent-child relationship is proper where the child's emotional and physical development is threatened. *Id.* The trial court need not wait until the child is irreversibly harmed before terminating the parent-child relationship. *Id.*

1. Motion for a Continuance

Father first argues the trial court abused its discretion in denying his motion for a continuance to allow him to participate in the hearing either in person or by telephone from jail. The decision to grant or deny a continuance rests within the sound discretion of the trial court. *Rowlett v. Vanderburgh County Office of Family and Children*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), *trans. denied*. We will reverse only for an abuse of that discretion. *Id.* An abuse of discretion may be found in the denial of a motion for a continuance when the moving party has shown good cause for granting the motion, but no abuse of discretion will be found when the moving party has not demonstrated he or she was prejudiced by the denial. *Id.*

An incarcerated parent has no absolute right to be physically present at the termination hearing. *J.T. v. Marion County Office of Family and Children*, 740 N.E.2d 1261, 1264 (Ind. Ct. App. 2000), *trans. denied, abrogated on other grounds by Baker v. Marion County Office of Family and Children*, 810 N.E.2d 1035 (Ind. 2004). Whether to permit an incarcerated parent to attend such a hearing rests within the sound discretion of the trial court. *Id.* at 1265.

The trial court denied Father's motion because the case had been open for more than a year and there had already been one continuance. The court noted Father was in jail "because of his own actions" after the petition to terminate his parental rights was filed. (Tr. at 6.) Father was represented by counsel who was available to cross examine witnesses and to introduce evidence on his behalf. Father has not shown good cause for granting his motion, nor has he demonstrated he was prejudiced by the denial of the continuance. The trial court did not abuse its discretion.

2. Denial of Right to Cross-Examine Witnesses

Father also argues the trial court denied him his right to cross examine Wilson about the appropriateness of the permanency plan for K.M. A parent has the right to cross-examine witnesses in a termination of parental rights proceeding, Ind. Code § 31-32-2-3, and Father was not denied that right.

Wilson testified the permanency plan in this case was adoption by the girls' former foster mother. Father cross-examined Wilson about 1) her education and experience at DCS, 2) who made the recommendation for the permanency plan, 3) whether the GAL or Father's family was present at the staffing for the permanency plan,

4) who approved the plan, 5) why the girls were not placed with Father's family, and 6) why DCS did not want to separate the two girls. *See* Appellee's App. at 46-60. Father has not directed us to anything in the record suggesting there were questions he was not allowed to ask. Nor has he shown prejudice. We find no error here.

3. Sufficiency of the Evidence

Lastly, Father argues there is insufficient evidence to support the termination of his parental relationship with K.M. When reviewing the sufficiency of the evidence to support an involuntary termination of a parent-child relationship, we neither reweigh the evidence nor judge the credibility of the witnesses. *In re R.S.*, 774 N.E.2d at 930. We consider only the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. *Id.*

To terminate a parent-child relationship, the DCS must allege and prove by clear and convincing evidence:

> (i) the child has been removed from the parent for at least six 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).

Father contends DCS did not prove termination of the parent-child relationship is in the best interests of K.M. 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 the continuation of the parent-child relationship is contrary to the child's best interests. *In re A.N.J.*, 690 N.E.2d 716, 722 (Ind. Ct. App. 1987). Father has historically been unable to provide adequate housing, stability and supervision, and testimony at the hearing reveals he is currently unable to do the same. His argument therefore fails.

Father also argues there is no evidence to support the finding that it was in K.M.'s best interests to remain with her sister rather than being placed by herself with a paternal relative. None of Father's relatives completed the necessary background checks that would permit such placement. Both the GAL and the DCS case worker testified the two sisters had never been separated and shared a bond, and the DCS' focus was maintaining that bond. This evidence supports the trial court's finding. There is sufficient evidence to support the termination of Father's parental relationship with K.M.

We reverse a termination of parental rights only on a showing of clear error – "that which leaves us with a definite and firm conviction that a mistake has been made." *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992). We find no such error here and therefore affirm the trial court.

Affirmed.

BAKER, C.J., and BARNES, J., concur.