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IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF A.J.B., C.B., & Cl.B. (Minor Children),	)	
W.B. (Father),	)	
Appellant-Respondent,	)	
vs.	)	No. 88A01-1011-JT-571
THE INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE WASHINGTON CIRCUIT COURT
The Honorable Frank Newkirk, Jr., Special Judge
Cause No. 88C01-0908-JT-167
88C01-0908-JT-168
88C01-0908-JT-169

August 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

W.B. ("Father") appeals the termination of his parental rights to his children, A.J.B., C.B., and Cl.B., on petition of the Indiana Department of Child Services ("DCS"). Father raises four issues, which we consolidate and restate as: 1) whether DCS was required and failed to work toward family reunification in this case; 2) whether the trial court's judgment terminating parental rights is clearly erroneous as to A.J.B.; and 3) whether the judgment is clearly erroneous as to C.B. and Cl.B. Concluding that any lack of effort to reunify was immaterial to the elements DCS had to plead and prove in this case, and that the trial court's judgment is not clearly erroneous as to any of the children, we affirm.

Facts and Procedural History

A.J.B., Father's adoptive daughter, was born in December 1993. Cl.B. and C.B., Father's adoptive sons, were born in January 1996 and March 1997, respectively. The children were the biological niece and nephews of Father's now-deceased wife, S.B. ("Mother"). Following removal from their biological parents, the children were placed with Father and Mother by the State of Arizona. Their adoption by Father and Mother was finalized by the Washington County, Indiana, Circuit Court in May 2002. Thereafter, the children lived with Father and Mother in Salem, Indiana.

In December 2004, DCS investigated and substantiated an incident where Father spanked Cl.B. with a board. An informal adjustment program was put in place. Mother and Father completed family counseling, and the informal adjustment was closed in December 2005 without further incident. In 2006, DCS investigated but did not substantiate a report of suspected abuse where both sons had bruises on their buttocks. The sons reported that the bruises resulted from riding on the back of a tractor.

In December 2006, Father and Mother learned that A.J.B. was sexually active with her boyfriend. An instance of A.J.B. having intercourse with that boyfriend, a juvenile, was captured on a "security system" videotape that Father provided to DCS in March 2007. Transcript Volume I at 58. At that time, A.J.B. reported that Father was sexually abusing her. Specifically, A.J.B. met with DCS investigator Charles Demlow and reported that Father was "trying to have sex with her." DCS Exhibit 42. In a tape-recorded conversation, A.J.B. related explicit details of abuse by Father, including actual or attempted genital contact that Father initiated on three separate dates in January 2007.

A.J.B. later testified at the termination trial consistent with her report to Demlow.[1] Consistent with A.J.B.'s account, Mother reported to Demlow that A.J.B. had told her that Father tried to have sex with her. As a result, DCS and the family agreed on a safety plan whereby Father was to live in a separate residence owned by the family. Demlow later testified that he considered the report of sexual abuse to be substantiated. A.J.B. testified that

[1] On a separate occasion during the investigation, A.J.B. went to Demlow and recanted her allegations of Father's sexual abuse. However, Demlow noted that A.J.B. looked away when asked whether the recantation was true. Later, A.J.B. returned to Demlow, admitted that her recantation was false and made under pressure from Father and Mother, and confirmed the details of the abuse as reported in the original tape-

after she reported the sexual abuse, Father threatened her by pointing a loaded gun in her face.

DCS filed a petition alleging A.J.B. was a child in need of services ("CHINS"). At a hearing on May 29, 2007, Father and Mother admitted that A.J.B. was a CHINS, and she was made a ward of DCS. That same day, Father and Mother voluntarily relinquished custody of C.B. and Cl.B., admitting through their attorney that "if [A.J.B. is] willing to stand by [her] allegations . . . [Father and Mother] feel that they are unable to continue . . . with the children in their home." DCS Exh. 3, at 3; accord id. at 6. As a result, the sons were placed in foster care together with A.J.B.

On June 8, 2007, DCS filed CHINS petitions as to the two sons. The petitions were later amended to reflect that the sons, since receiving counseling while in foster care, revealed instances of their abuse by Father. Specifically, DCS reported to the trial court that the sons:

> made disclosures about how they were made to sit naked during punishments in view of the family members, had access to pornographic movies, were given "beatings" as punishment, were subjected to verbal and physical intimidation by [F]ather, saw [M]other not intervening, and experienced parental behavior targeted to tearing down of the brother/sister sibling relationship in the adoptive family.
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> * * *
>
> . . . Mother has stated she would be in fear for her safety, and that of the children's safety, if the children were returned to her and [Father] was not to be with them. The siblings want to be together and have adjusted well in foster care.

Appellant's Appendix at 40.

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recorded conversation.

On October 31, 2007, the trial court held an initial hearing on the CHINS petitions as to the sons and entered a CHINS dispositional decree as to A.J.B. Father was ordered to receive a psychological assessment, participate in sex offender treatment, and participate in family team meetings with DCS. The trial court also entered a no-contact order between Father and all three children, upon receiving testimony that Father had approached the children in a vehicle while they were awaiting their school bus outside the foster mother's home, placing A.J.B. in fear of Father.

In November 2007, Mother reported that Father made reference to shooting DCS staff members. Later, Father repeated these sentiments to DCS employee Joann Frederick. In January 2008, the trial court entered a protective order against Father in relation to various DCS staff.

In April 2008, Father was referred for home-based case management services with Thomas Cutrell, a counselor employed by New Hope Services. In working with Cutrell, Father was non-compliant and failed to show up for multiple scheduled meetings. Father attended a team meeting with DCS staff in May 2008 but was disruptive, made vulgar gestures, and left before the meeting was complete.

In September 2008, Father and Mother signed forms consenting to the voluntary relinquishment of their parental rights as to the children. Accordingly, DCS filed petitions for voluntary termination of parental rights. However, at a hearing in October 2008, the trial court declined to accept Mother's or Father's consents because they were not then represented by counsel and were unaware that pauper counsel could be appointed.

At a CHINS hearing on October 31, 2008, the no-contact order against Father was vacated as to the two sons, and Father was given supervised visitation with the sons. Eight visits occurred, all at the Washington County Government Center. DCS and the foster mother advised the sons that they did not have to interact with Father during some visits. In January 2009, visitation was terminated at DCS's request, based upon a report from psychologist Jill Christopher. Christopher had evaluated the sons, who reported "extensive histories of physical abuse by [Father]" and fear of visiting Father. DCS Exh. 13. Christopher concluded it was not in their best interests to continue visits with Father, and neither should they be required to testify in Father's presence.

In December 2008, Father met with Therisa Kreilein, LCSW, to be evaluated for sex offender treatment. However, because Father denied any sexual offenses, Kreilein reported that such treatment would not be appropriate. Father also began a new series of meetings with Cutrell. At the first of those meetings, Father was "very cooperative" according to Cutrell. Father's Exhibit B.

In January 2009, Mother died. On February 4, 2009, Father entered an admission that the two sons were CHINS due to his inability to care for and supervise them following his wife's death. The trial court's dispositional order provided that Father shall participate in a psychological assessment, participate in individual therapy, maintain weekly telephone contact with the DCS case manager, and allow the case manager to make home visits once per month. Thereafter, Father continued home-based case management counseling with Cutrell. However, DCS terminated that service because Cutrell did not have a master's

degree in a mental health field, the service was not designed to address "therapeutic concerns," and Cutrell's employment with New Hope Services had ended. Tr. Vol. II at 191. Father then contacted DCS to begin counseling with another professional, but received no response. Family case manager Rico Rosado later testified that another professional was not provided because the professionals involved in the case "agreed that therapy would not be conducive to meet permanency for [Father]." Id.

In late April 2009, Father consented to a psychological evaluation and waived its confidentiality. Dr. Polly Shepard, clinical psychologist, wrote that Father "reported concern for the adoptive children but could not report their birthdates, appropriate ages, and or range of interests." DCS Exh. 9, at 5. Father's interview indicated "dominant, controlling, and aggressive personality features" and "serious problems with stress and anxiety for years which by his own statement was the result of adopting the three children." Id. at 6. Dr. Shepard gave her "clinical opinion that [Father] is not fit to be an adoptive parent to" any of the three children, and opined "it is unlikely that [Father] would benefit from therapy." Id.

In August 2009, DCS filed petitions for involuntary termination of Father's parental rights. From July 13 to 15, 2010, a fact-finding trial was held. A.J.B. appeared and testified, but the two sons did not appear for good cause found by the trial court.

On October 4, 2010, the trial court issued its findings of fact, conclusions of law, and judgment terminating Father's rights as to all three children. Father now appeals.

Discussion and Decision

I. Standard of Review

Our standard of review in termination of parental rights cases is well-settled:

> When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility. We consider only the evidence and reasonable inferences that are most favorable to the judgment. Here, the trial court entered findings of fact and conclusions thereon in granting the . . . petition to terminate Father's parental rights. When reviewing findings of fact and conclusions of law entered in a case involving a termination of parental rights, we apply a two-tiered standard of review. First, we determine whether the evidence supports the findings, and second we determine whether the findings support the judgment. We will set aside the trial court's judgment only if it is clearly erroneous.

Bester v. Lake Cnty. Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005) (citations omitted).

II. Termination of Father's Rights

A. Timing of Termination Petitions and Efforts to Reunify

Father argues that DCS "in many ways, failed to provide services" to Father in this case, that DCS "never sought reunification," and that in such circumstances, DCS's assertion that noncompliance with services was grounds for termination "violated [Father's] due process rights to fundamental fairness." Appellant's Brief at 12-14. Father acknowledges this court's holding that "the provision of family services is not a requisite element of our parental rights termination statute, and thus, even a complete failure to provide services would not serve to negate a necessary element of the termination statute and require reversal." In re E.E., 736 N.E.2d 791, 796 (Ind. Ct. App. 2000); see also Stone v. Daviess Cnty. Div. of Children & Family Servs., 656 N.E.2d 824, 830 (Ind. Ct. App. 1995) ("Our supreme court has held that the Indiana termination of parental rights statute does not require

the agency to prove that any services have been offered to the parent to assist in fulfilling parental obligations."), trans. denied.

Father urges us to decline to follow the above caselaw on the basis of Indiana Code section 31-34-21-5.5, which states:

> (a) In determining the extent to which reasonable efforts to reunify or preserve a family are appropriate under this chapter, the child's health and safety are of paramount concern.
> (b) Except as provided in section 5.6 of this chapter, [DCS] shall make reasonable efforts to preserve and reunify families as follows:
> (1) If a child has not been removed from the child's home, to prevent or eliminate the need for removing the child from the child's home.
> (2) If a child has been removed from the child's home, to make it possible for the child to return safely to the child's home as soon as possible.

While section 31-34-21-5.5 contains a general directive for "reasonable efforts to preserve and reunify" families, it also states that the extent to which such efforts are appropriate depends upon "the child's health and safety." By its terms, the statute does not make the provision of family services or prior efforts to reunify a necessary element of the termination of parental rights. Indeed, this court in E.E. cited section 31-34-21-5.5 and did not indicate any conflict between that provision and the holding that "even a complete failure to provide services would not serve to negate a necessary element of the termination statute." E.E., 736 N.E.2d at 796.

The elements that DCS had to plead and prove to terminate Father's rights are, as relevant here, set forth in Indiana Code section 31-35-2-4 (2009)[2]:

> [O]ne (1) of the following exists:

[2] Indiana Code section 31-35-2-4 was amended effective March 12, 2010. P.L. 21-2010, § 8. We quote the version of the statute in effect when the termination petitions were filed in August 2009.

> (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 . . .; or
> (iii) 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 . . .

Ind. Code § 31-35-2-4(b)(2)(A) (2009). The disjunctive structure of the statute makes clear that if the child has been removed for the requisite period of time under either prong (i) or prong (iii), then there is no need for a finding under prong (ii) that "reasonable efforts for family preservation or reunification are not required." See In re B.J., 879 N.E.2d 7, 20 (Ind. Ct. App. 2008) ("Clearly, subsection (b)(2)(A) is written in the disjunctive."), trans. denied. In other words, if either prong (i) or (iii) of subsection (b)(2)(A) is met, the making of reasonable efforts to preserve or reunify is immaterial to the elements of the termination statute that DCS must plead and prove.[3]

Here, it is uncontested that the children were alleged to be CHINS, removed from Father, and under DCS supervision continuously for well over fifteen months before DCS filed its termination petitions. The trial court so found. Appellant's App. at 159. Thus,

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[3] In this respect, the statute may stand in tension with another pronouncement of our caselaw, that "involuntary termination of parental rights is an extreme measure . . . designed to be used only as a last resort when all other reasonable efforts have failed." A.P. v. Porter Cnty. Office of Family & Children, 734 N.E.2d 1107, 1112 (Ind. Ct. App. 2000), trans. denied. However, when parents have failed to show improvement in their parental fitness despite removal of a child for a substantial period of time, such failure is an indication that further efforts by DCS to reunify would likely not succeed, would prolong uncertainty for the children, and as such would no longer be reasonable. See Prince v. Dep't of Child Servs., 861 N.E.2d 1223, 1231 (Ind. Ct. App. 2007) ("[T]he responsibility to make positive changes will stay where it must, on the parent. If the parent feels the services ordered by the court are inadequate to facilitate the changes required for reunification, then the onus is on the parent to request additional assistance from the court or DCS."). We further point out that given the substantiated history of physical and sexual abuse by Father in this case, the facts bode poorly for an argument that DCS had an obligation to try to reunify Father with the children when he showed no sustained improvement in his character and attitudes.

prong (iii) of Indiana Code section 31-35-2-4(b)(2)(A) is met, and Father cannot obtain reversal of the termination judgment on the grounds that DCS did not provide services or otherwise work toward reunification in his case.

B. Termination as to A.J.B.

To terminate Father's rights as to A.J.B., DCS had to plead and prove the following by clear and convincing evidence:

> (B) [T]here 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) (2009); Bester, 839 N.E.2d at 148 (noting clear and convincing standard). DCS argues that Father fails to specifically challenge the trial court's factual findings or its conclusion that elements (B) and (D) were met, such that we need only review whether the trial court's findings support the best interests element. However, we will review with respect to each of the above elements, whether the evidence supports the trial court's findings and whether the findings support the judgment. See Bester, 839 N.E.2d at 147. Unlike ordinary civil cases, termination cases involve the heightened importance of the "interests, rights, and privileges of parents facing the permanent severance of ties with their children." A.P., 734 N.E.2d at 1115. "Although we are not required to search the record for errors, we are not so restricted that we must close our eyes to what is clearly before us." Id.

The trial court concluded it was probable that the conditions which resulted in the removal of A.J.B. will not be remedied, and that termination of Father's rights was in A.J.B.'s best interests. While the trial court did not explicitly find Father had sexually abused A.J.B., it did find Father did not participate in sex offender treatment "due to his denial of responsibility." Appellant's App. at 166. The trial court also noted Father told sex offender therapist Kreilein that his personality "was not going to change at the age of fifty-five." Id. (quotation omitted). These findings are supported by the evidence and in turn support the trial court's conclusion that the conditions leading to A.J.B.'s removal – the substantiated sexual abuse against her by Father – would not be remedied. In addition, the children's current therapist, Larna Anderson, as well as two court-appointed special advocates ("CASA") and a family case manager, testified that termination of parental rights was in A.J.B.'s best interests. Based on the totality of the evidence, the trial court did not err in finding by clear and convincing evidence that termination was in A.J.B.'s best interests. See In re A.I., 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of CASA and family case manager, coupled with evidence that conditions resulting in continued placement outside the home would not be remedied, was sufficient to prove by clear and convincing evidence that termination was in child's best interests), trans. denied.

C. Termination as to C.B. and Cl.B.

The trial court also concluded regarding the two sons that it was probable that the conditions which resulted in their removal will not be remedied, and that termination of

Father's rights is in their best interests. The trial court supported these conclusions with a number of specific findings that relate to the sons. Both sons were diagnosed with post-traumatic stress disorder and other psychiatric problems, which the trial court found were "due to their treatment at the hands of [Father]." Appellant's App. at 167. This finding is supported by specific details of their emotional and physical abuse by Father, which the sons reported to their therapist, Anderson. See Tr. Vol. I. at 229-32. Both sons expressed to Anderson, during the time of their supervised visits with Father, that they did not want to return to Father's custody. Due to the sons' reports of abuse by Father, and out of concern for their safety, Anderson's efforts at reunification were minimal.

The trial court also noted Dr. Shepard's psychological evaluation and conclusion that Father was not fit to be an adoptive parent to any of the children. That conclusion was made in 2009, nearly two years after the initial reports of Father's abuse and after he had time to, but evidently did not, address the anger and anxiety problems that led him to abuse the sons. DCS case manager Rico Rosado testified, and the trial court found, that Father had not maintained the required contact with DCS, nor did he follow through on a referral for parenting classes with Purdue Extension that Rosado provided. Rosado also testified that the conditions leading to the removal of the sons were not likely to be remedied, because therapy cannot be expected to solve Father's parenting problems. That testimony was consistent with Dr. Shepard's opinion that Father was unlikely to benefit from therapy. Based on all of the evidence and the trial court's findings, the trial court did not err in its conclusion that the conditions leading to the sons' removal from Father's care were unlikely to be remedied.

As with A.J.B., the trial court heard the opinions of Anderson, Rosado, and two CASAs that termination of parental rights was in the sons' best interests. Anderson testified that the sons' current foster care placement is pre-adoptive and that termination of Father's rights and adoption can achieve permanency for them before they reach age eighteen. Based on all the evidence, the trial court did not err in its conclusion that termination of Father's rights was in the sons' best interests.

Father argues the trial court gave inappropriate weight to the alleged sexual abuse by Father against A.J.B., given that no criminal charges were filed. However, the trial court's findings and conclusions indicate that termination as to the sons was not based on the sexual abuse against A.J.B. Rather, the trial court based its judgment on the facts discussed above, all to the effect that Father's relationship with the sons was a physically and emotionally abusive one and Father was unable or unwilling to make positive changes. The trial court's judgment is not clearly erroneous, and we therefore affirm.

Conclusion

To the extent DCS did not provide services to Father or work to reunify him with the children, such omission does not entitle him to reversal of the judgment terminating his parental rights. The termination of Father's rights is amply supported by the evidence and the trial court's findings of fact, and is not clearly erroneous. We affirm.

Affirmed.

BARNES, J., and BRADFORD, J., concur.