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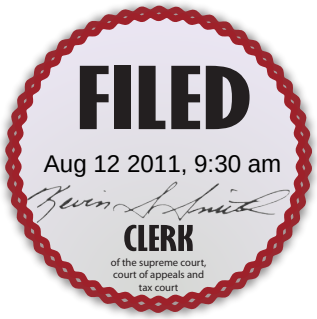

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF M.R., Jr., a minor child,	)	
and,	)	
M.R., father,	)	
Appellant-Respondent,	)	
vs.	)	No. 49A04-1012-JT-810
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner,	)	
and,	)	
CHILD ADVOCATES, INC.,	)	
Co-Appellee, Guardian Ad Litem.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary Chavers, Judge Pro-Tem
The Honorable Larry Bradley, Magistrate
Cause No. 49D09-1005-JT-20068

August 12, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

M.R. ("Father") appeals the termination of his parental rights to his son, M.R., Jr. We affirm.

Issues

The restated issues before us are:

I. whether the trial court erred in denying Father's motion to continue the termination hearing; and

II. whether the termination finding is supported by sufficient evidence.

Facts

M.R., Jr. was born in September 2008 to Father and T.H. ("Mother"). The Marion County Office of the Department of Child Services ("DCS") sought to have M.R., Jr. declared a child in need of services ("CHINS") when it was discovered that M.R., Jr. had opiates in his system at birth. Mother also admitted to using cocaine during her pregnancy, and admitted to not having any prenatal care. On October 1, 2008, the trial

court declared M.R., Jr., to be a CHINS, and he initially was placed in the custody of St. Vincent Hospital. After M.R., Jr. was released from the hospital he was placed in the care of his maternal grandmother.

As part of the CHINS order, Father was required among other things to maintain contact with DCS; to secure and maintain a legal and stable source of income; to obtain and maintain suitable housing; to participate in and successfully complete a home-based counseling program; and to submit to random drug testing and successfully complete a substance abuse program. Father admitted that he has a history of abusing alcohol. However, Father failed to complete any court-ordered substance abuse program and refused to take drug tests. Father later claimed that he had completed three phases of a substance abuse program while incarcerated, but he could provide no documentation to that effect and also could not remember the name of the purported program.

Father has a substantial history of being imprisoned or jailed. His criminal history began in 1986 with a conviction for robbery. He also had a 1993 conviction for theft and several convictions in the 2000s, prior to the CHINS proceedings, for operating a vehicle while intoxicated ("OWI"). His record also reflects numerous, primarily brief stints in the Marion County Jail throughout the 1990s and 2000s. Father himself could not recall how many times he had been incarcerated in his life.

Additionally, shortly after M.R., Jr. was declared a CHINS, Father apparently spent several weeks in the Hamilton County Jail for an unspecified offense. After being released, Father began weekly home-based counseling, but usually missed at least one

week of counseling per month for unexplained reasons, and sometimes missed more. Father also has never had regular, verifiable employment during the CHINS proceedings. He claimed to work "odd jobs" such as mowing lawns, cleaning gutters, and selling candy, but could not provide counselors or caseworkers with proof of his earnings. Father's home-based counseling was terminated as unsuccessful in November 2009.

In April 2009, DCS approved M.R., Jr. moving into Father's residence. At this time, Father was living with his nephew and niece. The home was appropriate and Father appeared to take proper care of M.R., Jr. However, on October 28, 2009, Father was arrested for shoplifting while shopping with Mother and M.R., Jr. Father later claimed that he was shoplifting t-shirts to re-sell on the streets in order to have money to buy diapers and milk for M.R., Jr. After this arrest, M.R., Jr. was returned to the custody of his maternal grandmother.

Father pled guilty to theft and was incarcerated until July 25, 2010, when he was released to home detention. Upon being released, Father discovered that he was no longer welcome to stay with his nephew and niece. Father could not find anywhere to live until he happened to run into a female friend, who was visiting Indianapolis but lived in Ohio. This friend offered to let Father move in with her in Ohio, and he did so.

Meanwhile, on January 19, 2010, the permanency plan for M.R., Jr. changed from reunification with the parents to adoption. On May 5, 2010, the DCS filed a petition to terminate Mother and Father's parental rights. Mother eventually consented to M.R., Jr.'s adoption by his maternal grandmother, but Father did not. A fact-finding hearing for

termination of Father's parental rights was scheduled to begin on November 5, 2010. Father appeared late for the hearing, and his attorney moved for a continuance on two grounds: that she was ill and that Father had failed to communicate with her. The trial court granted the continuance solely on the basis of counsel's illness, and the hearing was rescheduled to November 29, 2010.

Immediately after the November 5, 2010 hearing, Father was arrested on an outstanding warrant and incarcerated for violating the terms of his home detention. Father did not appear at the November 29, 2010 hearing, as he was still incarcerated, and counsel had not made arrangements for him to appear by telephone. Counsel again moved for a continuance at the beginning of the hearing, which the trial court denied. DCS called two witnesses, the home-based counselor and DCS case manager; the guardian ad litem ("GAL") agency also called the GAL to testify. All three witnesses were cross-examined by Father's attorney. At the conclusion of the GAL's testimony, Father's attorney again moved for a continuance to secure Father's presence by telephone at a future hearing, and the trial court granted this motion.

The hearing was continued to December 13, 2010. On December 9, 2010, Father's counsel moved to continue the hearing until after Father was scheduled to be released from his present incarceration, which was January 24, 2011. The trial court denied this motion, and Father testified by telephone at the December 13, 2010 hearing. On December 20, 2010, the trial court entered an order terminating Father's parental rights. Father now appeals.

Analysis

I. Continuance

First, Father challenges the denial of his November 29, 2010 continuance motion that was made at the beginning of the termination hearing.[1] The grant or denial of a motion for a continuance rests within the sound discretion of the trial court, and we will reverse a trial court's ruling only for an abuse of that discretion. Rowlett v. Vanderburgh County Office of Family and Children, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), trans. denied. An abuse of discretion in denying a motion for continuance may occur if the moving party has shown good cause for granting the motion. Id. "However, no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial." Id.

The denial of a continuance motion in the context of a termination of parental rights proceeding also carries constitutional due process implications. See In re C.C., 788 N.E.2d 847, 852 (Ind. Ct. App. 2007), trans. denied. The process due in a termination of parental rights proceeding turns on 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 governmental interest supporting use of the challenged procedure. Id. Both the private interests and the countervailing government interests that are affected by a termination proceeding are substantial. Id. The right to raise one's child is an essential, basic right that is more precious than property rights, and a parent

[1] Father's brief focuses on this continuance motion and does not provide argument as to the December 9, 2010 continuance motion.

has a commanding interest in the accuracy and justice of a termination decision. Id. On the other hand, the State's interest in protecting the welfare of a child also is significant. Id. Delays in the adjudication of a termination proceeding impose significant costs upon the functions of government as well as an intangible cost to the life of the child involved. Id. Although continuances may be necessary to ensure the protection of a parent's due process rights, "courts must also be cognizant of the strain these delays place upon a child." Id. at 853.

The facts of this case are similar to those in C.C. There, a parent facing termination appeared at the first day of the hearing, during which the parent testified. The parent did not appear at the second day of the hearing, and counsel unsuccessfully moved to continue the hearing to secure the parent's presence. The trial court denied the motion, and we affirmed. Id. We noted that the parent had been able to directly present his version of events to the trial court on the first day of the hearing. Id. Additionally, the parent's attorney had been present at the second day of the hearing and cross-examined witnesses on the parent's behalf. Id. We also noted that parents do not have a constitutional right to be present at a termination hearing. Id.; see also J.T. v. Marion County Office of Family and Children, 740 N.E.2d 1261, 1263-64 (Ind. Ct. App. 2000) (holding that parents do not have right to be present at termination hearing in order to assist counsel), trans. denied, abrogated on other grounds by Baker v. Marion County Office of Family and Children, 810 N.E.2d 1035 (Ind. 2004).

Here, the chronology of events is the opposite of those in C.C.: Father was not present at the first day of the hearing but was present by telephone on the second day of the hearing. In this case, Father was represented by counsel at the first day of the hearing, and counsel extensively cross-examined the witnesses. Father was able to present his version of events to the trial court through his telephonic testimony on the second day of the hearing. Although Father contends he was hampered by not being able to hear the testimony given by the witnesses on the first day of the hearing, it is reasonable to assume that his attorney could have informed him of the substance of that testimony. In fact, it does appear that some of Father's testimony on the second day of the hearing was directly related to and intended to refute some of the testimony given on the first day. Given these circumstances, and the fact that Father did not have a constitutional right to be present at the hearing, we cannot say the trial court abused its discretion or prejudicially violated Father's due process rights when it denied the November 29, 2010 continuance motion.

II. Sufficiency of the Evidence

Next, we address Father's contention that there is insufficient evidence to support termination of his parental rights. "When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility." In re I.A., 934 N.E.2d 1127, 1132 (Ind. 2010). We consider only the evidence and reasonable inferences most favorable to the judgment. Id. "We must also give 'due regard' to the trial court's unique opportunity to judge the credibility of the witnesses." Id. (quoting Indiana Trial

Rule 52(A)). Where a trial court enters findings of fact and conclusions thereon, as the trial court did here, we apply a two-tiered standard of review. Id. "First, we determine 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, which occurs if the findings do not support the trial court's conclusions or the conclusions do not support the judgment. Id.

A petition to terminate a parent-child relationship must allege:

> (A) that one (1) of the following is true:
>
> > (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.
> >
> > (iii) The child has been removed from the parent and has been under the supervision of a county office of family and children or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child;
>
> (B) that one (1) of the following is true:
>
> > (i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.

> (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
>
> (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;
>
> (C) that termination is in the best interests of the child; and
>
> (D) that there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2). DCS has the burden of proving these allegations by clear and convincing evidence. I.A., 934 N.E.2d at 1133.

Father contends that the conditions that led to M.R., Jr.'s removal have been remedied and that he does not pose a threat to M.R., Jr.'s well-being. Referring to a prior version of Indiana Code Section 31-35-2-4(b)(2)(B), our supreme court observed that the statute was written in the disjunctive, requiring DCS to prove only one of the requirements of subsection (B). Id. Although the statute has been amended, it specifically requires allegations of only one of the three factors. See I.C. § 31-35-2-4(b)(2)(B)(i)-(iii). Thus, even though Father argues DCS failed to prove two of the factors, we only need to address whether DCS proved that the conditions resulting in M.R., Jr.'s removal will not be remedied. See Bester v. Lake County Office of Family and Children, 839 N.E.2d 143, 148 n.5 (Ind. 2005) (observing that under the prior version of the statute DCS was required to prove either of the two factors, not both).

Father also notes that M.R., Jr. originally was declared a CHINS and removed from Father and Mother's custody due to Mother's drug use during pregnancy, and not

any wrongdoing of Father. However, M.R., Jr. subsequently was placed in Father's custody, only to be removed at a later date because of Father's arrest and incarceration for theft.[2] We will focus our attention on this removal from Father's care, and whether there is sufficient evidence that the reasons for this removal (as opposed to the initial removal) will not be remedied. We also observe that Father apparently was jailed in Hamilton County for several weeks at the beginning of the CHINS proceeding, which obviously would have precluded Father from having custody of M.R., Jr. at that time.

When deciding whether there is a reasonable probability that the conditions leading to a child's removal will not be remedied, a trial court must judge a parent's fitness to care for his or her child at the time of the termination hearing and take into consideration evidence of changed conditions. In re J.T., 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), trans. denied. The court may also consider the parent's habitual patterns of conduct, as well as evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, 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). Additionally, the court may consider any services offered by the DCS to the parent and the parent's response to those services. Id. "Finally, we must be ever mindful that parental rights, while constitutionally protected, are not

[2] This period of custody lasted from April 20, 2009 to October 28, 2009. The orders in this case from April 20, 2009 are somewhat confusing because they indicate that M.R., Jr. was both "removed from the care of the father" on that date and that the court was authorizing "the child to be placed on temporary in-home trial visitation with father." Ex. 8. The record indicates that this "trial visitation" entailed M.R., Jr. actually living with Father.

absolute and must be subordinated to the best interests of the child when evaluating the circumstances surrounding termination." Id.

Father argues that termination was improper here for several reasons. He notes the evidence that M.R., Jr. was adequately cared for when he was in Father's care for six months in 2009. He also notes that he was scheduled to be released from incarceration at the end of January 2011 and that he planned to live with his girlfriend in Ohio thereafter. He also claimed that he had learned his lesson and would not commit another crime in the future, now that he has a child to care for. Finally, Father submitted documentation that he had completed in October 2010 a four-hour parenting course through a program in Ohio, and testified that he had participated in other counseling programs and a substance abuse program while incarcerated, although he submitted no documentation with respect to these other programs.

Despite these contentions, we conclude there is clear and convincing evidence in the record that the conditions leading to M.R., Jr.'s placement outside of Father's custody would not be remedied. Most crucially, Father has an extensive criminal history. Although most of the offenses of which he has been convicted are not major felonies, still, the record reveals that Father has spent many years of his life in and out of jail or prison. Father's criminal behavior, even if usually petty, appears to be directly related to instability in his housing and employment arrangements.

Most tellingly, Father's inability to secure a legal source of income, either through employment or public assistance, led directly to his October 28, 2009 arrest for theft (i.e.

shoplifting) while in M.R., Jr.'s presence. Father claimed he was shoplifting in order to raise funds needed to purchase diapers and milk for M.R., Jr. This was precisely the type of problem that home-based counseling was meant to solve; it was ineffective in doing so. And although Father claimed to work odd jobs and earn income in that way, he failed to provide documentation to that effect, and whatever funds he might have been earning through odd jobs evidently was insufficient to provide necessities for M.R., Jr.

After Father's initial incarceration for this theft, he was no longer welcome to stay in his niece and nephew's house as he had done before. This led to his move out-of-state. Father's violation of the rules of home detention for whatever reason then led to another period of incarceration for him. At the termination hearing, Father became defensive when asked about the extent of his criminal history, asking the GAL attorney, "what does that have to do with me taking care of my son?" Tr. p. 248. This defensiveness reflects a complete lack of understanding by Father as to the impact that a parent's frequent incarcerations can have upon a child's well-being. As for Father's claim that he had finally learned his lesson with respect to criminal behavior after his 2009 theft conviction, the trial court was entitled to take that assertion with a grain of salt, especially given that Father was unable to abide by the rules of home detention and avoid being sent back to prison yet again.

Father also admitted at the outset of the CHINS proceedings that he has an alcohol abuse problem. This is confirmed by the several OWI convictions in Father's criminal history. There is no evidence that Father abuses illegal drugs. However, it certainly was

reasonable under the circumstances to require Father to undergo substance abuse counseling and drug testing generally in order to be reunified with M.R., Jr. Father received three referrals for an intensive substance abuse program, but never completed such a program. Additionally, we are not convinced that the trial court was required to believe Father's testimony that he had successfully participated in a substance abuse program while incarcerated, given his failure to provide any documentary evidence that he did so, along with his refusal to participate in a substance abuse program specifically ordered by the CHINS court while he was not incarcerated.

We acknowledge that our supreme court in recent years has carefully reviewed cases in which incarcerated parents' parental rights have been terminated; one such case is In re G.Y., 904 N.E.2d 1257, 1262 (Ind. 2009). There, a mother was incarcerated for an offense she committed twenty months before child was born, and there was no evidence that the mother had engaged in any criminal activity or was anything other than a fit parent for those twenty months. After mother was incarcerated, and she was unable to find someone to care for the child, a CHINS proceeding was initiated and the child was placed in foster care. While incarcerated, mother completed an eight-week substance abuse program and a fifteen-week parenting program, had engaged in educational pursuits, and had secured both full-time employment and housing for after she was released from prison. Her scheduled release date from incarceration at the time of the termination hearing was two years and three months after the hearing; by the time of oral

argument before our supreme court, that date had been moved back another year. The trial court terminated mother's parental rights, and this court affirmed.

On transfer, our supreme court reversed the termination. Id. at 1265-66. It noted that although mother had a criminal history, all of her crimes had been committed before the child's birth. It also observed that although mother could not participate in every treatment service that was requested by the DCS, because of her incarceration, she still had "made a good-faith effort" to participate in whatever programs were available to her in prison. Id. at 1262-63. The court also noted that mother would be released from incarceration in a relatively short period of time, that she had made definitive employment and housing arrangements following her release, and that because the child's foster care placement was "highly positive," it would be appropriate to permit the child to remain in foster care, rather than allowing his immediate adoption, while mother completed her incarceration and participated in the necessary DCS programs she could not complete while incarcerated. Id. at 1265-66.

Here, by contrast, we do not believe the trial court was compelled to believe Father made a "good faith" effort to better himself as a parent and person during the CHINS proceedings. Father, who was not incarcerated for many months out of the CHINS proceedings, nevertheless did not partake of or successfully complete services to which he was referred, namely, the home-based counseling and the substance abuse treatment. Also, unlike the mother in G.Y., Father not only has an extensive criminal history, but also committed another crime while in the child's presence, which led to two

periods of incarceration and great instability in Father's and, necessarily, M.R., Jr.'s life. We cannot say G.Y. compels reversal of the termination of Father's parental rights.

Conclusion

The trial court did not abuse its discretion in denying Father's November 29, 2010 motion for a continuance, and there is sufficient evidence to support the termination of his parental rights. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.