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FILED
Aug 14 2009, 8:33 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF T.Y., minor child, and S.Y., his mother, and T.M., the putative father ,	)	
T.M.,	)	
Appellant-Respondent,	)	
vs.	)	No. 03A05-0904-JV-191
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
The Honorable Heather M. Mollo, Referee
Cause No. 03C01-0709-JT-1878

August 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent T.M. (Father) appeals following the juvenile court's denial of his Motion for Relief from Judgment under Indiana Trial Rule 60(B). Specifically, Father argues that he did not receive adequate notice of the termination of parental rights hearing with regard to his son, T.Y., that the juvenile court abused its discretion when it denied his motion for relief from judgment, and that his attorney was ineffective. Finding no error, we affirm.

FACTS

Father is the putative father of T.Y., who was born to S.Y. (Mother)[1] on November 17, 2005. Father has neither established paternity with respect to, nor sought visitation with, T.Y. On December 9, 2005, the Indiana Department of Child Services (DCS) removed three-week-old T.Y. from Mother's care after he tested positive at birth for methamphetamine and amphetamine. T.Y. was placed with foster parents, who now plan to adopt him.

On February 28, 2006, T.Y. was adjudicated a Child in Need of Services (CHINS). On September 28, 2007, DCS filed a petition for the involuntary termination of the parent-child relationship between T.Y and both parents. Although Father was incarcerated at the New Castle Correctional Facility, he was served with notice of the petition on March 5, 2008. The certified mail receipt indicated that the notice was accepted by Monica Sullivan, an employee of the Indiana Department of Correction (DOC).

At the June 26, 2008, pre-trial conference, the juvenile court appointed an attorney to

[1] Mother does not appeal the termination of her parental rights to T.Y.

represent Father and scheduled the termination hearing for August 12, 2008. However, on July 22, 2008, the juvenile court rescheduled the hearing for August 26, 2008. Father's attorney was notified of this change.

Father was not present at the August 26, 2008, termination hearing, but his attorney was and requested a continuance, which was denied. Father's attorney explained that he had been contacted by Father's mother, but that he had never been contacted by Father.

At the termination hearing, the DCS family case manager testified that the only contact that she had had with Father was when she had seen him at an unrelated court hearing. During this brief encounter, Father did not mention any desire to establish paternity, meet with DCS, or attend hearings. Father's sole request was that the case manager give T.Y. a hug for him. The case manager further testified that Father was expected to be incarcerated until 2015 and would be unable to parent T.Y. even if he established paternity.

On October 3, 2008, the juvenile court entered findings of facts and conclusions of law in its order terminating both parents' parental rights to T.Y. Father filed his notice of appeal to this court on October 28, 2008. Appellate counsel was appointed on October 30, 2008; however, an appellant's brief was not filed. Instead, on December 29, 2008, Father filed a verified motion for relief from judgment pursuant to Indiana Trial Rule 60(B), arguing that there was newly discovered evidence that Father was not present at the termination hearing and that this violated his rights under Indiana Code section 31-35-2-6.5(e).

On February 9, 2009, the juvenile court denied Father's motion for relief from judgment without a hearing, concluding, in part, that:

> A parent does not have a constitutional right to be present at a termination of parental rights hearing. The court is cognizant that there are important private interests in a termination proceeding. However, there are equally important governmental interests, that being achieving timely permanency for the child. In balancing these competing interests of a parent and the State, the court must consider the risk of error. In the instant case, [Father] was represented throughout the entire termination proceedings. Counsel was able to cross-examine the State's witnesses and in fact, did so. Further, when there has been a total absence by the putative father in the underlying [CHINS] proceeding, there is a minuscule risk of error in the termination of his parental rights. [Father] has not been denied due process of law.

Appellant's App. p. 15. Father now appeals.

DISCUSSION AND DECISION

I. Notice

Father argues that he was not served with notice of the August 26, 2008, termination hearing. Initially, we note that any issue which either was or could have been raised by a timely motion to correct error or a timely direct appeal may not be the subject of a motion for relief from judgment. Snider v. Gaddis, 413 N.E.2d 322, 326 (Ind. Ct. App. 1980).

In the instant case, Father did not file a motion to correct error or an appellant's brief even though he had filed a notice of appeal. Instead, Father waited until December 29, 2008, to file a motion to set aside the judgment terminating his parental rights under Indiana Trial Rule 60(B). Rule 60(B) "is meant to afford relief from circumstances which could not have been discovered during the period a motion to correct error could have been filed." Cullison v. Medley, 619 N.E.2d 937, 945 (Ind. Ct. App. 1993). In addition, a 60(B) motion is not meant to be used as a substitute for a direct appeal or to revive an expired attempt to appeal.

Id. Although Father is trying to make an end run around the requirement of a timely appeal, we will address the issue because of the substantial interests at stake in parental termination proceedings.

Indiana Code section 31-35-2-6.5(b) requires the person who filed the petition to terminate the parent-child relationship to send notice of the termination hearing at least ten days prior to the hearing date to a number of interested persons, including the parents.[2] To comply with the notice statute, "a party need only meet the requirements of Indiana Trial Rule 5, which governs service of subsequent papers and pleadings in the action." In re B.J., 879 N.E.2d 7, 15 (Ind. Ct. App. 2008).

Trial Rule 5(B) states that "[w]henever a party is represented by an attorney of record, service shall be made upon such attorney unless service upon the party himself is ordered by the court." As Father concedes, the juvenile court's order continuing the termination hearing to August 26, 2008, indicates that Father's court-appointed attorney was notified of the new

[2] Although Father's argument is somewhat unclear, Father does not seem to be attacking the service of process of the termination proceedings, which, as indicated on the certified mail receipt, was received by Monica Sullivan, a DOC employee, on March 5, 2008. Rather, Father seems only to argue that he did not receive notice of the August 26, 2008, termination hearing. Thus, Father is not challenging the service of process of the termination proceeding as governed by Indiana Trial Rule 4, but the additional notice requirements provided by statute in parental termination proceedings. This court has held that these additional statutory requirements are not of constitutional dimension and are not governed by Indiana Trial Rule 4 regarding service of process, which incorporates a jurisdictional component. In re A.C., 770 N.E.2d 947, 950 (Ind. Ct. App. 2002). Accordingly, we will not analyze this issue under Trial Rule 4.

date. Indeed, Father's attorney was aware of the termination hearing because he was present during the entire hearing. Therefore, we find this argument unpersuasive.

II. Rule 60(B) Motion

Father argues that the juvenile court abused its discretion when it denied his motion for relief from judgment. Specifically, Father maintains that the judgment should be set aside on the basis of newly discovered evidence.

A motion for relief from judgment under Indiana Trial Rule 60(B) is addressed to the equitable discretion of the juvenile court, and its judgment will be disturbed only upon an abuse of that discretion. In re R.R., 587 N.E.2d 1341, 1342-43 (Ind. Ct. App. 1992). An abuse of discretion occurs when the juvenile court's action is against the logic and effect of the evidence before it and the inferences drawn therefrom. Id. at 1343. Moreover, upon a motion for relief from judgment, the burden is on the movant to show sufficient grounds for relief. Id. Finally, a motion brought pursuant to Rule 60(B) may only address the procedural, equitable grounds justifying relief instead of the substantive, legal merits of the judgment. Id.

Rule 60(B) enumerates several reasons for setting aside a judgment including "newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct error under Rule 59." In addition, when a movant files a motion to set aside a judgment on the basis of newly discovered evidence, he "must allege a meritorious claim or defense." T.R. 60(B).

Relief from judgment on the basis of newly discovered evidence requires "a showing

that the evidence is material, not merely cumulative or impeaching, not discoverable by due diligence and that it would reasonably and probably alter the result." Freels v. Winston, 579 N.E.2d 132, 135 (Ind. Ct. App. 1991). In addition, new evidence is material if it could be dispositive of the litigation or a relevant secondary issue. Cullison, 619 N.E.2d at 946.

Here, Father's alleged lack of notice was discoverable in time to file a timely motion to correct error. Father points out that his appellate attorney was not appointed until October 30, 2008, and that the attorney was not notified of his appointment until after the date on which a timely motion to correct error could be filed. However, this argument does not explain why Father did not directly appeal, especially since he had filed a notice of appeal on October 28, 2008. Indeed, Father's appellant's brief was not due until December 15, 2008. Consequently, we cannot say that Father has presented this court with newly discovered evidence as contemplated under Rule 60(B) and Father's attempt to bring these arguments in the form of a 60(B) motion seems to be an attempt to revive an expired appeal. See Gipson v. Gipson, 644 N.E.2d 876, 877 (Ind. 1994) (holding that the appellant had "brought his T.R.60(B)(8) motion as a substitute for a direct appeal, which we will not permit").

Notwithstanding the above analysis, the juvenile court addressed the substance of Father's 60(B) motion, concluding that "[a] parent does not have a constitutional right to be present at a termination of parental rights hearing. . . . [Father] has not been denied due process of law." Appellant's App. p. 15. Indiana code section 31-35-2-6.5(e) states that "[t]he court shall provide [a party] an opportunity to be heard and make recommendations to the court at the [termination] hearing." However, we have held that a parent does not have a

constitutional right to be physically present at the termination hearing. In re E.E., 853 N.E.2d 1037, 1044 (Ind. Ct. App. 2006).

When determining whether a parent's due process rights have been violated in a termination proceeding, the court applies a balancing test, which focuses on three factors: (1) the private interests affected by the proceedings; (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. at 1043.

We have recognized the substantial private interest implicated in termination of parental rights proceedings, namely, the parent's interest in the care, custody, and control of his children. In re C.C., 788 N.E.2d 847, 852 (Ind. Ct. App. 2003). Indeed, it is well settled that the right to raise one's child is an "'essential, basic right that is more precious than property rights.'" In re B.J., 879 N.E.2d at 16 (quoting In re C.C., 788 N.E.2d at 852).

Here, although we are cognizant of Father's substantial interest in the care, custody, and control of T.Y., we also note that Father never participated in the underlying CHINS proceeding or contacted the DCS case manager. In addition, Father has never sought visitation with T.Y. nor contacted his appointed attorney regarding the termination proceedings. Even more compelling, Father has failed to establish paternity.

Under the second factor, courts weigh the risk of error created by the parent's absence by focusing on whether the absent parent was adequately represented by counsel. Id. at 17. Specifically, when a parent has been zealously represented by counsel through the entire termination hearing and counsel was provided the opportunity to cross-examine DCS's

witnesses and present evidence in defense of the action, "the risk of an inaccurate result decreases significantly." Id. By contrast, this court has held that the risk of error is substantial when parental rights have been terminated at a summary proceeding where no witnesses testify and no cross-examination is conducted. In re B.T., 791 N.E.2d 792, 795-96 (Ind. Ct. App. 2003).

In the instant case, Father's attorney was present during the entire termination proceeding and cross-examined the DCS case manager, asking her pointedly if she told Father how he could establish paternity. Tr. p. 20. Furthermore, although Father's attorney did not present any evidence on Father's behalf, he had the opportunity to do so, and Father's failure to contact his attorney does not translate into a denial of procedural due process. Indeed, this case is markedly different from In re B.T., 791 N.E.2d at 795-96, where the mother's parental rights had been terminated in a summary proceeding where no witnesses testified and no cross-examination was conducted. Consequently, we cannot say that there was a great risk of error under these circumstances.

Under the final factor, the governmental interests, we have held that the State has a significant interest in protecting the welfare of children, recognizing that "[d]elays in the adjudication of a termination case 'impose significant costs upon the functions of the government as well as an intangible cost to the lives of the children involved.'" In re C.T., 896 N.E.2d 571, 587 (Ind. Ct. App. 2008) (quoting In re D.A., 869 N.E.2d 501, 510 (Ind. Ct. App. 2007)). Here, since December 9, 2005, T.Y. has been separated from his parents and cared for by foster parents who plan to adopt him. Under these circumstances, the State's

interest in seeking permanency for T.Y. is substantial.

Having balanced these three factors, we conclude that Father's absence from the hearing did not violate procedural due process. Consequently, the juvenile court did not abuse its discretion when it denied Father's 60(B) motion, and this argument fails.

III. Ineffective Assistance of Counsel

Finally, Father argues that he received ineffective assistance of counsel and points out that his counsel never sought any information from him. As discussed above, this is another attempt at a back door appeal, inasmuch as Father could have challenged the effectiveness of his counsel on a direct appeal from the termination order. Because Father failed to timely appeal this issue, he has waived it.

Waiver notwithstanding, we cannot agree with Father's contention that his counsel was ineffective. Our Supreme Court has held that:

> [w]here parents whose rights were terminated upon trial claim on appeal that their lawyer underperformed, we deem the focus of the inquiry to be whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination. The question is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest.

Baker v. Marion County Office of Family & Children, 810 N.E.2d 1035, 1041 (Ind. 2004).

As noted above, Father's attorney was present during the entire termination hearing and cross-examined the DCS case manager, who was the sole witness. The case manager testified that Father had never sought visitation or established paternity on T.Y. The case

manager further stated that Father had not seen T.Y. since he had been removed from Mother's home on December 9, 2005, and did not participate in the underlying CHINS proceeding. Perhaps even more compelling, the case manager testified that to her knowledge, Father would not be released from prison until 2015 and would be unable to parent the child even if he established paternity. In light of these circumstances, we cannot say that Father's counsel underperformed such that we are not confident in the juvenile court's determination. Therefore, we affirm the judgment of the juvenile court.

The judgment of the juvenile court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.