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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MATTER OF THE INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP OF P.B., JR., MINOR CHILD, AND HIS MOTHER, L.M., AND HIS FATHER, P.B.	)	
L.M. and P.B., Appellants-Respondents,	)	
vs.	)	No. 49A04-0812-JV-725
MARION COUNTY DEPARTMENT OF CHILD SERVICES, Appellee-Petitioner, and CHILD ADVOCATES, INC., Appellee-Guardian-ad-Litem.	)	

APPEAL FROM THE MARION SUPERIOR COURT
JUVENILE DIVISION
The Honorable Danielle Gaughan, Judge Pro Tempore
The Honorable Larry Bradley, Magistrate
Cause No. 49D09-0710-JT-46510

August 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellants-Respondents, L.M. (Mother) and P.B. (Father), appeal the juvenile court's order terminating their parental rights to their minor child, P.B., Jr. (P.B.).

We affirm.

ISSUES

Mother raises a single issue for our review, which we restate as:

(1) Whether the juvenile court's involuntary termination of Mother's parental rights is clearly erroneous.

Father raises two issues for our review, which we restate as:

(1) Whether the juvenile court denied Father's due process rights; and

(2) Whether the Marion County Department of Child Services (MCDCS) presented sufficient evidence to support the juvenile court's termination of Father's parental rights to P.B.

FACTS AND PROCEDURAL HISTORY

In October of 2006, P.B., born on March 3, 2006, was removed from Mother's home when an aunt called police after Mother left P.B. in a car seat on the aunt's front porch. P.B. was seven months old when he was removed from Mother's custody, and he had lived with Mother for only a two-month period. At the time of removal, Father was either incarcerated or avoiding law enforcement; and his parenting ability was unknown.

Because there were open warrants against Mother, she failed to appear in the CHINS matter and her whereabouts were unknown for approximately fifteen months. During this

time, Mother was defaulted in the CHINS matter and no parenting services were ordered. P.B. was formally removed from both Mother and Father pursuant to an April 19, 2007 dispositional order.

A petition for involuntary termination of Mother's and Father's parental rights to P.B. was filed on October 29, 2007. The juvenile court held evidentiary hearings on July 30, 2008 and October 6, 2008. The juvenile court ordered termination of both parents' rights on October 27, 2008. The following are pertinent findings contained in the court's termination order.

Mother was arrested on outstanding warrants in January 2008, and she was incarcerated until July 13, 2008. (Finding of Fact #6; Father's App. p. 23). During incarceration, Mother attended substance abuse classes and also completed a "Parenting Piece by Piece" workshop, a "Women Taking Charge HIV 101" program, and a "Healthy Relationships" class. (Finding of Fact #7; Father's App. p. 23). Mother had used marijuana twice daily from age seventeen until November 19, 2007, and although she received the aforementioned substance abuse assistance, her MCDCS case manager opined that she would need a drug and alcohol evaluation and that the assistance received in jail was not structured to provide therapy. (Finding of Fact #8; Father's App. p. 23).

Although Mother received Social Security for Paranoid Schizophrenia, was diagnosed with Paranoid Schizophrenia at a young age, and received intermittent treatment and medication—including medication while incarcerated—she did not believe she was Schizophrenic or needed medication. She stopped taking her medication upon her release

from jail. (Finding of Fact #9; Father's App. p. 23).[1] A July 22, 2008 psychological evaluation of Mother led Dr. Mary Papandria (Dr. Papandria) to conclude that Mother suffered from "Schizophrenia, Paranoid Type, Episodic with Interepisodic Residual Prominent Negative Symptons." Dr. Papandria also concluded that Mother exhibited multiple symptoms of "Personality Disorder." (Finding of Fact #10; Father's App. p. 23). Dr. Papandria recommended that Mother receive "intense counseling" one or two times per week and that she be placed on a consistent medical regimen. Dr. Papandria concluded that one to two years of intense counseling would likely "stabilize" Mother. Dr. Papandria warned that "[w]ithout the combination of intensive counseling and psychotropic medication, it would be doubtful that [Mother] would be able to consistently and effectively parent her children." (Finding of Fact #11; Father's App. p. 23). Dr. Papandria further warned that Mother "could appear stable at times but is at great risk of relapses and worsening symptoms. . .[that] could result in potential danger for herself and her child." (Finding of Fact #11; Father's App. p. 23). Dr. Papandria concluded that Mother "appeared marginally capable of making sound decisions regarding the welfare of her children."[2] (Finding of Fact #12; Father's App. pp. 23-24).

At the time of the second evidentiary hearing, Mother had had a part-time job for two weeks, and she had been living alone in an apartment in her sister's name for a two to three week period. (Findings of Fact ##14 and 15; Father's App. p. 24).

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[1] Mother was given a small supply of medication upon her release. She was not given, nor did she seek, a prescription.

[2] In addition to P.B., Mother's three other children had been removed from her care.

The juvenile court found that continuation of the parent-child relationship between Mother and P.B. posed a threat to P.B.'s well being because:

> A. [Mother's] lack of insight in her severe mental health issues presents an unstable and possibly dangerous environment in which to raise a child. As found by Dr. Papandria, without consistent, regular, intensive treatment with counseling and psychotropic medications, [Mother] will continue to have serious psychological symptoms and is at risk for inability to care for herself, let alone her children. [Mother's] ability to parent at this time is unknown except for the fact that she has not consistently parented [P.B.'s] two older siblings, or his younger sibling who is currently a ward with [MCDCS]. She has not had gainful employment or stable housing long enough to establish the ability to appropriately provide for a child's needs.
>
> B. [P.B.] has not seen his [M]other since October 2006. There may have been contact limited to a weekly two-minute phone call. His bond is with [his paternal grandmother]. Dr. Papandria found it very concerning that [P.B.], who only knows [his paternal grandmother] and his life with her, may be uprooted and placed into a very unfamiliar and unpredictable environment.
>
> There is a reasonable probability that the conditions that resulted in [P.B.'s] removal and placement outside the home will not be remedied by [Mother] given her extensive mental health history and refusal to take psychotropic medications. She would also need to participate in intensive therapy, and further services required by [MCDCS] to ensure [P.B.] would be safe and not neglected. Adequate housing and income are still needed.

(Finding of Fact #20; Father's App. p. 24).

Father was incarcerated during most of the CHINS proceeding and his outdate was June 6, 2009. He had been "convicted of crimes nine times since 2000, including three convictions for drugs, two convictions for possession of a handgun without a license, and a conviction of domestic battery where [Mother] was the victim." (Finding of Fact #16; Father's App. p. 24). Father had no contact with DCS during his incarceration, and there was

no evidence that he participated in services. He had one visitation with P.B. during his incarceration. (Finding of Fact #18; Father's App. p. 24). The juvenile court found that the continuation of the parent-child relationship between Father and P.B. poses a threat to P.B.'s well being because P.B. "would remain in limbo pending [Father's] release from prison. This would only extend the wait in obtaining the goal of permanency for P.B." (Finding of Fact #21; Father's App. p. 24-25).

The court concluded, "Given [Father's] habitual pattern of engaging in criminal activity, there is a strong likelihood that he will again become incarcerated and unavailable to provide for the needs of P.B." (Finding of Fact #21; Father's App. p. 25). The court further concluded that there is "a reasonable probability that the conditions that resulted in the removal and continued placement outside the home will not be remedied by [Father]. His ability to parent remains unknown and he has shown an unwillingness to parent, exhibited by the lack of contact in the CHINS proceedings." (Finding of Fact #22; Father's App. p. 25).

The court found that P.B. had been placed with his paternal grandmother since August of 2007 and that the paternal grandmother was willing to adopt P.B. (Finding of Fact #19; Father's App. p. 24).[3] The court concluded that termination of the parent-child relationship was in P.B.'s best interest. The court found that "[t]ermination would provide the opportunity for [the paternal grandmother] to adopt [P.B.] into a safe environment where he

[3] The paternal grandmother expressed a willingness to become a guardian while Mother and Father attempted to become P.B.'s caretakers. We note that MCDCS's "foster care drift" arguments are inapposite.

can achieve a sense of permanency and know his needs will be met." (Finding of Fact #23; Father's App. p. 25).

DISCUSSION AND DECISION

I. *Propriety of the Termination of Mother's Rights*

Mother contends that her incarceration prevented her from completing some services sponsored by MCDCS, that she completed a number of services while incarcerated, and that she has acquired stable employment and an appropriate home since her release. Stated simply, she contends that the juvenile court erred in its weighing and interpretation of the evidence. In addition, Mother contends that the juvenile court erred in terminating her parent-child relationship after the court found that it does not know whether she possesses the ability to parent P.B.

The traditional right of parents to establish a home and raise their child is protected by the Fourteenth Amendment of the United States Constitution. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). Parental rights may be terminated when parents are unable or unwilling to meet their parental responsibilities. *Id.* The purpose of terminating parental rights is not to punish parents, but to protect the child. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*, *cert. denied*, 534 U.S. 1161, 122 S.Ct. 1197, 152 L.Ed.2d 136 (2002).

When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *Bester*, 839 N.E.2d at 147. We will consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. *Id.*

When reviewing findings of fact and conclusions thereon entered in a case involving a termination of parental rights, we apply a two-tiered standard of review. *Id*. First, we determine whether the evidence supports the findings. *Id*. Then, we determine whether the findings support the judgment. *Id.* The trial court's judgment will be set aside only if it is clearly erroneous. *Id.* "A judgment is clearly erroneous if the findings do not support the trial court's conclusions or the conclusions do not support the judgment." *Id*. (quoting *In re R.J.*, 829 N.E.2d 1032, 1034 (Ind. Ct. App. 2005)).

Ind. Code § 31-35-2-8(a) provides that "if the court finds that the allegations in a petition described in [I.C. § 31-35-2-4] are true, the court shall terminate the parent-child relationship." Ind.Code § 31-35-2-4(b)(2) provides that a petition to terminate a parent-child relationship involving a child in need of services must allege that:

> (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 Ind.Code § 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 State must establish these allegations by clear and convincing evidence. *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1234-35 (Ind. 1992); *Doe v. Daviess County Div. of Children & Family Services*, 669 N.E.2d 192, 194 (Ind. Ct. App. 1996), *trans. denied.*

In the instant case, Mother contends that the evidence presented at the termination hearings warrants a finding that the conditions which led to P.B.'s removal have been remedied. She also contends that the continuation of the parent-child relationship does not pose a threat to P.B.'s well-being.

To determine whether conditions are likely to be remedied, the court must examine Mother's fitness to care for P.B. as of the time of the termination hearing and take into account any changed circumstances. *See Matter of A.N.J.*, 690 N.E.2d 716, 721 (Ind. Ct. App. 1997). At the same time, the court must evaluate Mother's patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.*

Here, the record clearly supports the juvenile court's findings and conclusions pertaining to Mother's fitness. Although she had received some services, she still refused to

believe that she was schizophrenic/paranoid and that she needed to take her medicine. Indeed, she immediately stopped taking her medicine upon her release from incarceration. Mother's mental health diagnosis and need for medicine was forcefully illustrated in Dr. Papandria's report, which questioned whether she could take care of herself, let alone P.B. Although Mother testified that she would agree to take psychotropic medicine if she were re-diagnosed, the court was free to, and apparently did, question the validity of her testimony. Although we applaud Mother's efforts to improve her social and parenting skills, we will not reweigh the evidence to overturn the juvenile court's ultimate conclusion that Mother will not continue the needed consistent, regular, intensive treatment with counseling and psychotropic medications that could possibly enable her to care for P.B.

With regard to Mother's contention that the termination of her rights is premature because the juvenile court does not know whether she can parent P.B., we note that Mother has taken the juvenile court's statement out of context. First, the court found that the parent-child relationship posed a threat to P.B.'s well being because of Mother's "lack of insight" into her severe mental health issues. (Father's App. p. 24). Then, the court noted that Mother's ability is "unknown" because mother has not parented any of her four children. (Father's App. p. 24). The juvenile court's word choice is misleading, but it is clear that the court is saying that Mother has given no evidence of her parenting ability that would offset the danger posed by her lack of insight. The evidence is sufficient to support the juvenile court's findings and conclusions that the problems necessitating P.B.'s removal will not be

remedied and that continuation of the parent-child relationship poses a threat to P.B.'s well being.[4]

II. *Due Process*

Father contends that the juvenile court violated his due process rights by proceeding with the July 30, 2008 hearing in his absence. Father argues that the juvenile court arbitrarily denied P.B.'s motion to transport him from prison to the termination hearing site. Father further argues that after the prison refused to allow Father to participate in the hearing by telephone, the juvenile court wrongly refused to continue the hearings until Father could participate. Father recognizes that due process does not give him an absolute right to appear at a hearing; however, he maintains that he was deprived of his constitutional right to be heard in a meaningful manner and at a meaningful time. Further, Father argues that his absence from the hearing left him without effective assistance of counsel, as counsel did not have Father's assistance during cross-examination or as a witness in chief. Father argues that the violation of his due process rights warrants a reversal of the juvenile court's termination of Father's parental rights.

The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. *In re E.E.*, 853 N.E.2d 1037, 1043 (Ind. Ct. App. 2006), *trans. denied*. When the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due

[4] We note that under Ind. Code § 31-35-2-4(b)(2), the juvenile court was required to make only one of these findings. *See In re J.W.*, 779 N.E.2d 2d 954, 962 (Ind. Ct. App. 2002), *trans. denied*.

process. *Id*. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Thompson v. Clark County Div. of Family and Children*, 791 N.E.2d 792, 795 (Ind. Ct. App. 2003), *trans. denied* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). The nature of 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.* The balancing of these factors recognizes that although due process is not dependent on the underlying facts of the particular case, it is nevertheless "flexible and calls for such procedural protections as the particular situation demands." *Id*. (quoting *Mathews*, 424 U.S. at 334).

This court must first identify the precise nature of the private interest threatened by the State before we can properly evaluate the adequacy of the State's process. *E.E*., 853 N.E.2d at 1043. Here, both the private interests and the countervailing governmental interests affected by the proceeding are substantial. *See id*. In particular, the action concerns a parent's interest in the care, custody, and control of his child, which has been recognized as one of the most valued relationships in our culture. *Id*. Moreover, it is well settled that the right to raise one's child is an essential, basic right that is more precious than property rights. *Id*. As such, a parent's interest in the accuracy and justice of the decision is commanding. *Id*. On the other hand, the State's *parens patriae* interest in protecting the welfare of the children involved is also significant. *Id*. Delays in the adjudication of a case impose significant costs

upon the functions of the government as well as an intangible cost to the lives of the children involved. *Id*.

When balancing the competing interests of a parent and the State, we must also consider the risk of error created by the challenged procedure. *Id*. In this case, Father suggests that the risk of error is great given the juvenile court's refusal to transport him to the hearing, the correctional facility's refusal to make a telephone available, and the court's refusal to grant a continuance. We disagree. Initially, we observe that a parent does not have a constitutional right to be physically present at a final termination hearing. *Thompson*, 791 N.E.2d at 794. Rather, a parent is entitled to representation in a termination hearing, and the trial court shall provide to such parent *or his attorney* an opportunity to be heard and make recommendations at the hearing. Ind.Code §§ 31-32-2-5, 31-35-2-6.5(e) (emphasis added). In addition, a parent's right to be heard and make recommendations at the hearing can be fulfilled by submitting a written statement to the trial court. *Id*. (providing that a written statement may be made part of the court record). Furthermore, Ind. Code § 31-32-2-3(b) provides that in termination proceedings, a parent is entitled (*pro se* or through his attorney) to (1) cross-examine witnesses; (2) obtain witnesses or tangible evidence by compulsory process; and (3) introduce evidence in his behalf.

In the present case, Father identifies no occasion where the trial court denied his attorney an opportunity to ask pertinent questions or to admit pertinent evidence. We cannot determine that there was a measurable risk of error without such identification. Indeed, we note that counsel cross-examined the State's witnesses and made appropriate objections.

In making her request for a continuance, Father's attorney stated:

> On behalf of my client, I would move to continue the proceedings. I spoke with officials yesterday at the prison and he was… He was not… They would allow him to participate for a short period of time but would not let him, allow him to participate for the full time period of the trial. And I would move to continue Judge, based upon the fact that my client will not be able to participate in the trial, in his trial.

(Transcript p. 1). Thus, Father was given a limited opportunity to participate by phone, but for an unexpressed reason, chose not to do so. Furthermore, he neither filed a motion nor submitted a written statement in the October 6, 2008 hearing. He cannot now complain that he was denied participation when he chose not to take advantage of the opportunities he was given. In addition, he cannot complain of the denial of an opportunity to present specific evidence when he neither availed himself of the opportunity to do so nor informed either the juvenile court or this court of what that evidence would be.

In balancing Father's interest with that of the State that has an interest in protecting P.B. and preserving judicial resources, we find the juvenile court's decision to move forward with the termination hearing did not deny Father due process of law.[5]

III. *Sufficiency of the Evidence*

Father contends that the MCDCS failed to present sufficient evidence to support the juvenile court's findings and conclusions. He argues that the MCDCS's failure to offer

[5] Seven years ago, in *Tillotson v. Clay County Department of Family and Children*, 777 N.E.2d 741, 746 (Ind. Ct. App. 2002), *trans. denied*, we cautioned that trial courts "would be well advised to fully consider alternative procedures by which an incarcerated parent could meaningfully participate in the termination hearing when the parent cannot be physically present." We even listed alternative procedures in a footnote. *Id.* at n.7. Under the facts of this case, we see no due process violation. However, we believe it would be a better practice for the juvenile courts to hold termination hearings in the numerous Marion County courtrooms that have holding cells or to insure that a parent can participate by alternative means.

services to him negates the juvenile court's conclusion that there is a reasonable probability that the conditions which resulted in P.B.'s removal and continued placement will not be remedied and/or that the continuation of the parent-child relationship poses a threat to P.B.'s well being. Specifically, he claims that the record contains no evidence indicating that he is incapable of caring for P.B. after his release from prison or that P.B. would suffer if guardianship by the paternal grandmother, rather than termination, was pursued.

Here, the record indicates that MCDCS was unable to contact Father during the CHINS proceedings because Father was trying to avoid arrest by hiding from law enforcement. The juvenile court found that Father was then incarcerated and that he has been convicted of nine crimes since 2000, including drug convictions, weapon related convictions, and a battery against Mother. The juvenile court further found that Father did not contact DCS during his incarceration, and he did not participate in any services. Essentially, the trial court concluded that termination was necessary because there was a significant probability that Father would continue to commit crimes and would be unavailable to parent. The juvenile court further concluded that Father's lack of contact with MCDCS showed a lack of true interest in parenting.

Father questions the juvenile court's finding that he will continue to commit crimes, stating that parenthood may be a life-changing event for him. We note that there is nothing

in the record to indicate that Father has been transformed by P.B.'s birth, and we cannot say that the juvenile court's finding and conclusion are improper.[6]

Father also questions the court's finding that he made no effort to communicate with MCDCS, pointing to his attorney's question pertaining to a letter he allegedly sent to a MCDCS case manager. Although the case manager was equivocal, she did not acknowledge receiving the letter, and there is no evidence of any other attempts to contact the MCDCS. We will not reweigh the evidence.

Father also questions the termination order because he believes that a guardianship would accomplish the same thing and would allow P.B. to be reunited with a sibling. Given Father's criminal history and his lack of interest in this matter prior to the hearing, we cannot say that the juvenile court erred in determining that a guardianship would not be in P.B.'s best interest. The guardianship works only if Father stays out of jail and engages in the activities necessary for reunification, presumptions that are not supported by the evidence.

Father also questions whether MCDCS and the juvenile court are improperly using "permanence" as a justification for termination. While we agree that the "permanence" argument is more applicable to situations where the child is in foster care, we cannot say that "permanence" is not a valid consideration under the circumstances of this case. P.B. is thriving with his paternal grandmother, does not know Father as a participating and on-site parent, and would be forced to wait while for an unspecified amount of time to see whether

[6] We note that Father and Mother also had a child together in 2002. This birth did not prove to be life-changing event for Father.

Father will stop committing crimes that result in incarceration and whether Father will engage in the activities necessary for reunification.

We conclude that the evidence supports the juvenile court's findings and that the findings support its judgment. We will set aside a court's judgment only if it is clearly erroneous, and we do not find the court to have committed such error here. *See In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied, cert denied,* 534 U.S. 1161, 122 S.Ct. 1197, 152 L.Ed.2d 136 (2002).

CONCLUSION

Based on the foregoing, we conclude that the juvenile court's order was based on sufficient evidence to support the termination of both Mother's and Father's parental rights to P.B. We further conclude that the juvenile court did not violate Father's due process rights by holding the termination hearings in his absence.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.