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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE INVOLUNTARY)
TERMINATION OF THE PARENT-CHILD)
RELATIONSHIP OF T.H. AND HIS FATHER)
TYRONE BLUE,)

Appellant-Respondent,)

vs.)

MARION COUNTY DEPARTMENT)
OF CHILD SERVICES,)

Appellee-Petitioner,)

and)

CHILD ADVOCATES, INC.,)

Co-Appellee.)

No. 49A02-0703-JV-278

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Danielle Gaughan, Magistrate
Cause No. 49D09-0608-JT-31540

October 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Tyrone Blue appeals the trial court's involuntary termination of his parent-child relationship with T.H., his alleged minor child.¹ On appeal, Blue raises two issues, which we restate as 1) whether sufficient evidence supports the trial court's conclusions that the conditions resulting in T.H.'s removal from Blue's custody will not be remedied and that continuation of the parent-child relationship poses a threat to T.H.'s well-being; and 2) whether the guardian ad litem's performance denied Blue due process. We affirm, concluding sufficient evidence supports the trial court's conclusions and the guardian ad litem's performance did not deny Blue due process.

Facts and Procedural History

In early May 2005, Blue took T.H., who was four months old at the time, to the hospital. Doctors determined that T.H. had sustained a broken arm and leg at least two days previously. On May 11, 2005, based on evidence that T.H.'s injuries were consistent with child abuse, the State charged Blue with battery, a Class B felony, and neglect of a

dependent, a Class D felony. Blue pled guilty to the neglect charge and was sentenced to 1,090 days, half of which was suspended, and the State dismissed the battery charge. On May 12, 2005, the Marion County Department of Child Services (“MCDCS”)² filed a petition to adjudicate T.H. as a child in need of services (“CHINS”). On October 18, 2005, the CHINS court granted the petition. On December 1, 2005, the CHINS court removed T.H. from Blue’s custody. The CHINS court also ordered that Blue participate in parenting services, which included completing a parenting assessment, securing and maintaining a stable source of income, undergoing a psychological evaluation, establishing paternity, attending parenting and anger control classes, seeking substance abuse treatment, submitting to random drug testing, and visiting T.H. according to a schedule established by the MCDCS caseworker.

Following his release from incarceration on March 23, 2006, Blue visited T.H. once a week during April and May 2006. From June to August 2006, however, Blue visited T.H. twice. Moreover, by the end of August 2006, except for completing a parenting assessment and visiting T.H., Blue had not participated in any of the court-ordered parenting services. On August 1, 2006, MCDCS filed a petition to terminate Blue’s parental rights. On December 13, 2006, while the termination petition was pending, Blue was ordered to serve 365 days of his suspended sentence for violating the terms of his probation. On February 6 and 12, 2007, the trial court conducted a trial on the termination petition. On March 2, 2006, the trial court entered findings of fact and conclusions of law, which included the following:

¹ The trial court also involuntarily terminated the parent-child relationship between T.H. and Terri Hunt, T.H.’s mother. Hunt was not present at trial and has not joined this appeal.

² At the time of T.H.’s injury, the MCDCS was known as the Marion County Office of Family and

11. [Social Worker] Liz Ulen . . . performed a parenting assessment on Tyrone Blue in May of 2006. She gathered information regarding his relationship with Terri Hunt, [his] criminal history, [his] educational and employment background[,] and [his] substance abuse history. Based upon her assessment, she did not recommend that it would be safe to place the child back with Mr. Blue at that time. The child would be at risk for abuse due to a history of violence in the home (as evidenced by both the injury to the child and the parents' history of physical fights with each other) and at risk for neglect due to Mr. Blue's instability, as evidenced by his criminal convictions resulting in incarceration and lack of stable housing and employment over an extended period of time.

12. Mr. Blue has been offered extensive services to address anger control, domestic violence and substance abuse, by both the Probation Department and the Department of Children's Services. He has failed to take advantage of these services offered to help him address the issues which place the child at risk.

14. Mr. Blue was criminally convicted of neglect with regard to the incident leading to the CHINS for [T.H.] He is presently incarcerated for violating the terms of his probation in that case because he did not comply with court ordered parenting classes, domestic violence counseling[,] or substance abuse counseling. Because of his conviction, incarceration, and violation of his terms of probation, resulting in additional incarceration, Mr. Blue has been unavailable to provide the material necessities of life and the emotional nurturing necessary to the child. His failure to avail himself of services, [his] incarceration, [his] violation of probation, and [his] lack of stability both prior to and after the [CHINS] case was initiated demonstrate that it is likely that the child would be at risk for both abuse and neglect if returned to the care of Mr. Blue. Accordingly, there is a reasonable probability that both the reasons for removal of the child and the reasons for continued placement of the child out of the home and custody of Mr. Blue are not likely to be remedied.

23. Based upon Mr. Blue's pattern of conduct, including criminal activity, incarceration, violation of probation, failure to complete anger control counseling, lack of cooperation with the probation department and MCDCS, and instability, the child would be at significant risk for abuse and neglect if returned to his care.

Appellant's Appendix at 11-13. Based on these findings, the trial court terminated Blue's parental rights. Blue appeals.

Children. We refer to the organization throughout this opinion as the MCDCS for the sake of clarity.

Discussion and Decision

I. Termination of Parental Rights

A. Standard of Review

When reviewing a termination of parental rights, we neither reweigh evidence nor judge witness credibility. Bester v. Lake County Office of Family and Children, 839 N.E.2d 143, 147 (Ind. 2005). Instead, we consider only the evidence most favorable to the judgment and the reasonable inferences that can be drawn from the evidence. In re J.W., 779 N.E.2d 954, 959 (Ind. Ct. App. 2002), trans. denied. When a trial court enters findings of fact along with its judgment, we use a two-tiered review, first deciding if the evidence supports the findings and then deciding if the findings support the judgment. Id. We will set aside a finding or judgment only if it is clearly erroneous. Id. “A finding is clearly erroneous when there are no facts or inferences drawn therefrom which support it.” In re D.G., 702 N.E.2d 777, 780 (Ind. Ct. App. 1998). We will reverse a judgment as clearly erroneous if we review the record and have “a firm conviction that a mistake has been made.” In re J.W., 779 N.E.2d at 959.

B. Propriety of Trial Court’s Termination Decision

Because involuntary termination of parental rights is the most extreme sanction a court can impose, “termination is a last resort, available only when all other reasonable efforts have failed.” In re T.F., 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), trans. denied. Parental rights are not terminated to punish a parent, but to protect a child. In re A.N.J., 690 N.E.2d 716, 720 (Ind. Ct. App. 1997). Although a parent has a constitutional right to raise his child, that right may be terminated when the parent is unwilling or unable to meet his

parental responsibilities. In re T.F., 743 N.E.2d at 773. Accordingly, courts may subordinate the parent's rights to those of the child if the relationship threatens a child's emotional or physical development. In re R.S., 774 N.E.2d 927, 930 (Ind. Ct. App. 2002), trans. denied.

To involuntarily terminate Blue's parental rights, MCDCS had to prove the following by clear and convincing evidence:

- (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;***
- (B) there is a reasonable probability that:
 - (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
 - (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
- (C) termination is in the best interests of the child; and
- (D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2). Blue argues clear and convincing evidence does not support the trial court's conclusions that there is a reasonable probability the conditions resulting in T.H.'s removal will not be remedied and that continuation of the parent-child relationship poses a threat to T.H.'s well-being. We will address each argument in turn.³

1. Remediation of Conditions

The trial court concluded there was a reasonable probability the conditions resulting in T.H.'s removal will not be remedied based on findings that Blue failed to participate in court-

³ Although we address both of Blue's arguments, MCDCS was not required to prove both Indiana Code section 31-35-2-4(b)(2)(B)(i) and (ii) to terminate Blue's parental rights. See In re L.V.N., 799 N.E.2d 63, 69 (Ind. Ct. App. 2003) (noting that because Indiana Code section 31-35-4-2(b)(2)(B) is written in the disjunctive, "it requires the trial court to find only one of the two requirements of subparagraph (B) by clear and convincing evidence").

ordered parenting services, violated probation, and demonstrated a general “lack of stability both prior to and after the [CHINS] case was initiated.” Appellant’s App. at 12. Blue argues these findings “alone are insufficient to establish that the conditions that resulted in removal [would not] be remedied” Appellant’s Brief at 9.

In determining whether clear and convincing evidence supports the finding of a reasonable probability that the conditions resulting in a child’s removal will not be remedied, “the trial court should judge a parent’s fitness to care for his children at the time of the termination hearing, taking into consideration evidence of changed conditions.” In re L.S., 717 N.E.2d 204, 209 (Ind. Ct. App. 1999), trans. denied, cert. denied, 534 U.S. 1161 (2002). The trial court also should consider “the parent’s habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child.” Id. In making this inquiry, it is appropriate for the trial court to consider services offered to the parent and whether the parent took advantage of those services, In re D.L., 814 N.E.2d 1022, 1028 (Ind. Ct. App. 2004), trans. denied, as well as the parent’s prior criminal history, evidence of drug and alcohol abuse, history of neglect, and failure to provide adequate housing and employment, In re D.G., 702 N.E.2d at 789.

MCDCS presented evidence of Blue’s lack of participation in parenting services. The MCDCS caseworker testified that with the exception of completing a parenting assessment and visiting T.H. between March and August 2006, Blue did not participate in any court-ordered services.⁴ The MCDCS caseworker also testified she reminded Blue on several

⁴ Blue testified he attended between six and eight parenting classes, but the MCDCS caseworker testified she did not receive documentation of Blue’s attendance at these classes. Regardless, the trial court resolved this conflicting testimony when it found Blue “fail[ed] to avail himself of services.” Appellant’s

occasions of his obligation to complete the services and she never received any indication from Blue that he was unable to participate in them. Moreover, Blue testified there was “no reason” he failed to attend anger management classes and submit to random drug testing. Transcript at 37-38.

Blue’s failure to participate in parenting services is not the only evidence supporting the trial court’s conclusion. The record also indicates that in addition to his felony conviction for neglect, Blue has two Class D felony convictions for theft. For each of these convictions, Blue violated the terms of his probation. Blue testified he did not have any job prospects, but planned on contacting a temp service upon release from incarceration. Blue also implied he planned on living with T.H.’s mother even if she failed to complete substance abuse treatment:

Q So you attend [sic] to live with the mother again, Terri Hunt?

A Yes.

Q And would you intend to do that even if she hasn’t completed any substance abuse treatment?

A Actually I don’t know what to tell you. I mean we’re together.

Tr. at 40. Based on this evidence, the trial court did not commit clear error when it found the conditions leading to T.H.’s removal from Blue will not be remedied.

2. Continuation of the Parent-Child Relationship

The trial court found continuation of the parent-child relationship between Blue and T.H. posed a threat to T.H.’s well-being based on evidence of a history of domestic violence, Blue’s criminal convictions, and his “lack of stable housing and employment over an

App. at 11-12.

extended period of time.” Appellant’s App. at 11. Although we agree with Blue that there is no evidence he battered T.H., it does not follow that “there is no evidence . . . [Blue] is a danger to T.H.” Appellant’s Br. at 10. In this respect, the evidence indicates Blue’s home was the setting for repeated incidents of domestic violence. The social worker who interviewed Blue regarding his parenting assessment testified as follows:

Q [W]hat did Mr. Blue tell you regarding his relationship with the child’s mother Terri Hunt?

A He said that they were not married and they had lived together for awhile.

Q Did he describe their interactions at all?

A Yes. He said that there were many physical fights between them and that she was not faithful to him. They fought about once a month.

Q And he described those [fights] as physical?

A Yes[,] as well as arguing, but this ha[d] gone on off [and] on [during] the four years that they were together, according to his [parenting assessment].

Tr. at 10. In addition to the history of domestic violence between Blue and T.H.’s mother, the strongest evidence supporting the trial court’s conclusion is Blue’s conviction for neglect. The circumstances that led to Blue’s neglect conviction indicate T.H. sustained a broken arm and leg when he was only four months old. Despite these injuries, Blue waited at least two days before taking T.H. to the hospital. Based on this evidence, there was no clear error when the trial court concluded there was a reasonable probability that the parent-child relationship between Blue and T.H. posed a threat to T.H.’s well-being.

II. Guardian Ad Litem’s Performance

Blue argues he was denied due process because the guardian ad litem failed to fulfill her statutory duty. We note initially that our review of the record indicates Blue did not make this argument to the trial court. Accordingly, this failure constitutes waiver on direct appeal. See Hite v. Vanderburgh Co. Office of Family and Children, 845 N.E.2d 175, 180-

81 (Ind. Ct. App. 2006). Waiver notwithstanding, we will address the merits of Blue’s argument. See In re Infant Girl W., 845 N.E.2d 229, 239 (Ind. Ct. App. 2006), trans. denied (noting “our preference to resolve cases on their merits”).

The duty of the guardian ad litem is to “represent and protect the best interests of the child.” Ind. Code § 31-17-6-3. Although not stated explicitly, Indiana Code section 31-9-2-50(2) suggests this duty is discharged through adequately researching, examining, advocating, facilitating, and monitoring the child’s situation. The record indicates the guardian ad litem interviewed two MCDCS caseworkers; observed T.H. at his foster home five times; interviewed T.H.’s first foster mother and T.H.’s foster mother at the time of trial; and discussed the case with her supervisor and her counsel. The guardian ad litem opined T.H. was “[v]ery happy” in his current foster home and was doing “[r]eally well” in daycare, “learning his ABCs and . . . doing flash cards” Tr. at 75.

The guardian ad litem testified she did not contact Blue or T.H.’s mother because “[n]either . . . made consistent efforts . . . to comply with their services, so there was no reason for me to contact them.” Id. at 76. The guardian ad litem also testified it was not in T.H.’s best interest to give Blue and T.H.’s mother more time to complete their services “[b]ecause they have had over a year and a half since I have been involved with this case and there hasn’t been any consistent effort to complete services or visitation.” Id. at 77. On cross-examination, the guardian ad litem elaborated on her decision:

Q You indicated you did not make any effort to contact parents because they had not completed enough services. Is that correct?
A Correct.

Q Exactly how many services does a parent, a biological parent, have to complete before you believe that it is important to talk to them and make a recommendation to this Court?

A I don't have a specific number in my head. I just know that services were referred to them, [and] they have not completed [them].

Q Is it an interest to you as the [g]uardian ad [l]item to contact the parents and find out why they have not completed services?

A My job as the [g]uardian ad [l]item is [to] follow the best interest of the child, not the best interest of the parent, so if it looked like they were going to be a possible placement then I would. They, if their visitations and services that would be my role.

Q Well, that is not really the question that I asked you. The question that I asked you was; do you make an effort to find out from the parents why they have not completed services before you testified in this Court.

A That is not my role.

Id. at 78-79. Based on this testimony, Blue argues the guardian ad litem's "fail[ure] to explore the individual situation of each of T.H.'s parents" constitutes failure to fulfill her statutory duty. Appellant's Br. at 16. Although we agree the failure to contact a child's biological parents may constitute failure to fulfill a statutory duty under certain circumstances, by no means is a guardian ad litem required to do so in every case. Here, the record reveals Blue failed to participate in services, and therefore it was reasonable for the guardian ad litem to conclude that initiating contact with him would not be in T.H.'s best interests. Therefore, because we conclude the guardian ad litem fulfilled her statutory duty, it follows that Blue was not denied due process. See Wagner v. Grant Co. Dept. of Pub. Welfare, 653 N.E.2d 531, 534 (Ind. Ct. App. 1995) (rejecting father's request for a new trial based on the guardian ad litem's alleged deficient performance because the evidence did not indicate "the guardian ad litem failed to represent and protect the best interests" of the child).

Conclusion

Sufficient evidence supports the trial court's findings that the conditions resulting in T.H.'s removal from Blue's custody will not be remedied and that continuation of the parent-child relationship poses a threat to T.H.'s well-being. Moreover, the guardian ad litem's performance did not deny Blue due process.

Affirmed.

KIRSCH, J., and BARNES, J., concur.