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ATTORNEYS FOR APPELLANTS:

Dedria Banter:

TIMOTHY E. STUCKY

Blume, Connelly, Jordan, Stucky
& Lauer, LLP
Fort Wayne, Indiana

Foster Mowrey:

THOMAS C. ALLEN

Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

ALISA L. RUDE

SHERRY A. HARTZLER

Fort Wayne, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

In Re: The Matter of the Termination of the)
Parent-Child Relationships of R.M., and)

DEDRIA BANTER and FOSTER MOWREY,)

Appellants-Respondents,)

vs.)

ALLEN COUNTY DEPARTMENT OF)
CHILD SERVICES,)

Appellee-Petitioner.)

No. 02A03-0704-JV-178

APPEAL FROM THE ALLEN SUPERIOR COURT

The Honorable Charles F. Pratt, Judge

The Honorable Lori K. Morgan, Magistrate

Cause No. 02D07-0512-JT-157

November 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Dedria Banter (“Banter”) and Foster Mowrey (“Mowrey”) (collectively “Appellants”) appeal the trial court’s involuntary termination of their parental rights to R.M. We affirm.

Issues

Mowrey raises the sole issue of whether the trial court abused its discretion in denying his motions for a continuance of the termination hearing.

Banter raises two issues which we consolidate and re-state as the sole issue of whether the Allen County Department of Child Services (“DCS”) established, by clear and convincing evidence, the requisite statutory elements to support the involuntary termination of her parental rights.

Facts and Procedural History

R.M. was born on March 16, 2004. Appellants executed a paternity affidavit two days later, asserting that Mowrey was R.M.’s biological father.

Over the course of R.M.’s first eleven months of life, he and Banter resided in at least three different places—with Banter’s mother in Ft. Wayne, in Ohio, and with Banter’s aunt somewhere near Connersville and New Castle. Banter had fled Ohio with R.M. to escape Mowrey, who was abusive. On February 9, 2005, Banter and R.M. spent “about an hour” in a Ft. Wayne motel room provided by a person not a party to this matter. Transcript 1 at 34.

Other than milk, Banter had no food. Mowrey found them. As Banter held R.M., Mowrey kicked her in the stomach. Mowrey held R.M. and choked Banter. Police arrested Mowrey and DCS took custody of R.M.¹

One month later, DCS filed a Verified Petition Alleging Child to be in Need of Services (“CHINS”). The trial court found R.M. to be a CHINS and ordered each of the Appellants to follow a Parent Participation Plan. On July 19, 2005, the trial court found that each Appellant had “substantially not complied with the Parent Participation Plan” Exhibit 15. On December 30, 2005, DCS filed a “Petition for Termination of Parent-Child Relationship (Involuntary)” as to both Appellants. Appendix at 7. On December 6, 2005 and May 16, 2006, the trial court again found that neither Appellant was complying with his or her respective Parent Participation Plan (“PPP”).

On March 21, 2006, each Appellant moved orally for a continuance of the termination proceedings. Over DCS’s objection, the trial court granted the motion and scheduled the hearing to begin on October 11, 2006. That day, Mowrey again moved for a continuance, citing his recent release from incarceration in Ohio. The motion was denied and the trial court held the first day of a two-day evidentiary hearing.² Mowrey also moved unsuccessfully for a continuance on the second day of trial, two months later.³ On March 14, 2007, the trial court terminated Appellants’ parental rights.

This appeal ensued.

¹ R.M. has resided in licensed foster care since February of 2005.

² On October 25, 2006, the trial court entered a No Contact Order, prohibiting Mowrey from any contact with R.M, effective until October 25, 2008.

Discussion and Decision

I. Mowrey: Denial of Continuance

On appeal, Mowrey argues that the trial court abused its discretion in denying his motions for a continuance of the termination proceedings. We review the trial court's denial of his motions pursuant to the following standard.

The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. We will reverse the trial court only for an abuse of that discretion. An abuse of discretion may be found in the denial of a motion for a continuance when the moving party has shown good cause for granting the motion. However, no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial.

Rowlett v. Vanderburgh County Office of Family and Children, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006) (citing Riggin v. Rea Riggin & Sons, Inc., 738 N.E.2d 292, 311 (Ind. Ct. App. 2000)), trans. denied.

On March 22, 2005, the trial court ordered Mowrey, among other things, to refrain from all criminal activity and to complete anger management counseling. In terminating Mowrey's parental rights, the trial court found that he had not complied with these requirements of his PPP. Mowrey was incarcerated from February to March of 2005 for a conviction related to his Battery of Banter, one night for a fight occurring in May of 2005, from July of 2005 through August of 2006, and was again incarcerated as of the second day of the termination hearing. Indeed, in his brief, Mowrey acknowledges that he "was incarcerated during most of the duration of the pendency of the underlying [CHINS] case."

³ Mowrey appeared by telephone, from prison, for the second day of the hearing. His attorney appeared in person.

Mowrey's Brief at 4. In essence, he asserts that his motions for a continuance should have been granted to allow him time to comply with his PPP. As support, he cites Rowlett, in which this Court reversed the trial court's denial of a father's motion for a continuance. Rowlett, 841 N.E.2d at 624. Rowlett, however, is distinguishable from the facts of this case. Rowlett's hearing was held six weeks prior to his release. Id. at 618. While incarcerated during most of the CHINS and termination proceedings, Rowlett participated in more than one thousand hours of individual and group services, earned twelve hours of college credit, was enrolled in eighteen more hours of college credit, and had been admitted to the University of Evansville where he was to begin studies two months after his release. Id. at 622.

In contrast, Mowrey was released from prison two months prior to the October 11, 2006 hearing. Mowrey acknowledged not attending any anger management sessions while in prison. Instead of remaining in Indiana to receive court-ordered services and establish paternity, Mowrey went to Kentucky to care for his brother. He then went back to Ohio, where he was arrested for a misdemeanor on December 4, 2006.

Mowrey's abuse of Banter caused her to flee Ohio with R.M. Finding her in a motel in Ft. Wayne, Mowrey kicked her in the stomach and choked her. Furthermore, the evidence of Mowrey's lack of participation in court-ordered services is overwhelming. Finally, the trial court had already continued the beginning of the termination proceedings from March of 2006 to October of 2006. Mowrey was not prejudiced by the trial court's denial of his motions for a continuance. The trial court did not abuse its discretion in denying his motions.

II. Banter: Sufficiency of the Evidence

A. Standard of Review and Statutory Elements

This Court will not set aside the trial court's judgment terminating a parent-child relationship unless it is clearly erroneous. In re A.A.C., 682 N.E.2d 542, 544 (Ind. Ct. App. 1997). When reviewing the sufficiency of the evidence to support a judgment of involuntary termination of a parent-child relationship, this Court neither reweighs the evidence nor judges the credibility of the witnesses. Id. We consider only the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence. Id.

The Fourteenth Amendment of the Federal Constitution protects the traditional right of parents to establish a home and raise their children. Bester v. Lake County Office of Family and Children, 839 N.E.2d 143, 147 (Ind. 2005) (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923)). Nonetheless, the law provides for the termination of those rights when the parents are unable or unwilling to meet their parental responsibilities. Id. The purpose of terminating parental rights is not to punish the parents, but to protect their children. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), trans. denied, cert. denied, 534 U.S. 1161 (2002).

Indiana Code Section 31-35-2-4(b)(2) establishes the elements that the DCS must allege and prove by clear and convincing evidence in order to terminate a parent-child relationship:

(A) [not disputed]

(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 trial court must subordinate the interests of a parent to those of the child when evaluating the circumstances surrounding the termination. In re A.A.C., 682 N.E.2d at 544. Termination of a parent-child relationship is proper where the child's emotional and physical development is threatened. Id. The trial court need not wait to terminate the parent-child relationship until the child is irreversibly harmed such that his or her physical, mental, and social development is permanently injured. Id.

B. Analysis

On appeal, Banter argues that DCS did not establish by clear and convincing evidence the requisite statutory elements for the involuntary termination of her parental rights to R.M.⁴ Banter and R.M. resided with Mowrey in Ohio for approximately one month. During that time, domestic violence "sometimes" occurred. Banter and R.M. fled to her aunt's home near Connersville and New Castle. They entered a Ft. Wayne hotel room paid for by someone else. Although they had just eaten fast food, they had only milk on hand. Despite their lack of provisions, Banter had been able to smoke marijuana that week. Mowrey found them and kicked and choked Banter. R.M. was passed from one to the other during the altercation.

A little more than one month after the incident in the hotel, the trial court ordered

Banter to refrain from all criminal activity, refrain from using illegal drugs, “cooperate with all caseworkers by attending all case conferences as directed,” follow the recommendations of a drug and alcohol assessment, complete home-based services with the Parent’s & Partner’s Program, commence proceedings to establish paternity, and “fully participate in the Women’s Support Group at the Center for Non-Violence.” Ex. 12. In part, Banter asserts that, upon moving from Ft. Wayne to Angola in September of 2005 to secure employment with a restaurant, travel and expense prevented her from fully complying with her PPP.

Banter tested positively for cocaine and marijuana before and after her move to Angola. Banter told one of her social-service providers that she did not feel that her use of marijuana was a problem.

Banter attended fourteen of twenty-eight appointments scheduled with her Parent’s & Partner’s counselor before moving to Angola. On occasion, Banter would attend visitation with R.M., then fail to attend a counseling session scheduled immediately afterward. Banter completed one of twenty-six classes she was to attend at the Center for Non-Violence. Banter was trying to save money to begin the process of establishing paternity.

After Banter moved, DCS arranged for her to receive drug and alcohol treatment in Angola, but Banter was released from that program in March of 2006 due to non-participation. A DCS employee testified as follows:

Ms. Banter has, well, not complied with the services as required. One of our main concerns is her drug use and previous drug screens that were positive and Ms. Banter has not complied with the services for the drug use as well as she has not attended the Parents & Partners program through SCAN which has, arrangements have been made for that to occur right after her visitation and she

⁴ She does not challenge the trial court’s findings regarding Indiana Code Section 31-35-2-4(b)(2)(A).

has not made progress through that program which would help her as far as being more stable and being a more appropriate parent and ensuring [R.M.'s] safety.

Transcript 2 at 52.

The trial court found that Banter failed to complete drug and alcohol counseling and services provided by the Center for Non-Violence. Further, it found that she failed to cooperate with the Parent's & Partner's Program, attending only half of her scheduled appointments, even prior to moving to Angola. For these reasons, the trial court found by clear and convincing evidence that Banter had not remedied the reasons R.M. had been taken from the home, that a continuation of the parent-child relationship posed a threat to R.M.'s well-being, that termination was in R.M.'s best interest, and that DCS had a satisfactory plan for his care and treatment. Based upon the evidence, we do not conclude that the judgment was clearly erroneous.

Conclusion

The trial court did not abuse its discretion in denying Mowrey's motions for a continuance of the termination hearing. There was sufficient evidence for the trial court to find, by clear and convincing evidence, that the requisite statutory elements had been established to support the termination of parental rights.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.