

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Involuntary Termination
of the Parent-Child Relationship
of: A.M. and E.M. (Minor
Children), and M.M. (Mother),
Appellant-Respondent,

v.

Indiana Department of Child
Services,
Appellee-Petitioner

May 4, 2022

Court of Appeals Case No.
21A-JT-2824

Appeal from the Cass Circuit
Court

The Honorable Steven R. Kitts,
Judge

Trial Court Cause Nos.
09C01-2107-JT-12
09C01-2107-JT-13

May, Judge.

[1] M.M. (“Mother”) appeals the involuntary termination of her parental rights to E.M. and A.M. (collectively, “Children”). Mother argues her due process rights were violated when the Department of Child Services (“DCS”) did not provide joint therapy sessions between Mother and E.M. as recommended by some service providers. We affirm.

Facts and Procedural History

[1] Mother gave birth to E.M. and A.M. on March 1, 2009, and June 12, 2013, respectively. Mother is married to S.M. (“Father”),¹ who is Children’s father. On March 15, 2018, E.M., who was nine years old at the time, reported to a school official that Father had touched her private area and she was worried that he would do so to then-four-year-old A.M. or Children’s unborn sibling,² which was also to be a girl. DCS interviewed Father, who admitted he applied “cream to his nine[-]year[-]old child’s vagina due to rashes.” (App. Vol. II at 148.) DCS also interviewed Mother, who “stated that the nine[-]year[-]old has not had any rashes on her skin or vagina.” (*Id.*) DCS also noted Father had been convicted of a sex crime in Florida, Father was required to register as a sex offender, and the family lived in a home also occupied by a person required to register as a sexually violent predator. Based thereon, DCS filed a petition

¹ Father voluntarily relinquished his rights to Children and does not participate in this appeal. Mother and Father were still married at the time of the termination hearings.

² Children’s sister, T.M., was born in July 2018 and is not part of these proceedings.

alleging Children were Children in Need of Services (“CHINS”). On March 27, 2018, the trial court approved DCS’s request to remove Children from the home of Mother and Father and placed them in foster care, where they have remained throughout these proceedings.

[2] On July 25, 2018, the trial court held a hearing on DCS’s CHINS petition. Mother and Father denied Children were CHINS. On August 3, 2018, the trial court issued its order adjudicating Children as CHINS based on Father’s sexual abuse of E.M. and the fact that “[Mother] was unable to establish a plan to ensure the safety of her children. [Mother] stated that she did not know how to ensure safety of [Children] other than ‘talking to her husband and figure [sic] it out.’” (Ex. Vol. I at 104.) On August 21, 2018, the trial court held its dispositional hearing, and it entered its order the same day. The trial court ordered Mother to maintain stable housing and employment, obey the law, submit to random drug screens, meet all personal mental and physical health needs, participate in homebased casework services, and visit with Children.

[3] Mother was mostly compliant with services, however, service providers questioned whether Mother was benefitting from those services and putting the recommended changes into place. For example, one of Mother’s therapists testified she feared for Children’s safety because Mother, who was diagnosed with dependent personality disorder, was “highly subject to manipulation and influence” and would be “likely to do whatever someone might instruct her to do that might not be safe.” (Tr. Vol. II at 57, 62.) Mother also testified she “didn’t want to believe that [Father’s molestation] happened to [E.M.],” (*id.* at

26), and admittedly did not start to believe E.M. about the incidents until about a month before the termination hearings.

[4] Mother and Father consistently participated in supervised visitation with Children, though visitation was halted for a portion of time following an incident during which Father was holding A.M. “down and making her sit on his lap” while A.M. “was screaming to be let go and he would not” let her go. (*Id.* at 149.) Mother was never allowed unsupervised visitation with Children. Near the end of the CHINS case and the beginning of the termination case, Children refused to visit with Mother.

[5] While she was able to maintain employment throughout the course of these proceedings, Mother was unable to maintain stable housing. At the beginning of the CHINS case, Mother and Father lived with paternal grandfather. Mother, Father, and paternal grandfather were evicted from that residence, and then Mother lived in an apartment with multiple people, while Father lived in a tent outside the apartment because the landlord would not allow a registered sex offender to live in the apartment. At one point, Mother moved into a hotel with her girlfriend. At another point, Mother lived in a two-bedroom house with eight other people. At the time of the termination hearing, Mother and her girlfriend were living with several other adults, one of whom was a registered sex offender. When DCS asked to inspect Mother’s newest residence, DCS was not allowed to enter because the owner “didn’t want the drama.” (*Id.* at 110.)

[6] On August 15, 2019, Father requested the trial court voluntarily terminate his parental rights to Children, and the trial court granted his request on August 24, 2019. On September 3, 2019, the trial court changed Children’s reunification plan from reunification to adoption with a concurrent plan of reunification. In April 2021, Father was charged with crimes related to allegations that he inappropriately touched his niece and nephew. Shortly following Father’s arrest, Children started to refuse to visit Mother. When they did consent to visitation, the visits would occur in the community because Mother’s roommate “couldn’t be involved in the case anymore.” (*Id.* at 109.) On July 30, 2021, DCS filed its petition to terminate Mother’s parental rights to Children based on a lack of progress in services.

[7] The trial court held the fact-finding hearing on the termination petition over three days: November 3, 2021, November 17, 2021, and December 1, 2021. On December 15, 2021, the trial court entered its orders³ terminating Mother’s parental rights to Children. The trial court found, in relevant part:

j. Since [Children’s] removal, [Mother] has lived in 7 different locations. At two of these residences, Mother was evicted for failure to pay rent and/or for creating within the residence an unhealthy, unsanitary environment with roach and bed bug infestation along with trash and dog feces accumulated to an unacceptable level.

³ The trial court entered separate orders for each child. The orders are nearly identical, and we will quote from the order pertaining to E.M., unless otherwise noted.

k. Mothers [sic] most recent residence is also the address of a known registered sex offender.

l. Services have been provided to [Mother] through the life of this case and while she has attended With [sic] consistently [sic] most of these services when required, she has failed to gain insight or grasp a basic understanding of the tools made available to her and ultimately use them in a manner that would warrant reunification with [Children].

m. Mother continues to struggle with finances, housing[, and] transportation as well as mental health issues.

n. There has been a deterioration in the parent child relationship to the extent that one if not both of the children no longer wish to exercise visitation with [Mother].

o. Therapist testified that Mothers [sic] diagnosis of dependent personality disorder along with limited cognitive ability create a reality that [Mother] could place [Children] as well as her self in a situation that is dangerous, unstable and not in the best interest of [Children].

p. Mother continues to struggle with independence and making safe and/or healthy decisions.

q. [Children] have been rehabilitated and are in a safe, secure and nurturing home.

r. DCS has a satisfactory plan of adoption for [Children].

s. The Court finds that it is not here to determine what [Mother] wants but rather what is in the best interest of [Children]. The

court is not required to wait for permanent damage to [Children] before terminating parental rights.

t. Therapist testified that in light of [Mother's] mental condition, virtual around the clock care would likely have to take place inside the home for a considerable period of time before it could be determined whether or not [Mother] could ever improve her condition. The court is not required to wait indefinitely for every possible service to be exhausted before granting termination.

u. [Mother] has demonstrated a pattern of conduct that would make predictable future conduct probable with the end result being a continued threat to the well-being of [Children].

v. The Court finds that Mothers [sic] attendance in services is not participation in services.

w. The issue in this matter is whether Mother can or will ever remove herself from her social environments. The Court cannot say that Mother can be responsible for making decisions about the well being of [Children] when her most consistent behavioral pattern is to let others make those decisions for her regardless of the well being of [Children]. It is not a question of whether she can avoid placing herself in situations that place [Children] in harms [sic] way when she is still doing so.

We know that she is going to repeat her circumstances because her corroborated testimony is that she is repeating her circumstances, in spite of all offered services to the contrary.

(App. Vol. II at 61-2) (internal citations omitted) (formatting in original).

Discussion and Decision

- [8] We review termination of parental rights with great deference. *In re K.S., D.S., & B.G.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). We will not reweigh evidence or judge credibility of witnesses. *In re D.D.*, 804 N.E.2d 258, 265 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences most favorable to the judgment. *Id.* In deference to the juvenile court’s unique position to assess the evidence, we will set aside a judgment terminating a parent’s rights only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *reh’g denied, trans. denied, cert. denied* 534 U.S. 1161 (2002).
- [9] “The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution.” *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. A trial court must subordinate the interests of the parents to those of the children, however, when evaluating the circumstances surrounding a termination. *In re K.S.*, 750 N.E.2d at 837. The right to raise one’s own children should not be terminated solely because there is a better home available for the children, *id.*, but parental rights may be terminated when a parent is unable or unwilling to meet parental responsibilities. *Id.* at 836.
- [10] In a termination of parental rights proceeding, parents have certain due process rights:

When a State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of the due process clause. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388,

71 L.Ed.2d 599 (1982). Although due process has never been precisely defined, the phrase embodies a requirement of “fundamental fairness.” *E.P. v. Marion County Office of Family & Children*, 653 N.E.2d 1026, 1031 (Ind. Ct. App. 1995) (quoting *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 26, 101 S. Ct. 2153, 68 L.Ed.2d 640 (1981)). Citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976), this court has recently acknowledged that the nature of the process due in parental rights termination proceedings turns on a 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. *A.P. v. Porter County Office of Family and Children*, 734 N.E.2d 1107 (Ind. Ct. App. 2000)[, *reh’g denied*].

J.T. v. Marion Cty. Office of Family & Children, 740 N.E.2d 1261, 1264 (Ind. Ct. App. 2000), *reh’g denied, trans. denied, abrogated on other grounds by Baker v. Marion Cty. Office of Family & Children*, 810 N.E.2d 1035, 1041 (Ind. 2004) (abrogating *J.T.*’s statement regarding the similarity between counsel’s performance in a child case versus counsel’s performance in a criminal case). Mother argues her due process rights were violated because DCS did not provide her with therapeutic visits with E.M. during which they could discuss Father’s abuse of E.M.

[11] Mystine Collins Bergman, who was the Director of DCS for Cass County and the individual advocate for the family, testified E.M. had requested sessions with Mother to discuss Father’s sexual abuse of E.M., but those had not yet occurred. Bergman indicated those services had been offered to Mother and Mother “has said that she’s willing and able to do those” (Tr. Vol. II at 128),

however “E.M. still doesn’t feel safe to have that conversation with [Mother]” due to Mother’s continued denial that the incidents occurred and the fact that Mother, in the past, has said to E.M., “you’re a liar. I don’t believe you” when discussing the sexual abuse. (*Id.* at 129.) Family Case Manager Deanna McGee answered in the negative when asked whether “[Mother] ever indicated through the life of this case that she would like to have one on one therapy sessions with [E.M.]?” (*Id.* at 154.) McGee also indicated DCS had made a recommendation for one-on-one therapy to start between Mother and E.M., but those sessions never commenced.

[12] At the conclusion of presentation of evidence on December 1, 2021, Mother argued that her due process rights had been violated because DCS “failed to acknowledge [Mother’s] request for and willingness to participate in any necessary services.” (*Id.* at 193.) Specifically, Mother contended that “[E.M.] wants to talk to [Mother] in a therapeutic setting and I think that’s been halted by DCS as well or at least not aggressively moved forward.” (*Id.* at 195.) The trial court responded, “[t]he obligation of [DCS] is to lead [Mother] to water. It cannot make her drink it. She has not drunk it and now wants to blame [DCS] that she has not done so. These are not applicable standards and therefore are unavailing as well.” (*Id.* at 196.)

[13] Even if we assume *arguendo* that Mother requested therapy with E.M. to discuss Father’s sexual abuse, Mother cannot demonstrate she was prejudiced by the failure of that therapy to occur. As noted *supra*, Mother participated in services, but did not benefit from them or apply the concepts presented in them;

Mother never progressed beyond supervised visitation; and Mother did not have stable housing. Because of the multiple circumstances that prohibited DCS from returning Children to Mother, Mother has not shown prejudice or harm⁴ that would justify our disturbing the trial court's decision to terminate Mother's parental rights to Children. *See Smith v. Marion Cnty. Dept. of Pub. Welfare*, 635 N.E.2d 1144, 1149 (Ind. Ct. App. 1994) ("One who seeks to disturb a trial court's judgment must affirmatively show an erroneous ruling and prejudice resulting therefrom. This court does not presume prejudice, and absent such a showing, we will not disturb the trial court's ruling.") (internal citations omitted), *trans. denied*.

Conclusion

[14] Mother has not demonstrated prejudice from DCS's failure to arrange one-on-one therapy with E.M. in order to discuss Father's sexual abuse of E.M. Accordingly, we affirm the termination of Mother's parental rights.

[15] Affirmed.

Riley, J., and Tavitas, J., concur.

⁴ Mother relies upon *Matter of D.H.*, 119 N.E.3d 578 (Ind. Ct. App. 2019), *adhered to as modified on reh'g*, 122 N.E.3d 832, 834 (Ind. Ct. App. 2019), *trans. denied*. However, *D.H.* does not apply here because the parent in *D.H.* was able to demonstrate harm in the trial court's termination of her parental rights. Such is not the case here.