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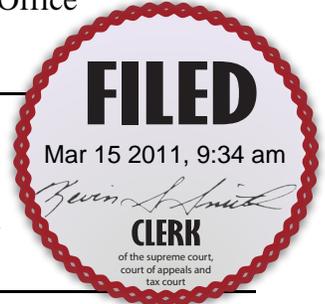
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**IN THE
COURT OF APPEALS OF INDIANA**



IN THE MATTER OF THE INVOLUNTARY)
TERMINATION OF THE PARENT-CHILD)
RELATIONSHIP OF S.H. (Minor Child) and)
)
R.H. (Father),)
Appellant-Respondent,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES, JACKSON COUNTY OFFICE,)
Appellee-Petitioner.)

No. 36A01-1008-JT-418

APPEAL FROM THE JACKSON SUPERIOR COURT
The Honorable Bruce A. MacTavish, Judge
Cause No. 36D02-0911-JT-404

March 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Respondent R.H. (“Father”) appeals an order terminating his parental rights to S.H. upon the petition of the Appellee-Petitioner Jackson County Department of Child Services (“DCS”). We affirm.

Issue

Father presents three issues for our review, which we restate as:

- I. Whether the trial court abused its discretion by permitting DCS to amend its Petition for Involuntary Termination of the Parent-Child Relationship prior to the termination hearing;
- II. Whether clear and convincing evidence supports the trial court’s determination that there is a reasonable probability the conditions resulting in the removal from his care will not be remedied, and that the continuation of the parent-child relationship poses a threat to the well-being of S.H.; and
- III. Whether clear and convincing evidence supports the trial court’s determination that termination of the parent-child relationship is in the child’s best interest.

Facts and Procedural History

Father is the biological parent of S.H., who was born on March 8, 1998. On May 19, 2008, DCS filed a petition alleging that S.H. was a Child in Need of Services (CHINS) based on Father’s May 13, 2008, arrest and incarceration for allegations of sexual crimes against two of his daughters and step-daughter. The CHINS petition was also premised upon S.H.’s emotional health and well-being following Father’s arrest, and the fact that S.H.’s mother did not have a stable residence and tested positive for illegal controlled substances.¹ On May 21,

¹ S.H.’s biological mother voluntarily relinquished her parental rights during the underlying proceedings and is

2008, after holding a hearing on the matter, the trial court declared S.H. a CHINS. DCS filed its initial petition to terminate Father's parental rights on November 16, 2009.

Throughout the CHINS and termination proceedings, Father was incarcerated awaiting trial, and on June 9, 2010, he was found guilty of two counts of child molesting, attempted child molesting, incest, two counts of sexual misconduct with a minor, and child solicitation. DCS then filed a Motion for Leave to File an Amended Petition on June 15, 2010 to include Father's conviction in its termination petition, which the trial court granted on June 16, 2010. On June 16, 2010, DCS filed its amended petition and served a copy upon Father through counsel in open court at the hearing. The trial court then conducted the fact finding hearing and on July 14, 2010, terminated Father's parental rights to S.H. Father now appeals.

Discussion and Decision

I. Leave to File an Amended Petition

Father argues that the trial court abused its discretion when it granted DCS's Motion for Leave to File Amended Petition immediately before the termination hearing and almost seven months after the original petition was filed to allege his criminal conviction. Father maintains that the late amendment constitutes undue delay on DCS's part² and that its

not an active party to this appeal.

² More specifically, Father argues that DCS did not provide him with adequate notice of all of the issues to be litigated at the hearing because DCS added new allegations in its amended petition. In support of his argument, he directs us to Bahre v. Metropolitan School District of Washington Township, Marion County, 400 N.E.2d 197 (Ind. Ct. App. 1980). However, the issue in that case upon which Father relies concerned Indiana Trial Rule 15(B), amendment of the pleadings to conform to the evidence. We wrote that "[t]he basic text of fairness would indicate that a 'party is entitled to some notice that an issue is before the court which has

amendment shifted the burden to him.

Indiana Trial Rule 15(A) controls the filing of amended pleadings and states, in relevant part:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within [30] days after it is served. Otherwise a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be given when justice so requires.

Amendments to pleadings are to be liberally allowed. MAPCO Coal, Inc. v. Godwin, 786 N.E.2d 769, 777 (Ind. Ct. App. 2003). The trial court retains broad discretion in granting or denying amendments to pleadings, and we will reverse on appeal only when it abuses that discretion. Id. “An abuse of discretion may occur if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law.” Fleming v. Int’l Pizza Supply Corp., 707 N.E.2d 1033, 1036 (Ind. Ct. App. 1999), trans. denied.

To determine whether the trial court abused its discretion, “we look to a number of factors, which include ‘undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiency by amendment previously allowed, undue prejudice to the opposing party by virtue of the amendment, and futility of the amendment.’” Nyby v. Waste Management, Inc., 725 N.E.2d 905, 915 (Ind. Ct. App. 2000) (quoting Palacios v. Kline, 566

not been pleaded or has not been agreed to in a pre-trial order.” Id. at 200 (quoting Aldon Builders, Inc. v. Kurland, 152 Ind. App. 570, 580, 284 N.E.2d 826, 832 (1972)). Here, Father did receive notice of the issues to be litigated at the hearing, but he is primarily troubled with when he received that notice.

N.E.2d 573, 575 (Ind. Ct. App. 1991)). To evaluate undue delay, consider the length of the delay and the amount of prejudice the delay causes. See MAPCO, 786 N.E.2d at 777 (finding no abuse of discretion when party was denied amendment almost three years after the initial complaint when issue could have been raised at the outset, and where the “late hour” amendment would force opposing party to quickly develop a defense against the new theory and obtain and synthesize evidence); Hendrickson v. Alcoa Fuels, Inc., 735 N.E.2d 804, 808 (Ind. Ct. App. 2000) (finding no abuse of discretion when party was denied third amendment in almost four years, and three months after the opposing parties filed summary judgment motions regarding the second amended complaint); General Motors Corp. v. Northrop Corp., 685 N.E.2d 127, 142 (Ind. Ct. App. 1997) (finding no abuse of discretion upon denial of amendment four years after initial complaint and two years after its second amended complaint without an assertion of new evidence justifying the delay).

Here, although DCS sought to amend its original petition almost seven months after its original filing, it sought leave less than a week after Father was found guilty. Father’s conviction could not have been included in DCS’s original petition since he had only been charged at that point. Thus, DCS’s delay is justified. Also, despite the amendment’s proximity to the hearing, we cannot agree that Father incurred an undue and unexpected late-hour burden of preparation for his hearing because his sexual misconduct formed the basis of the original CHINS petition.

Nor did DCS’s amended petition shift the burden of proof, as Father maintains. DCS has the burden in a termination of parental rights proceeding, which is one of clear and

convincing evidence. See I.C. § 31-34-12-2; McBride v. Monroe County Office of Family and Children, 798 N.E.2d 185, 198 (Ind. Ct. App. 2003). A conviction for child molestation (among other crimes) is prima facie evidence that the conditions that resulted in the removal of the child have not been remedied or that the continuation of the parent-child relationship poses a threat to the well-being of the child. I.C. 31-35-3-8. However, prima facie evidence merely means that the evidence is sufficient to establish a given fact, and it remains sufficient if uncontradicted. Ramsey v. Madison County Dep't. of Family and Children, 707 N.E.2d 814, 817 (Ind. Ct. App. 1999). The introduction of prima facie evidence does not alter DCS's responsibility to show that clear and convincing evidence supports all elements of its petition.

Given the circumstances of DCS's amendment and the deference we afford trial courts in these matters, we cannot say that the trial court abused its discretion when it permitted DCS leave to amend its termination petition.

II. Conditions of Removal not Remedied and Threat to S.H.'s Well-being

Standard of Review

Our standard of review is highly deferential in cases concerning the termination of parental rights. In re K.S., 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). We neither reweigh the evidence nor judge witness credibility and instead consider only the evidence and reasonable inferences most favorable to the judgment. In re D.D., 804 N.E.2d 258, 265 (Ind. Ct. App. 2004), trans. denied. "In deference to the trial court's unique position to assess the evidence, we will set aside a judgment terminating a parent-child relationship only if it is

clearly erroneous.” In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), trans. denied.

In terminating Father’s parental rights, the trial court entered specific findings and conclusions; therefore, we apply a two-tiered standard of review. Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. Id. “Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). If the evidence and inferences support the trial court’s decision, we must affirm. L.S., 717 N.E.2d at 208.

Analysis

“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. However, a trial court must subordinate the interests of the parent to those of the child when evaluating the circumstances surrounding a termination. K.S., 750 N.E.2d at 837. Although the right to raise one’s own child should not be terminated solely because there is a better home available for the child, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. Id. at 836.

Before an involuntary termination of Father’s parental rights could occur, DCS was required to allege and prove by clear and convincing evidence, among other things:

- (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; [and]

(C) termination is in the best interests of the child

Ind. Code § 31-35-2-4(b)(2)(B) and (C) (2008)³; McBride, 798 N.E.2d at 198. If the court finds the allegations in a petition described in section 4 of this chapter are true, the court shall terminate the parent-child relationship. I.C. § 31-35-2-8(a). A trial court must judge a parent’s fitness to care for his or her child at the time of the termination hearing, taking into consideration evidence of changed conditions. In re J.T., 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), trans. denied. The trial court must also “evaluate the parent’s habitual patterns of conduct to determine the probability of future neglect or deprivation of the child.” Id. Courts have properly considered evidence of a parent’s prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment. A.F. v. Marion County Office of Family & Children, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), trans. denied.

Father challenges the court’s findings as to subsections (b)(2)(B) and (C) of the termination statute cited above. Indiana Code section 31-35-2-4(b)(2)(B) was written in the disjunctive at the time this case was filed, and therefore the trial court needed to find that only one of the two [now three] requirements of subsection (b)(2)(B) had been established by

³ Indiana Code section 31-35-2-4 was amended by Pub. L. No. 21-2010, § 8 (eff. March 12, 2010). The changes to the statute became effective after the filing of the termination petition involved herein and are not applicable to this case.

clear and convincing evidence. See L.S., 717 N.E.2d at 209. Because we find it to be dispositive under the facts of this case, we only consider whether DCS established, by clear and convincing evidence, that there is a reasonable probability the continuation of the parent-child relationship between Father and S.H. poses a threat to S.S.'s well-being. See Ind. Code § 31-35-2-4(b)(2)(B)(ii).

A showing that Father has been convicted of an offense listed in I.C. 31-35-3-4(1) is prima facie evidence that the continuation of the parent-child relationship poses a threat to S.H.'s well-being. See I.C. § 31-35-3-8. Child molesting is one such listed offense. I.C. § 31-35-3-4(1)(G). At the hearing, DCS introduced evidence of Father's conviction for, among other crimes already mentioned, child molesting. Father did not object to the introduction of this evidence or otherwise contradict the fact that he was convicted. DCS also introduced evidence that Father perpetrated his crimes against his biological daughter B.H., who is S.H.'s sister and who was under sixteen years old at the time of the offense.

In addition to evidence of Father's arrest and incarceration, DCS presented testimony that the continuation of the parent-child relationship poses a threat to S.H.'s emotional and psychological health. Termination of a parent-child relationship is proper where a child's emotional and physical development is threatened. K.S., 750 N.E.2d at 837. S.H. has an adjustment disorder with mixed disturbance of emotion and conduct. He has problems with anger management, and was prone to "fly off the handle pretty much...you know apparently unprovoked." Tr. 14. Although S.H.'s condition has improved since removal, his clinical social worker and child therapist, Ms. Susan Burk, expressed continued concerns about his

behavior and testified that S.H. needs a nurturing, stable, and predictable environment. S.H.'s court appointed special advocate (CASA) Ms. Connie Gerth and Ms. Andrea Blair of Jackson County Child Services both echoed Ms. Burk's testimony. They agreed that S.H.'s behavior has improved since removal, but further opined that S.H. needs continued care for his behavioral problems, and has received beneficial results from counseling and medication. Given the evidence presented regarding Father's conviction and incarceration, as well as evidence of S.H.'s emotional and psychological problems, we conclude that clear and convincing evidence supports the trial court's finding and ultimate determination that DCS had satisfied its burden with regard to I.C. 31-35-3-5(2)(D).

III. Best Interests

Father also asserts that the trial court erred in determining that termination of his parental rights is in S.H.'s best interests. In determining what is in the best interests of a child, the trial court is required to look beyond the factors identified by the Indiana Department of Child Services to the totality of the evidence. McBride, 798 N.E.2d at 203. In so doing, the trial court must subordinate the interests of the parent to those of the child and the court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. Id. Moreover, we have previously held that the recommendations of both the case manager and child advocate to terminate parental rights, coupled with evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. In re M.M., 733 N.E.2d 6, 13 (Ind. Ct. App. 2000).

Here, both Ms. Blair, the family case manager, and Ms. Gerth, S.H.'s CASA, recommended terminating Father's parental rights. Ms. Blair explained that S.H. needs stability and permanency. She also stated that S.H. worries about his future and told her "I just want this over with so I know what's gonna [sic] happen." Tr. 38. Ms. Gerth testified that S.H. needs stability and permanency and stated that S.H. told her that "my parents are both losers." Tr. 30-32. In her opinion, S.H.'s various moves between different relatives' houses have been difficult for him, but now S.H. feels more stable in a foster home. Father was incarcerated throughout the CHINS and termination proceedings, and S.H. will likely not be a minor when Father is released. Given the recommendations of Ms. Blair and Ms. Gerth, as well as the evidence of Father's conviction and continued incarceration, we do not find that the trial court clearly erred in concluding that it is in S.H.'s best interests to have Father's parental rights terminated. Father's arguments to the contrary amount to an invitation to reweigh the evidence, which we will not do. D.D., 804 N.E.2d at 265.

Conclusion

This Court will reverse a termination of parental rights "only upon a showing of 'clear error'— that which leaves us with a definite and firm conviction that a mistake has been made." In re A.N.J., 690 N.E.2d 716, 722 (Ind. Ct. App. 1997) (quoting Egly v. Blackford County Dep't of Public Welfare, 592 N.E.2d 1232, 1235 (Ind. 1992)). We find no such error here.

Affirmed.

NAJAM, J., and DARDEN, J., concur.