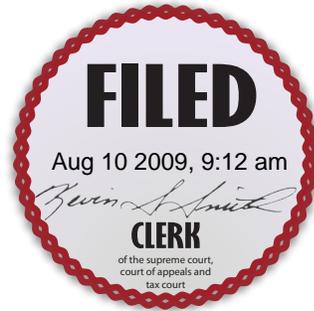


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE INVOLUNTARY)
RELATIONSHIP OF Ne.D., and Nn.D.,)
MINOR CHILDREN and THEIR FATHER, S.D.,)
)
S.D. (FATHER),)
)
Appellant-Respondent,)
)
vs.)
)
MARION COUNTY DEPARTMENT OF)
CHILD SERVICES,)
)
Appellee-Petitioner,)
)
and,)
)
CHILD ADVOCATES, INC.,)
)
Co-Appellee (Guardian Ad Litem).)

No. 49A04-0901-JV-27

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Larry E. Bradley, Magistrate
Cause No. 49D09-0807-JT-29671
49D09-0807-JT-29672

August 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

S.D. appeals the termination of his parental rights to his twin children Ne.D. and Nn.D. We affirm.

Issues

S.D. raises a compound issue, which we separate and restate as:

- I. whether his due process rights were violated when the juvenile court denied his motion to continue; and
- II. whether he received effective assistance of counsel.

Facts

On July 3, 2007, the Marion County Department of Child Services (“DCS”) filed a petition alleging that twins Ne.D. and Nn.D. were children in need of services (“CHINS”). S.D. had recently been arrested on charges of child molesting as Class A and Class C felonies. His children were not the victims, but were in the home with him when the crimes occurred. He was convicted of those charges and sentenced to thirty years imprisonment on February 13, 2008.

On August 30, 2007, the twins were declared to be CHINS. On July 3, 2008, DCS filed a petition for involuntarily termination of parental rights. Counsel for S.D., Barbara Clements, appeared at the initial hearing on July 24, 2008. S.D. did not appear. At the pretrial hearing on November 7, 2008, Attorney Clements was not present and counsel for the mother appeared for S.D. in her place.

The children's mother relinquished her rights at the start of the December 11, 2008 trial. At that time, Attorney Clements made a verbal motion to continue due to S.D. not being present. She admitted to not having seen S.D. in the past six months and asked to postpone the proceedings because "I know he does not want his rights terminated from the correspondence I received from him." Tr. p. 13. The DCS objected to the continuance and reminded the juvenile court that S.D. would be incarcerated until 2022. The guardian ad litem also objected. The juvenile court concluded S.D. would not be prejudiced by moving forward. It denied Clements's motion to continue and held the trial. The juvenile court issued findings and conclusions terminating S.D.'s parental rights to N.D. and N.D. This appeal followed.

Analysis

I. Due Process

S.D. contends that because the termination proceedings were held in his absence, his due process rights were violated; thus, the termination must be reversed. He contends it was an abuse of discretion for the juvenile court to deny his attorney's motion to

continue.¹ The decision to grant or deny a motion to continue rests within the sound discretion of the juvenile court. Parmeter v. Cass County Dep't of Child Servs., 878 N.E.2d 444, 449 (Ind. Ct. App. 2007).

A termination of parental rights proceeding must be consistent with the requirements of due process. Lawson v. Marion County Office of Family & Children, 835 N.E.2d 577, 579 (Ind. Ct. App. 2005). Due process in a termination proceeding involves the balancing of three factors: 1) the private interests affected by the proceedings; 2) the risk of error created by the State's chosen procedure; and 3) the countervailing governmental interest supporting use of the challenged procedure. C.T. v. Marion County Dep't of Child Services, 896 N.E.2d 571, 586 (Ind. Ct. App. 2008), trans. denied. The private interests of S.D. as a father and the countervailing government interests are both substantial. Id. at 587. A parent's interest in maintaining a relationship with his children is extremely high. Id. Yet, the State also has a significant interest in protecting the welfare of children. Id. "Delays in the adjudication of a termination case impose significant costs upon the functions of the government as well as intangible cost to the lives of the children involved." Id. In balancing the competing interests, we also consider the risk of error created by the challenged procedure, here S.D.'s absence from

¹ He also contends that the juvenile court's own policy of not transferring inmates to parental rights proceedings is "arbitrary." Appellant's Br. p. 9. The record does not contain details of such a policy, other than Attorney Clements stating at the hearing: "As you know, folks who are incarcerated are not transported here to juvenile court." Tr. p. 12. S.D. directs our attention to the transcript of another matter, which apparently "revealed the rationale" for this juvenile court's policy. Appellant's Br. p. 12 n.1. S.D.'s argument on this matter is not cogent and lacks evidence in the record. Regardless of any policy in place, the facts of which are not in this record, parents do not have a constitutional right to be present at termination proceedings. Tillotson v. Clay County Dep't of Family and Children, 777 N.E.2d 741, 745 (Ind. Ct. App. 2002), trans. denied.

the termination hearing. See id. Although an incarcerated parent has a “right to be heard at a meaningful time and in a meaningful manner” at the termination hearing, he “does not have an absolute right to be physically present.” Tillotson v. Clay County Dep’t of Family and Children, 777 N.E.2d 741, 745 (Ind. Ct. App. 2002), trans. denied.

Considering the facts in this case, it seems any participation by S.D. would not have been outcome determinative. He has been convicted of child molesting and will not be released until 2022. It is unclear how S.D.’s participation would have prevented the termination of his parental rights. Because she also represented him during the CHINS proceedings, at the time of the termination hearing Attorney Clements had represented S.D. in some capacity for over a year. When the final hearing was held on December 11, 2008, Attorney Clements was there and requested a continuance, apologizing to the court that she had not arranged for S.D. to participate telephonically. The juvenile court inquired about S.D.’s release date, which was 2022, when the twins would be about nineteen years old. The juvenile court pointed out the children had been out of the home since between the ages of three and five. It also noted that the children’s need for permanency outweighed any possibility of delaying the hearing until a time when father could participate telephonically. Instead, the juvenile court heard evidence and S.D.’s attorney questioned witnesses, reviewed exhibits, and made a closing argument on his behalf. We cannot find that S.D.’s due process rights were violated by this proceeding. He was represented by counsel and under these facts it was well within the juvenile court’s discretion to deny the motion to continue.

II. Ineffective Assistance of Counsel

To the extent that S.D. argues that his own counsel's ineffective assistance rendered the proceedings invalid, we disagree. He contends that Attorney Clements failed to adequately prepare and failed to arrange his participation, either live or by telephone, in the hearing. As explained by this court:

In Indiana, all indigent parties have a statutory right to the assistance of counsel in termination of parental rights proceedings. Ind. Code §§ 31-32-4-1; 31-32-2-5. However, the inquiry into whether counsel's assistance was effective is not the Strickland inquiry used in criminal cases; instead "the focus of the inquiry [is] whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination." Baker v. Marion County Office of Family and Children, 810 N.E.2d 1035, 1041 (Ind. 2004). Therefore, we must decide "whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest." Id.

Lang v. Starke County Office of Family and Children, 861 N.E.2d 366, 375 (Ind. Ct. App. 2007), trans. denied.

Attorney Clements cross-examined witnesses on S.D.'s behalf. She reviewed exhibits prior to their admission and had the opportunity to object. Attorney Clements also made a closing statement. She was familiar with the case and had represented S.D. during the CHINS proceedings and corresponded with him. Unfortunately, Attorney Clements did not have a face to face meeting with him prior to the termination hearing, nor did she arrange his participation in or transport to the hearing. S.D. contends this "prevented [him] from being heard in a meaningful time and in a meaningful manner."

Appellant's Br. p. 16. Yet, it is unclear how S.D.'s participation would have changed the outcome. His earliest release date would be 2022, and by then the twins would be nineteen years old. Considering that his conviction related to the sexual abuse of a child, it is also highly unlikely that it would be in the twins' best interest to remain with S.D. even if he had been released earlier. S.D. received a "fundamentally fair trial" and the facts we have reviewed indicate an "accurate determination." Lang, 861 N.E.2d at 375. He did not receive ineffective assistance of counsel.

Conclusion

The juvenile court did not abuse its discretion by denying S.D.'s motion to continue. S.D.'s due process rights were not violated by the proceedings and eventual termination. His counsel was not ineffective. We affirm.

Affirmed.

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