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ATTORNEY FOR APPELLANT:

DEIDRE L. MONROE
Public Defender's Office
Gary, Indiana

ATTORNEY FOR APPELLEE:

EUGENE M. VELAZCO, JR.
Merrillville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF J.F., M.F., and R.F.)

APRIL FERGUSON,)

Appellant-Respondent,)

vs.)

LAKE COUNTY DEPARTMENT)
OF CHILD SERVICES,)

Appellee-Petitioner.)

No. 45A03-0611-JV-544

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Mary Beth Bonaventura, Judge
Cause Nos. 45D06-0601-JT-13, JT-14, and JT-15

April 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Respondent April Ferguson (“Ferguson”) appeals an order terminating her parental rights to J.F., M.F., and R.F. (“Children”) upon the petition of the Appellee-Petitioner Lake County Department of Child Services (“DCS”).¹ We affirm.

Issues

Ferguson raises two issues on appeal, which we restate as:

- 1) Whether the trial court abused its discretion by appointing counsel to Ferguson at the initial hearing in the termination proceeding, and
- 2) Whether the DCS established, by clear and convincing evidence, the requisite statutory elements to support the involuntary termination of her parental rights.

Facts and Procedural History

Ferguson had nine children, including R.F., J.F., and M.F., born respectively November 23, 2000, June 28, 2002, and September 3, 2004. Eddie Ferguson (“Father”) was the father of six of Ferguson’s children, including the three Children involved in this case. Ferguson receives social security benefits in light of a learning disability first diagnosed when she was in kindergarten.

In 2004, the DCS received information indicating that M.F. had been born testing positive for HIV and that Ferguson and the Father were providing substandard housing conditions. The Children were placed in foster care with their aunt, Linda Adams (“Adams”), on January 4, 2005, and continue to live with her. Two days later, the trial court conducted a hearing, after which it concluded that there was probable cause the Children

¹ Effective July 1, 2005, the Lake County Office of Family and Children changed its name to the Lake County

were children in need of services (CHINS) and required the delivery of social services to the Children.² On April 11, 2005, the trial court heard evidence and ordered that the Children were to be wards of the DCS, retroactive to January 4, 2005, ordered the Children to be tested for HIV, and ordered Ferguson and Adams to participate in the case plan adopted by the trial court.³

The Children began receiving various home-based services and parental visitation. Ferguson and the Father, however, did not consistently attend the visits. Suffering from complications related to AIDS, the Father was hospitalized much of that summer and died on September 8, 2005.

After the Father's death, Ferguson applied for and began to receive social security benefits on behalf of the Children, although they were in their aunt's custody. The DCS was not informed by Ferguson that she was receiving these funds, but after learning of this, Adams applied to receive the benefits.

On September 19, 2005, the trial court concluded that reasonable efforts to reunify the Children with Ferguson were not required because her parental rights to three of her other children had previously been terminated.⁴ Further, the trial court adopted a Permanency Plan, including termination of parental rights and adoption of the Children by Adams.

On January 19, 2006, the DCS filed a Petition alleging that Ferguson's parental rights

Department of Child Services.

² The Record does not contain the Chronological Case Summary. If one exists, both parties have a duty to provide it in an appendix. See Ind. Appellate Rule 50(A)(2), (3).

³ There is no transcript for the January 6 or April 11, 2005 hearings.

⁴ In prior proceedings, Ferguson's parental rights to three of her other children were terminated. Three others

to the Children should be involuntarily terminated. The trial court appointed counsel to Ferguson at the initial hearing on April 20, 2006. Based upon evidence heard on August 15, 2006, with Ferguson represented by counsel, the trial court involuntarily terminated Ferguson's parental rights to the Children and named Adams as their prospective adoptive parent. Ferguson now appeals.

Discussion and Decision

I. Assistance of Counsel for Permanency Plan Hearings

Ferguson contends that she was prejudiced by the trial court's omission to appoint state-provided counsel or a guardian ad litem for "her Permanency Plan hearings" and to assist with her case plan. Appellant's Br. at 1, 10. Ferguson argues,

The CHINS Court was aware that Mrs. Ferguson had been diagnosed as being mildly mentally handicapped, and failed to appoint an attorney or guardian ad litem at the Permanency Hearing phase, especially when the plan was changed from reunification to termination. It can be reasoned that if Mrs. Ferguson had been afforded counsel at an earlier stage in the proceeding, she could have complied with the case plan quicker.

Id. at 11.

The Federal Constitution does not require the appointment of counsel in every parental termination proceeding. Baker v. Marion County Office of Family and Children, 810 N.E.2d 1035, 1038 (Ind. 2004) (citing Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27-32 (1981)). "Rather than incur the time and money to litigate eligibility for public counsel in each case, Indiana has chosen to provide counsel in termination proceedings to all parents who are indigent." Id. (citing I.C. § 31-32-4-1 and I.C. § 31-32-2-5) (emphasis added). This

were in legal guardianship, in adoption proceedings, and died during adoption proceedings.

appointment shall be made “at the initial hearing or at any earlier time.” I.C. § 31-32-4-3(a). In other words, the trial court’s authority to appoint counsel to a parent in any other proceeding is discretionary. I.C. § 31-32-4-3(b).

As an initial matter, we find no evidence in the Record to indicate that Ferguson presented this issue during the termination proceedings. Because Ferguson cannot raise the issue for the first time on appeal, she has waived the argument. Smith v. Marion County Dep’t of Pub. Welfare, 635 N.E.2d 1144, 1148 (Ind. Ct. App. 1994) (concluding that mother had waived her right-to-counsel argument for purposes of her appeal by not presenting the argument during termination proceedings), trans. denied.

Waiver notwithstanding, it is undisputed that the trial court appointed counsel to Ferguson at the initial hearing, in compliance with I.C. § 31-32-4-3(a). Prior to that hearing, it was within the trial court’s discretion to appoint counsel. I.C. § 31-32-4-3(b). See also E.P. v. Marion County Office of Family and Children, 653 N.E.2d 1026, 1031-33 (Ind. Ct. App. 1995) (concluding that appointment of counsel during CHINS proceeding was discretionary under statute and not required by Federal Due Process Clause). Ferguson cites no authority to suggest that appointment of counsel or guardian ad litem was required to occur earlier in the proceedings by virtue of her being mildly mentally handicapped. Meanwhile, her assertion of prejudice, that with earlier appointment of counsel “she could have complied with the case plan quicker,” is unpersuasive. Appellant’s Br. at 11. Ferguson’s argument speaks not to the assertion of rights or arguments, but to her willingness and capacity to be responsible for her actions as a parent—the very subject of this litigation. We conclude that the trial court was within its discretion in deciding not to appoint counsel

prior to the initial hearing in the termination proceeding.

II. Sufficiency of the Evidence

A. Standard of Review

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.

B. Requirements for Involuntary Termination of Parental Rights

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. Society 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) 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;
- (ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or
- (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;

(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.

C. Analysis

Ferguson acknowledges that DCS met its burden as to I.C. § 31-35-2-4(b)(2)(A) and (D). Ferguson contends, however, that DCS failed to establish by clear and convincing evidence: (1) that termination is in the best interests of the Children, and (2) that there is a reasonable probability that either the conditions resulting in the Children's removal from the

home will not be remedied or that the continuation of the parent-child relationship poses a threat to the well-being of the Children.

At the evidentiary hearing, parent aid Sandra Rash testified that upon her first visit to the home, there was nowhere to sit due to the roaches and general condition of the house. “It was stuff everywhere,” including clothing, food, roaches, and dog feces. Transcript at 83. By her second visit, the condition of the home had not improved. Despite being offered services to assist with obtaining better housing, Ferguson kept the Children in poor living conditions.

DCS case worker Sharon Wesley (“Wesley”) testified that, during the Father’s decline, Ferguson “was more focused on her husband at that time and his health problems” than she was on visiting the Children. *Id.* at 38. In addition, Wesley testified that Ferguson failed to complete parenting classes offered in January and August of 2005. Ferguson secured clean housing and completed the parenting class, but only after the DCS had petitioned for involuntary termination. Further, Wesley testified that Ferguson “needed supervision in order to take care of the kids. She had to be told what to do.” *Id.* at 45. Wesley concluded that termination was in the Children’s best interest and that adoption was a satisfactory plan for their care and treatment. Wesley testified that the Children were progressing well under their aunt’s care, and that the three of them had a bond with each other and with their aunt.

Adams, the prospective adoptive parent, testified that Ferguson would fail to fulfill certain promises to the Children, such as offers to take them to a restaurant for Christmas or R.F.’s birthday. Despite Adams’s offers to take the Children to meet their mother, Ferguson

failed to take advantage of these opportunities. Indeed, Ferguson herself acknowledged that she could have visited with the Children one hour per week, but she did not. Adams testified that the Children had bonded with her and that she intended to adopt the Children if Ferguson's parental rights were involuntarily terminated.

Finally, therapist Desmond Williams ("Williams") testified that he met with Ferguson and the Father in their home, but that Ferguson was not "getting anything out of the intervention" because she could not repeat back the information he would give her. Id. at 70. Williams concluded that Ferguson "was not capable of maintaining her children in her home." Id. Ferguson, he said, "would need continuous intervention in order to be able to maintain her children. Continual." Id. at 73.

Based upon the evidence presented, the trial court concluded that Ferguson was "mentally incapable of caring for the [C]hildren," "unable to obtain and maintain suitable housing for the [C]hildren," and "not showing an interest in her [C]hildren." Appendix at 2. In considering the evidence supporting the judgment, we conclude that the DCS presented clear and convincing evidence that termination was in the best interest of the Children and that there was a reasonable probability that the conditions that resulted in their removal from Ferguson's home would not be remedied or that the continuation of the relationship posed a threat to their well-being.

Conclusion

The trial court did not abuse its discretion in appointing counsel to Ferguson at the initial hearing in the termination proceeding. Further, the DCS established by clear and convincing evidence the requisite statutory elements to support the involuntary termination of

Ferguson's parental rights to J.F., M.F., and R.F.

Affirmed.

SHARPNACK, J., and MAY, J., concur.