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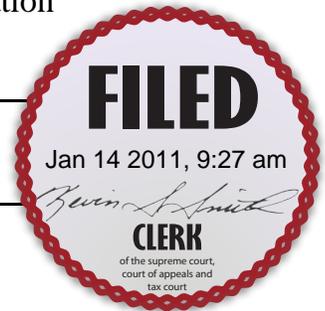
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**IN THE
COURT OF APPEALS OF INDIANA**



In the Matter of the Termination of the Parent-Child Relationship of N.J., minor child, and J.J., father, and A.D., mother,)

J.J. and A.D.,)

Appellants-Respondents,)

vs.)

INDIANA DEPARTMENT OF CHILD SERVICE,)
ST. JOSEPH COUNTY OFFICE,)

Appellee-Petitioner.)

No. 71A04-1004-JT-209

APPEAL FROM THE ST. JOSEPH PROBATE COURT

The Honorable Peter J. Nemeth, Judge

Cause No. 71J01-0902-JT-28

January 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

A.D. (“Mother”) and J.J. (“Father”) appeal the involuntary termination of their parental rights to their child, N.J. Both parents challenge the sufficiency of the evidence supporting the trial court’s judgment in this consolidated appeal.

We affirm.

FACTS AND PROCEDURAL HISTORY

Mother and Father are the biological parents of N.J., born in January 2007. In October 2007, the Indiana Department of Child Services, St. Joseph County (“JCDCS”), received a report alleging Mother was using drugs, participating in drug-related activities, and neglecting N.J. JCDCS intake case manager Carissa Stivers (“Stivers”) initiated an investigation and attempted to contact Mother on several occasions by visiting Mother’s apartment, leaving both written notes and voice mail messages, and sending letters to Mother’s home. Despite several telephone conversations and scheduled meeting times during the ensuing weeks, Mother failed to meet with Stivers.

In November 2007, Stivers received a tip that Mother was at home.¹ Stivers and local law enforcement officers proceeded to Mother’s apartment where they discovered Mother and N.J. Mother was arrested on an outstanding warrant, and N.J. was taken into emergency protective custody as there was no one willing or able to care for the child. At the time of Mother’s arrest, a device which looked like a pipe that is used to smoke drugs was found in Mother’s purse.

JCDCS filed a petition alleging N.J. was a child in need of services (“CHINS”), and Mother admitted to the allegations therein during an initial hearing on the matter. Father

¹ For clarification purposes, we observe that Mother and Father have never been married and were not living together at the time N.J. was removed from Mother’s care.

did not attend any of these initial CHINS hearings, but his paternity of N.J. was established in December 2007. Father later attended the dispositional hearing in January 2008.

Following the dispositional hearing, the trial court entered an order directing both parents to participate in a variety of services in order to achieve reunification with N.J., who remained in foster care. Specifically, both parents were ordered to, among other things, pay child support for N.J.,² exercise consistent visitation with the child, and maintain regular contact with JCDCS. In addition, Mother was directed to complete a drug and alcohol rehabilitation program and to follow all aftercare recommendations.³

Father initially complied with the trial court's orders by visiting with N.J. and cooperating with JCDCS case workers. However, shortly after the six-month review hearing, Father stopped visiting with N.J. altogether and no longer maintained any contact with JCDCS. Initially, Mother also failed to participate in visits with N.J. and continued to produce positive drug screens. Although Mother's compliance with court-ordered services showed signs of improvement at times, her overall participation remained sporadic. Specifically, Mother was "in and out of different rehab [sic] programs," had inconsistent housing, and her visitation privileges with N.J. remained suspended. *Tr. at 21.*

In July 2009, Mother began to show signs of progress, and her participation in services was characterized as going "fairly well." *Id. at 22.* She was participating in

² Mother was required to pay \$20.00/week in child support for N.J., and Father was required to pay \$29.00/week.

³ At the time of the CHINS dispositional hearing, Mother was under similar dispositional orders in another CHINS case involving N.J.'s older sibling, L.J., including submitting to random drug screens and maintaining stable housing and employment. L.J. was subsequently adopted by his paternal grandmother and is not a party to this case.

individual counseling, paying some child support, and producing negative drug screens. Although JCDCS had already filed a petition seeking the involuntary termination of both Mother's and Father's parental rights in February 2009, JCDCS agreed to continue the termination hearing in light of Mother's recent improvements, and instead set a status hearing for December 2009 to "see how things would go." *Id.* at 23. It was further determined that if Mother continued to show improvements, JCDCS planned to "dismiss the [termination of parental rights case]." *Id.*

In September 2009, Mother tested positive for cocaine on two separate occasions. Mother tested positive for cocaine two more times in October 2009. In addition, at the time of the status hearing in December 2009, Mother still had not completed a substance abuse program, and she was no longer maintaining contact with JCDCS case manager Nicolette Buntyn ("Buntyn").

A hearing on the termination petition was eventually held in March 2010. During the termination hearing, JCDCS presented evidence indicating both Mother and Father had failed to successfully complete a majority of the trial court's dispositional goals. Specifically, JCDCS presented evidence showing Mother had lived at approximately fifteen different addresses, including various treatment centers, during the underlying proceedings, was currently living with her own mother while caring for her third biological child born after N.J. was removed from her care, and had only paid approximately \$200.00 in child support since N.J.'s removal. In addition, Mother tested positive for cocaine in February 2010. Regarding Father, JCDCS presented evidence that Father was currently

incarcerated, had not visited with N.J. since July 2008, had failed to maintain regular contact with JCDCS, and had only paid approximately \$500 in child support.

At the conclusion of the termination hearing, the trial court took the matter under advisement. On March 30, 2010, the trial court entered its judgment terminating both Mother's and Father's parental rights to N.J. Both parents now appeal.

DISCUSSION AND DECISION

We begin our review by acknowledging that this court has long had a highly deferential standard of review in cases concerning the termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). When reviewing a termination of parental rights case, we will not reweigh the evidence or judge the credibility of the 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 that are most favorable to the judgment. *Id.* Moreover, in deference to the trial court's unique position to assess the evidence, we will set aside the court's 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*.

Here, in terminating Mother's and Father's parental rights, the trial court entered specific findings and conclusions. When a trial court's judgment contains specific findings of fact and conclusions thereon, 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.

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*. These parental interests, however, are not absolute and must be subordinated to the child’s interests when determining the proper disposition of a petition to terminate parental rights. *Id.* In addition, 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. *K.S.*, 750 N.E.2d at 836.

Before an involuntary termination of parental rights may occur, the State is required to allege and prove, among other things, that:

- (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 . . . [.]

Ind. Code § 31-35-2-4(b)(2)(B) (2008).⁴ Moreover, “[t]he State’s burden of proof in termination of parental rights cases is one of ‘clear and convincing evidence.’” *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (quoting Ind. Code § 31-37-14-2 (2008)).

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

Mother and Father challenge the sufficiency of the evidence supporting the trial court's findings as to subsection (B) of the termination statute cited above. *See* Ind. Code § 31-35-2-4(b)(2). The trial court found both prongs of this subsection had been satisfied. We pause to observe, however, that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, JCDCS was required to establish only one of the two requirements of subsection (b)(2)(B) by clear and convincing evidence. *See L.S.*, 717 N.E.2d at 209. Because we find the issue to be dispositive, we need only consider whether sufficient evidence supports the trial court's determination that there is a reasonable probability the conditions resulting in N.J's removal and/or continued placement outside Mother's and Father's care will not be remedied.

In determining whether conditions causing removal or continued placement outside the care of a parent will be remedied, 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.* Pursuant to this rule, 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*. Finally, we point out that a county department of child services is not required to provide evidence ruling out all possibilities of change;

rather, it need establish only that there is a reasonable probability the parent's behavior will not change. *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In its judgment terminating Mother's and Father's parental rights to N.J., the trial court specifically found that Mother was not in compliance with the terms of its dispositional order in that Mother had failed to "complete a drug or alcohol rehabilitation program, follow all aftercare recommendations[,] and maintain consistent contact with [JCDCS]. Trial Court's Judgment at 2.⁵ The trial court also found that Mother had had no contact with N.J. since March 2008, had recently tested positive for cocaine, and that the court had previously postponed a scheduled evidentiary hearing on the termination petition when JCDCS and the court-appointed special advocate ("CASA") informed the court they "believed that [M]other was serious about being in compliance with her case plan and abstaining from illicit drug use." *Id.* The court further found that Mother generally does better during pregnancy[,] but once her child is born she "falls back into the same destructive lifestyle and begins to neglect the needs, safety[,] and stability of her children." *Id.*

With regard to Father, the trial court found that Father "has had no relationship with the child since his birth," is not in "compliance with the [JCDCS] case plan," was arrested and is currently incarcerated for "breaking into the pharmacy at Memorial Hospital and attempting to steal approximately nine-hundred dollars (\$900.00) worth of various prescription medications," and admitted to the arresting officer that he has had a drug

⁵ At the request of this Court, the trial court entered an Amended Order to Terminate Parent-Child Relationship on October 11, 2010, containing complete findings of primary facts and conclusions thereon. We therefore cite directly to the trial court's amended judgment.

problem “for approximately two years.” *Id.* Based on these findings, the trial court concluded that there is a reasonable probability the conditions resulting in the removal of N.J. from his parents’ care will not be remedied. Our review of the record reveals that there is ample evidence to support the trial court’s findings cited above, which in turn support the court’s ultimate decision to terminate Mother’s and Father’s parental rights to N.J.

Testimony from various caseworkers and service providers makes clear that despite a wealth of services available to both parents for approximately two years, Mother’s and Father’s circumstances remained largely unchanged. During the termination hearing, case manager Buntyn confirmed that neither parent was in compliance with the trial court’s dispositional orders and that both parents had recently tested positive for drugs. Although Buntyn acknowledged a brief period in 2009 during which Mother appeared to be doing “fairly well” in services and had requested reinstatement of her visitation privileges, Buntyn thereafter explained that Mother’s request had initially been denied because JCDCS “felt that [Mother] needed to show some consistency with her drug treatment program before [the Department] went to court to ask for [Mother’s] visits to be reinstated,” and that ultimately visitation was never reinstated due to Mother’s renewed drug use. *Tr.* at 22. Buntyn also confirmed Father had failed to maintain consistent contact with JCDCS, visit regularly with N.J., and provide Buntyn with a proof of a valid prescription after Father tested positive for Methadone. Buntyn further testified that the conditions that led to N.J.’s removal still existed as of the time of the termination hearing,

and that neither parent was capable of meeting their parental responsibilities in order to care for N.J.

Similarly, CASA Linda Brasseur (“Brasseur”) also recommended termination of both Mother’s and Father’s parental rights to N.J. In so doing, Brasseur testified that at one point during the case, Mother “really did convince me that she had changed. . . . She gave me every reason to believe that this time it was going to be different,” but that Brasseur’s opinion had changed when Mother “started testing positive [for drugs] again.” *Id.* at 45-46. When asked why she recommended termination of Father’s parental rights, Brasseur referenced Father’s involvement with drugs and apparent “lack of interest” in N.J. throughout the duration of the underlying proceedings. *Id.* at 49.

Based on the foregoing, we conclude that JCDCS presented clear and convincing evidence to support the trial court’s findings and ultimate determination that there is a reasonable probability the conditions resulting in N.J.’s removal and continued placement outside the family home will not be remedied. Mother’s and Father’s arguments to the contrary, emphasizing Mother’s recent sobriety and Father’s initial participation in services, rather than the evidence relied upon by the trial court, amount to an invitation to reweigh the evidence, which we may not do. D.D., 804 N.E.2d at 264.

Affirmed.

RILEY, J., and BAILEY, J., concur.