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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF: B.B. & M.B. (Minor Children), and K.A. (Mother), And B.B. (Father),	)	
Appellants,	)	
vs.	)	No. 33A01-1007-JT-379
THE INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee.	)	

APPEAL FROM THE HENRY CIRCUIT COURT
The Honorable Mary G. Willis, Judge
Cause Nos. 33C01-1004-JT-3 and 4

February 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

K.A. ("Mother") and B.B. ("Father") appeal the termination of their parent-child relationship with Br.B. and M.B. (collectively "the children").

We affirm.

ISSUE

Whether clear and convincing evidence supports the termination of Mother and Father's parental rights.

FACTS

Mother and Father are the parents of Br.B. (born February 3, 2006). Genetic testing conducted during the pendency of the instant action excluded Father as the biological father of Mother's son, M.B. (born February 27, 2007).[1]

In February of 2009, the Henry County Department of Child Services ("HCDCS") received reports that Mother and Father were abusing alcohol and controlled substances and were not adequately supervising the children. On February 25, 2009, Father was arrested for various offenses, including operating a motor vehicle while intoxicated and

[1] Mother has three prior-born children, none of whom is in her care. Of these children, the second and third -- A.B. and J.B. -- were adjudicated as CHINS, and Mother's parent-child relationship with them was subsequently terminated. Father is not the father of Mother's prior-born children.

possession of a Schedule I controlled substance.[2] Br.B. was in Father's vehicle at the time of the offenses and was not properly restrained in a child safety seat. On March 11 and March 18 of 2009, Mother submitted to random drug screens and tested positive for prescription medications[3] that had not been prescribed for her.

On March 24, 2009, the HCDCS entered into an informal adjustment with Mother as to Br.B.[4] Mother was ordered to undergo a mental health assessment, to receive individualized therapy for domestic violence and anxiety issues, and to maintain a protective order against Father for the safety of the children. On March 25, 2009, HCDCS detained the children upon learning that Mother had dismissed the protective order, taken the children to visit Father, and tested positive for methadone, which was not prescribed for her.

On April 6, 2009, Mother was arrested.[5] That day, the HCDCS filed a petition alleging that the children were children in need of services ("CHINS"). The juvenile court subsequently adjudicated the children as CHINS, and on June 15, 2009, the trial court conducted a dispositional hearing, wherein it adopted HCDCS' case plan. Under the case plan, which was aimed toward a goal of reunification, Mother was ordered to, among other things: (1) submit to random drug screens which were to be free of illegal

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[2] On January 25, 2010, Father began serving a six-year prison sentence.

[3] Mother tested positive for alprazolam and methadone.

[4] The informal adjustment was terminated as unsuccessful on June 11, 2009.

[5] With the exception of a three-week period, Mother remained incarcerated until the underlying fact-finding hearing.

and non-prescribed controlled substances; (2) satisfactorily complete substance abuse treatment; (3) obtain and maintain suitable housing; (4) secure a legal source of income sufficient to support her household; (5) participate in services as recommended by the children's therapist(s); (6) participate in any programming available to her while incarcerated that would improve her ability to properly parent the children; and (7) pursue establishment of M.B.'s paternity.

Father was ordered to satisfy the same objectives as Mother, with the addition of the requirements that he submit to random drug screens which were to be free of illegal, non-prescribed controlled substances and prescribed[6] controlled substances in excess of therapeutic level; and participate in services recommended by Br.B.'s therapist.

On March 19, 2010, HCDCS adopted a permanency plan of termination of parental rights; and on April 12, 2010, it filed a petition requesting the involuntary termination of Mother and Father's parental rights. The juvenile court conducted a fact-finding hearing on June 15, 2010. Mother and Father were still incarcerated at the time of the fact-finding hearing.[7] On June 21, 2010, the juvenile court terminated Mother and Father's parental rights; they now appeal.

Additional facts will be provided as necessary.

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[6] Father had previously been prescribed methadone to aid in his recovery from an opiate dependency.

[7] At the time of the hearing, Mother's release was imminent, and Father's earliest possible release date was January of 2013.

DECISION

Mother and Father challenge the sufficiency of the evidence to support the juvenile court's termination of their parental rights. Specifically, they argue that DCS failed to establish, by clear and convincing evidence, that (1) the conditions which resulted in the children's removal would not be remedied; and that termination of their parental rights is in the best interests of the children. We disagree.

"Parental rights are of a constitutional dimension, but the law provides for the termination of those rights when the parents are unable or unwilling to meet their parental responsibilities." *In re E.E.*, 736 N.E.2d 791, 793-94 (Ind. Ct. App. 2000). The purpose of terminating parental rights is not to punish the parents, but to protect their children. *Id.* at 794. In reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004). Instead, we consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. *Id.*

Where, as here, the juvenile court enters findings of fact and conclusions of law in its termination of parental rights, we apply the following two-tiered standard of review: we must determine whether the evidence supports the findings; and whether the findings support the judgment. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). "In deference to the juvenile court's unique position to assess the evidence, we will set aside the court's findings and judgment terminating a parent-child relationship only if they are clearly erroneous." *In re J.H.*, 911 N.E.2d 69, 73 (Ind. Ct.

App. 2009). A finding of fact is clearly erroneous when there are no facts or inferences drawn therefrom that support it. *D.D.*, 804 N.E.2d at 264. A judgment is clearly erroneous only if the conclusions of law drawn by the court are not supported by its findings of fact or the conclusions of law do not support the judgment. *J.H.*, 911 N.E.2d at 73.

To effect the involuntary termination of a parent-child relationship, the State must present clear and convincing evidence establishing the elements of Indiana Code section 31-35-2-4(b)(2). *D.D.*, 804 N.E.2d at 265. Thus, the State must prove that:

> (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;
>
> * * *
>
> (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.

I.C. § 31-35-2-4(b)(2).

Because subsection (b)(2)(B) is written in the disjunctive, the juvenile court need only find by clear and convincing evidence that one of the two requirements of subparagraph (B) has been met in order to terminate a parent-child relationship. Here,

the juvenile court found both conditions of subsection (b)(2)(B) to be met. Because Mother and Father challenge only the finding that the conditions that resulted in removal will not be remedied, HCDCS argues -- and we agree -- that Mother and Father's failure to challenge the court's finding that continuation of the parent-child relationship poses a threat to the wellbeing of the children amounts to a concession of the same. Nonetheless, we proceed to analyze Mother and Father's claims below.

1. Remedy of Conditions

The CHINS petition stated the following reasons for the children's removal: (1) Mother's substance abuse; (2) Mother and Father's failure to properly supervise the children; (3) Mother's allegations of Father's substance abuse and alleged molestation of Br.B.; (4) Mother's failure to comply with the terms of the informal adjustment; and (5) Mother and Father's continued contacts with the criminal justice system. Subsequently, in its final order, the juvenile court concluded that a reasonable probability existed that the conditions that resulted in the children's removal would not be remedied.

In determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the juvenile 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. *R.W., Sr. v. Marion County Dep't of Child Serv.,* 892 N.E.2d 239, 246 (Ind. Ct. App. 2008). However, the juvenile court must also evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the

child. *Id.* The court may properly consider the services offered by DCS, and the parent's response thereto, as evidence of whether the conditions that resulted in the child's removal from the home will or will not be remedied. *Id.* at 248. DCS need not rule out all possibilities of change; rather, it must establish that there is a reasonable probability that the parent's behavior will not change. *In re B.J.*, 879 N.E.2d 7, 18-19 (Ind. Ct. App. 2008), *trans. denied*.

Here, the juvenile court heard the following evidence: HCDCS investigator John Huffman testified that in October 2002 and February 2004, he performed assessments of Mother's prior born children, A.B. and J.B., respectively. He testified that as to A.B., the "[n]ature of [the] report was neglect with regards to lack of supervision and ability to properly care for a child due to alcohol abuse and mom being arrested for DUI." (Tr. 144). As to J.B., he testified that DCS became involved after a report "once again," of "neglect and inability to supervise and inability to care for [newborn J.B.]; [and] using or abusing controlled substances." (Tr. 144).

Therapist Amber Nussbaum of Center Stone testified that she performed Mother's intake assessment in March 2009 and subsequently recommended individual therapy case management and a medication evaluation aimed at addressing Mother's anxiety and physically-abusive relationship with Father. She testified that Mother had "denied any criminal history and any legal involvement" as well as any history of or current substance abuse, (tr. 122); that she (Nussbaum) was surprised to learn, under questioning, that Mother had prior convictions for forgery, operating a motor vehicle while intoxicated,

and possession of a controlled substance. She testified further that had Mother truthfully disclosed her history, such might have influenced Nussbaum's recommendations; and that Mother's omissions rendered effectiveness of therapy "very difficult," because unless Mother is "honest with a provider, [she] can't really work on pertinent issues. It also indicates an unwillingness to be honest about her needs." (Tr. 124). Lastly, she testified that Mother never benefited from the recommended therapeutic treatment because she was incarcerated shortly after the assessment was conducted.

Family Case Manager Nikki Williams of HCDCS testified that she conducted welfare assessments of the children in March 2009 after reports of Father's drunk-driving arrest with Br.B. in the car; allegations of domestic violence; Mother and Father's drug abuse; Mother's concerns that Br.B. had been sexually molested; and Mother's general concern for the safety of the children because of Father's drug and alcohol use. Williams testified that after "neglect was substantiated on both parents," (tr. 21), HCDCS entered into an informal adjustment with Mother, but that Mother failed to comply with the terms. *See* Tr. 22 ("Two days after it was signed, she dropped the protective order against [Father] and took [the children] to his house.").

HCDCS case manager Carly Lawson testified that the children were thriving in foster care, and that given Mother's involvement with HCDCS since 2002 regarding four different children, Mother had been given a fair opportunity to fulfill her parental obligations. According to Lawson, Mother had failed to demonstrate sufficient progress and the ability to properly parent and provide for her children.

HCDCS case manager Chelsea Givens testified that Mother's incarceration prevented her from participating in court-ordered case management, family therapy, supervised visitation, and therapies recommended by Br.B.'s therapist. She testified that because Mother was incarcerated throughout much of the formal CHINS action, HCDCS had recommended that she should participate in any services that might be available to her through the DOC or jails; however, Mother provided no certificates of completion of any such programs. She testified that Mother had also failed to present a plan for housing or employment in anticipation of her release date, which was imminent at the time of the fact-finding hearing.

As to Father, Givens testified that he was discharged as unsuccessful from substance abuse treatment on December 16th of 2009 due to non-compliance. She testified that Father did "participate in supervised visitation's [sic] and began," but would not comply with therapeutic visitations with Br.B.'s therapist. (Tr. 37). Lastly, she testified that Father failed to provide documentation of having completed any substance abuse programming during his incarceration.

Clinical Social Worker Robert Johnson of Anchor Behavioral Counseling testified that he performed a substance abuse assessment of Father, which revealed opiate and alcohol dependencies. He also testified that Father was "not compliant" and that "there was more information to be gathered [during the assessment] that [Father] didn't share." (Tr. 70). He testified that Father failed to provide documentation that he had "completed a program or was completing a [substance abuse treatment] program." (Tr. 72). He also

testified that he had recommended that Father participate in individual and group substance abuse therapy as well as participating in Narcotics Anonymous and Alcohol Anonymous meetings ("NA/AA"). He did not successfully complete the 12-week group program or individual therapy, and did not produce proof of having attended NA and/or AA meetings; thus, Father's case was closed for "non-compliance." (Tr. 74).

Life Line Youth and Family Services Therapist Shannon Hicks testified that she provided therapeutic services to Father and Br.B. beginning in early December 2009. She testified that Br.B. exhibited "intense aggression," "screaming or yelling at [Father]; hitting him and throwing toys." (tr. 107). She testified that Br.B. also exhibited "sexual acting out behavior," such as "touch[ing] her genitals outside of her clothes and [telling Father] to look." (Tr. 110). She testified that Father's participation in therapeutic supervised visitations with Br.B. was interrupted by his incarceration.

Dr. Creta Roberts of Anchor Behavioral Counseling, testified that Br.B "exhibit[ed] a lot of aggression, tantrums, a lot of sexualized behaviors," and that there was a "very high probability of sexual abuse." (Tr. 139).

In addition to the foregoing evidence, the juvenile court made extensive findings of fact on this statutory factor – none of which is challenged by Mother and Father. We conclude that the record contains ample evidentiary support for the juvenile court's conclusion that there is a reasonable probability that the reasons for Br.B. and M.B.'s removal from Mother and Father are not likely to be remedied. We find no clear error.

2. Best interests

When determining whether termination of parental rights is in the best interest of the child, the trial court need not wait until a child is irreversibly harmed such that his or her physical, mental, and social development are permanently impaired before terminating the parent-child relationship. *In re D.J.*, 755 N.E.2d 679, 684 (Ind. Ct. App. 2001). In determining what is in the best interests of a child, the trial court is required to look beyond the factors identified by the Department of Child Services and to consider the totality of the evidence. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In so doing, the trial court must subordinate the interests of the parent to those of the child. *Id.* 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 the case manager and court-appointed advocate to terminate parental rights, in addition to evidence (as discussed above) 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).

Based upon the aforementioned testimony of family case managers and therapists, we also find sufficient evidentiary support for the juvenile court's conclusion that termination of Father and Mother's parental rights is in the best interests of the children. *See In re A.I.*, 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of family case manager, coupled with evidence that conditions resulting in continued

placement outside of home will not be remedied, is sufficient to prove, by clear and convincing evidence, that termination is in child's best interests), *trans. denied*. Accordingly, we find no clear error.

Affirmed.

NAJAM, J., and BAILEY, J., concur.