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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF:	)	
The Involuntary Termination of the	)	
Parent-Child Relationship of the Minor	)	
Children Y.O., D.N., and C.O. and the Mother, S.N.	)	
	)	
Mother, S.N.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A04-0908-JV-462
	)	
DEPARTMENT OF CHILD SERVICES,	)	
	)	
Appellee-Petitioner,	)	
	)	
and	)	
	)	
CHILD ADVOCATES, INC.,	)	
	)	
Co-Appellee-Guardian ad Litem.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Larry E. Bradley, Magistrate
Cause Nos. 49D09-0901-JT-1623, 49D09-0901-JT-1624, and 49D09-0901-JT-1625

March 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

S.N. ("Mother") appeals a juvenile court order involuntarily terminating her parental rights to Y.O., D.N., and CO.[1] We affirm.

Issues

Mother raises the following issues on appeal:

I. Did the Department of Child Services ("DCS") present sufficient evidence to support the juvenile court's termination order?

II. Was she denied her constitutional due process rights based on DCS's decision not to place the children with relatives during the Children in Need of Services ("CHINS") proceedings?

Facts and Procedural History

Mother has three biological children, Y.O., born September 24, 1997, D.N., born January 3, 1999, and C.O., born March 11, 2001. On February 14, 2007, Mother was convicted of marijuana possession and was placed on probation. In August 2007, she tested positive for marijuana and, as a result, she was incarcerated for violating her probation. The DCS removed the children from Mother and placed them in foster care.

On August 23, 2007, DCS filed a petition alleging that Y.O., D.N., and C.O. were CHINS, based on Mother's substance abuse and incarceration as well as a pattern of domestic violence between Mother and her then-husband, T.D. The children were placed with foster parent Foresteen Dillard on August 24, 2007, and have remained with her since. Mother's sister and brother-in-law, Alabama residents, sought custody of the children. On

[1] As part of the order, the juvenile court also involuntarily terminated the parental rights of N.O., the father of Y.O. and C.O. However, he is not a party to this appeal.

November 30, 2007, the juvenile court found the children to be CHINS, based on Mother's instability, marijuana use, and domestic violence.

On December 28, 2007, the juvenile court held a dispositional hearing and issued a participation decree ordering Mother to visit the children, complete certain services, and follow the ensuing recommendations. The services included a parenting assessment, drug and alcohol assessment, random drug testing, substance abuse treatment, a domestic violence program, and home-based counseling. She completed twenty-eight domestic violence classes. As part of her participation in a November 12, 2007 parenting assessment, Mother was expected to complete intensive outpatient treatment ("IOP"), submit to random urine screens, continue supervised visitation, obtain employment, secure housing for herself and her children, participate in home-based counseling, establish paternity of her children, apply for food stamps, and take a smoking cessation program. Despite completing her IOP in March of 2008, she tested positive for marijuana five times during February 2009. A home-based counselor unsuccessfully attempted to contact Mother at four different addresses.

In September 2008, DCS investigated possible placement of the children with Mother's sister and brother-in-law and recommended against it based on its concern that Mother might attempt to follow them to Alabama and thereby circumvent services, concern over the relatives' frequent moves, and the stability of the children's current foster care placement. On December 23, 2008, acting on the recommendation of the guardian ad litem,

the juvenile court issued an order suspending Mother's supervised visitation with her children.

On January 12, 2009, the DCS filed a termination petition. The juvenile court held a hearing on May 21 and June 24, 2009. As of that time, Mother had lived at five different addresses within the prior year and had lived at her current address for two months. On July 15, 2009, the juvenile court entered findings of fact and conclusions thereon, terminating Mother's parental rights to Y.O., D.N., and C.O. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Sufficiency of Evidence

Mother challenges the sufficiency of evidence supporting the juvenile court's judgment terminating her parental rights to Y.O., D.N., and C.O. When reviewing a juvenile court's order terminating a parent-child relationship, we neither reweigh evidence nor judge witness credibility; rather, we consider only the evidence and inferences most favorable to the judgment. *In re A.I.*, 825 N.E.2d 798, 805 (Ind. Ct. App. 2005), *trans. denied*. Here, the juvenile court entered extensive findings of fact and conclusions thereon. Thus, we apply a two-tiered standard of review and will not set aside the findings or judgment unless they are clearly erroneous. *Parmeter v. Cass County Dep't of Child Servs.*, 878 N.E.2d 444, 450 (Ind. Ct. App. 2007). First, we consider whether the evidence supports the factual findings. *Id*. Then, we consider whether the findings support the judgment. *Id*. "Findings are clearly erroneous only when the record contains no facts to support them either directly or

indirectly." *Id*. (citation and quotation marks omitted). A judgment is clearly erroneous if it relies on an incorrect legal standard. *Id*.

In *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143 (Ind. 2005), our supreme court stated,

> The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. A parent's interest in the care, custody, and control of his or her children is perhaps the oldest of the fundamental liberty interests. Indeed the parent-child relationship is one of the most valued relationships in our culture. We recognize of course that parental interests are not absolute and must be subordinated to the child's interests in determining the proper disposition of a petition to terminate parental rights. Thus, parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities.

Id. at 147 (citations, quotation marks, and alteration omitted). In recognition of the seriousness with which we address parental termination cases, Indiana has adopted a clear and convincing evidence standard. *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 377 (Ind. Ct. App. 2006), *trans. denied*.

To obtain a termination of the parent-child relationship, DCS must establish 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;
>
> (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.

Ind. Code § 31-35-2-4(b)(2) (emphasis added).

Mother claims that the evidence is insufficient to support the juvenile court's findings and conclusions regarding the reasonable probability of remedied conditions and the threat to the children's well-being. We note, however, that subsection (b)(2)(B) is written in the disjunctive. Thus, DCS was required to establish, by clear and convincing evidence, only one of the two requirements of subsection (B). *In re I.A.*, 903 N.E.2d 146, 154 (Ind. Ct. App. 2009). Nonetheless, we will address both requirements.

When assessing whether there is a reasonable probability that the reasons for placement outside the parent's home will not be remedied, juvenile courts must consider the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. In this regard, courts have properly considered evidence concerning the parent's history of criminal conduct, substance abuse, neglect, and lack of adequate housing and employment. *Id*. In making its case, the "DCS need not rule out all possibilities of change; rather, [it] need establish only that there is a reasonable probability that the parent's behavior will not change." *In re Kay.L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

Here, the juvenile court entered the following findings in addressing whether a reasonable probability exists that conditions leading to the children's removal will be remedied:

8. [Mother] was referred for services to complete toward reunification with her children. She completed a parenting assessment with a substance abuse assessment, and attended enough classes to complete an intensive outpatient drug treatment program and a domestic violence program, though she was inconsistent.

9. [Mother] was also to participate in random urine screens and home based counseling. She was to secure and maintain a legal source of income and adequate housing, visit the children and maintain contact with [DCS].

10. Five separate referrals for random urine screens through Mosaic Recovery were made for [Mother] from March 11, 2008 to February 2, 2009. [Mother] started participating in screens in February 2009, testing positive for THC on her first five screens. She tested negative on screens given in March 2009 and thereafter.

11. Positive screens for [Mother] in February 2009 came after she completed her intensive outpatient program. [Mother's] substance abuse assessor, Michelle Rightley, would recommend a new assessment and program for someone using after completing an intensive outpatient program.

12. Although home based services were referred on three occasions prior to trial in this matter, home based counselor Janna Schmidt could not find [Mother's] home, or at home. [Mother] was given contact information by Ms. Schmidt but has not contacted her.

13. The trial in this matter consisted of two days with a duration of thirty five days between the trial dates. [Mother] received another referral for home based services and started services three to four weeks prior to the second day of trial at which time she had four sessions. She could only remember her counselor's first name.

14. Since the CHINS proceedings were filed, [Mother] worked as forklift driver for approximately four months in 2008 until she was fired. She works minimally at stadium events, making a couple hundred dollars so far in 2009. She also "works on hair" part-time and receives food stamps. [Mother] recently commenced on-line classes for graphic design, and receives approximately $800.00 every five weeks as financial aid. This is the third graphic design program [Mother] has started.

> 15. [Mother] has had unstable housing, living with friends and family, until she signed a lease on a two bedroom townhouse on April 1, 2009. Her rent is $475.00 per month plus utilities.
>
> ….
>
> 17. Seventeen months elapsed between the times of [Mother's] participation decree to the first day of trial in this matter. Although inconsistent, [Mother] completed some services. However, she continued to test positive for marijuana after her intensive substance abuse treatment and had not undertaken home based services. It was not until after the first day of trial that she commenced home based services, having four sessions.
>
> 18. [Mother] has a history of unstable housing. She has only recently signed a lease and uses school money toward rent. The Court has major concerns of how [Mother] will be able to maintain her rent and utilities when not having a full-time income, let alone provide for the necessities of three children. In the event [Mother] discontinues classes, as she has done in the past, there will be even less resources available.
>
> 19. At the time of trial, conditions of instability remained to the point that the children would not be able to be returned safely to [Mother].
>
> 20. There is a reasonable probability that the conditions that resulted in the children's removal and continued placement outside the home will not be remedied by their mother. [Mother] has been unsuccessful in completing services to insure the children could be returned to a safe stable home, free of neglect in the long period of time in which she has been given. She did recently commence home based services, but not until after the first day of trial in this matter. [Mother] has had a lease for three months but is still not fully employed, but partially relying of [sic] school money. Although [Mother's] enrollment in school is admirable, her history of not completing school once started raises concerns that she will not remain in school until her self-projected graduation sometime in 2013.

Appellant's App. at 36-38.

In concluding that there was a reasonable probability that conditions would not be remedied, the juvenile court noted that "[s]ervices to remedy conditions were not successfully completed at the time of trial after almost two years and, given [Mother's]

history, will not be successfully completed." *Id*. at 39. Mother's history includes not only inconsistent participation in services, but also continued drug use even after she participated in IOP and after the CHINS proceedings had led to termination proceedings. While her last-minute progress in the areas of housing and home-based counseling is laudable, we conclude that this change fails to overcome evidence of her patterns of behavior demonstrated over the two years of proceedings. Thus, the juvenile court's findings in this regard are not clearly erroneous.

As for whether the continuation of the parent-child relationship poses a threat to the children's well-being, the juvenile court need not wait until the children are irreversibly influenced by a deficient lifestyle before terminating the relationship. *In re E.S.*, 762 N.E.2d 1287, 1290 (Ind. Ct. App. 2002). Instead, "[w]hen the evidence shows that the emotional and physical development of child[ren] in need of services is threatened, termination of the parent-child relationship is appropriate." *Id*.

Here, the juvenile court made the following finding regarding the threat to the children's well-being:

> 31. The continuation of the parent-child relationship poses a threat to the well-being of the children given the period of time they have been removed and their need for continued stability and permanency in a safe environment, and without having to adjust further. [Mother] tested positive for marijuana in February 2009, and after participating in an outpatient program. It is a concern that as a support person of mother, [witness] Ms. Webster believes [Mother's] parenting ability is fine but also believes "that doing drugs does not make you a bad mother". [Mother] has a history of marijuana abuse resulting in a conviction and parole violation. As explained by [parenting assessment administrator Michelle] Rightley, drug use alters a child's safety because the parent is not attentive and does not always respond to a child's need. In addition, it takes money. The ability to provide necessities for the children is

> still in question with [Mother's] history of instability and income, and parenting issues have not been addressed.

Appellant's App. at 38-39. Ms. Rightley testified that the children's safety is affected by parental inattention while under the influence of drugs and that Mother should have participated in further treatment after failing the five drug screens in February 2009. Tr. at 88. Not only did Mother continue to use drugs after completing the IOP, but she also continued to use them despite a drug-related conviction, a drug-related probation revocation, and the removal of her children and impending termination of her parental rights. As such, the juvenile court's finding regarding the threat to the children's well-being is not clearly erroneous.

Mother also challenges the sufficiency of evidence supporting the juvenile court's finding that termination is in the children's best interests.[2] In determining whether termination is in the best interests of the child, the juvenile court must look beyond the factors identified by DCS to the totality of the evidence. *C.T. v. Marion County Dep't of Child Servs.*, 896 N.E.2d 571, 585 (Ind. Ct. App. 2008), *trans. denied* (2009). In so doing, the court must subordinate the interests of the parent to those of the child. *Id.* A child's need for stability and permanency is paramount. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 192-193 (Ind. Ct. App. 2003). Recommendations from the caseworker and guardian ad litem that parental rights be terminated have been held sufficient

[2] To the extent that Mother bases this argument on an alleged procedural due process violation, we address it separately below.

to support a finding that termination is in the child's best interests. *Id*. at 203; *A.J. v. Marion County Office of Family & Children*, 881 N.E.2d 706, 718 (Ind. Ct. App. 2008), *trans. denied*.

Here, the juvenile court made the following findings regarding the children's best interests:

> 26. The three children have resided together in the foster home of Foresteen Dillard since August 24, 2007. This placement is pre-adoptive. She feels the children are bonded in their placement.
>
> 27. [Y.O.] has been diagnosed with Post Traumatic Stress Disorder and has issues of anxiety and hypervigilance for which she receives medications and therapy. There is also an Individual Education Plan in place at school. Therapist Cherie Patrick addresses [Y.O.'s] anger, anxiety, and adjustment issues which have resulted in progress, including no longer having nightmares. Ms. Patrick believes that Ms. Dillard provides the environment [Y.O.] needs to progress; an environment which includes [s]tability, consistency and safety. Her opinion is that [Y.O.] would need more therapy if moved at this time.
>
> 28. Ms. Patrick is also counseling [D.N.] for anger and adjustment issues. Ms. Patrick has observed [D.N.'s] anger outbursts as decreasing and feels Ms. Dillard's home is a good placement.
>
> 29. [C.O.] has no extensive special needs. Although tearful and hard to communicate with upon first coming to Ms. Dillard's residence, [C.O.] no longer has problems and is now a bubbly and cheerful child.
>
> 30. All three children are asthmatic and often had episodes when first placed with Ms. Dillard. Their asthma is now monitored and controlled.
>
> ….
>
> 32. Termination of the parent-child relationship is in the children's best interests. The children have been removed for almost two years. They have become adjusted in their pre-adoptive home. Termination would provide the opportunity for the children to be adopted into a safe, stable and secure environment and achieve permanency.

> 33. There is a satisfactory plan for the care and custody of the children, that being adoption by their current foster mother.
>
> 34. In taking into consideration the children's wishes, the parents' lack of progress in services, length of time, and placement, Guardian ad Litem Nataki Pettigrew agrees with [DCS's] recommendation of termination and adoption as being in the children's best interests. She has observed a tremendous improvement in the children and that they are thriving and feel safe and secure with Ms. Dillard.

Appellant's App. at 38-39. The record indicates that Mother did not complete the services available to her and continued to use drugs despite the knowledge that her parental rights were at stake. Moreover, the record supports the guardian ad litem's recommendation that the children's best interests are served by keeping them in the stable environment provided by Ms. Dillard. As such, the juvenile court's findings and conclusions are not clearly erroneous.

II. Due Process

Mother contends that her due process rights were violated based on DCS's alleged failure to investigate placement of the children with relatives during the CHINS proceedings. At the outset, we address DCS's argument that Mother has waived the issue for failure to object and/or appeal the issue during the CHINS proceedings. In this regard, we recognize that, given the differences in the nature and consequences of the CHINS versus the termination proceedings, a parent is not barred by collateral estoppel from raising the relative-placement issue during the termination proceedings, which Mother did in this case. *See In re C.M.*, 675 N.E.2d 1134, 1138 (Ind. Ct. App. 1997) (holding that ultimate goal of reunification in CHINS proceedings differs from that of termination proceedings, which is

permanent severance and, as such, the mother was not estopped from challenging her admissions to CHINS allegations during termination). We also note that the CHINS permanency plan order was not an appealable final judgment. Ind. Appellate Rule 2(H). Thus, Mother's failure to address the issue until the termination proceedings did not constitute waiver.

"The nature of process due in a termination of parental rights proceeding turns on the balancing of three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure." *Lawson v. Marion County Office of Family & Children*, 835 N.E.2d 577, 580 (Ind. Ct. App. 2005). A parent's interest in the accuracy and justice of the termination decision is commanding. *Id*.

Here, Mother's challenge concerns the juvenile court's decision to place the children in foster care instead of with her sister and brother-in-law, who reside in Alabama. Regarding the placement decision, Indiana Code Section 31-34-18-2 provides in pertinent part:

> (b) If the department or caseworker believes that an out-of-home placement would be appropriate for a child in need of services, the department or caseworker *shall consider* whether the child should be placed with the child's suitable and willing blood or adoptive relative caretaker, including a grandparent, an aunt, an uncle, or an adult sibling, before considering other out-of-home placements for the child.

(Emphasis added.) In concluding that DCS's actions did not violate due process, we note that the statute requires merely that the DCS *consider* a relative placement, not that it actually

make or give any particular weight to such a placement.[3] Moreover, we note that DCS *did* consider Mother's relatives as a placement option, but determined that the option was unsuitable because they had lived at various addresses in Alabama and DCS was concerned that Mother might simply follow the children to Alabama, forego the services required by DCS, and circumvent the process. Thus, DCS followed the statutory mandate that it *consider* placement with relatives but, having given such consideration, ultimately decided to pursue a more suitable option. As such, we find no due process violation. Accordingly, we affirm.

Affirmed.

RILEY, J., and VAIDIK, J., concur.

[3] To the extent Mother argues that DCS violated the statute by waiting until the children had been with their foster mother for one year before considering placement with relatives, we note that the statute does not include a deadline. We also note that, at the time of the initial CHINS hearing, the goal was reunification with Mother. Since Mother resided in Indiana, relocation of the children to Alabama at that time would have been incongruous with reunification.