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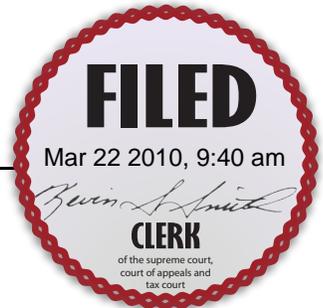
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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE INVOLUNTARY TERMINATION)
OF THE PARENT CHILD RELATIONSHIP)
BETWEEN N.W., Mother, AND R.W., Child)

N.W.,)
)
Appellant-Respondent,)

vs.)

INDIANA DEPARTMENT OF)
CHILD SERVICES,)

Appellee-Petitioner.)

No. 48A02-0909-JV-939

APPEAL FROM THE MADISON SUPERIOR COURT
DIVISION II

The Honorable G. George Pancol, Judge
Cause No. 48D02-0806-JT-287

March 22, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, N.W. (Mother), appeals the involuntary termination of her parental rights to her child, R.W., claiming there is insufficient evidence to support the trial court's order.

We affirm.

ISSUE

Mother raises two issues on appeal, which we consolidate and restate as the following single issue: Whether the trial court properly terminated Mother's parental rights to her minor child.

FACTS AND PROCEDURAL HISTORY

Mother is the biological mother of R.W., born on August 26, 2007.¹ The facts most favorable to the trial court's judgment indicate that on September 6, 2007, Mother left eleven-day-old R.W. with Gerald Humphries, a sixty-two-year-old man she had been staying with from time to time. On September 10, 2007, at approximately 9:30 in the evening, Humphries contacted Mother's sister, A.M. (Aunt). Aunt lived in Tennessee but had recently traveled to Indiana, at the request of Mother, to help with R.W. Even though Aunt had attempted to reach Mother for several days since her arrival in Indiana, Mother had not met with Aunt nor returned her calls. Consequently, Aunt had left a final telephone message,

¹ The parental rights of R.W.'s alleged biological father, L.F., were also terminated in the trial court's July 2009 judgment. The alleged father does not participate in this appeal. Consequently, we limit our recitation of the facts to those pertinent solely to Mother's appeal.

including her telephone number, telling Mother she planned to return to Tennessee the next day.

When Humphries telephoned Aunt, he told her he had been caring for R.W. for four days, but could no longer keep the baby because he was in poor health and having symptoms similar to the heart attack he had suffered several weeks earlier. Aunt drove to Humphries' home to get R.W. Upon her arrival at Humphries' home, Aunt immediately contacted the local police, who provided Aunt with the local MCDCS emergency after-hours telephone number.

Later that same evening, Mother returned to Humphries' home and learned that Aunt had picked up R.W. Mother became upset and accused Aunt of kidnapping R.W. Mother eventually called the local police. Officer Matt Smith responded to Mother's call and subsequently arrested her on an outstanding warrant.

On September 11, 2007, MCDCS received a referral concerning the incidents that had occurred between Mother and Aunt the night before. MCDCS also received a report from the hospital that R.W. had been born testing positive for cocaine and the drug alprazolam, commonly referred to as Xanax. MCDCS initiated an investigation, and on the morning of September 13, 2007, MCDCS investigating caseworker Jessica Hasenmyer (Hasenmyer) visited Mother at jail. Hasenmyer also spoke with Aunt, who informed her that Mother did not have a permanent home and that she "hangs out with a bad crowd of people." (Petitioner's Exh. 25). Based on Hasenmyer's investigation revealing Mother's current incarceration, unstable living environment, and history of leaving R.W. with non-relative

caregivers for extended periods of time without maintaining contact with said caregivers, MCDCS decided to take R.W. into emergency protective custody. R.W. was left, however, in the care of Aunt.

On September 18, MCDCS filed a petition alleging R.W. was a child in need of services (CHINS). During a detention hearing held the same day, Mother, who had been released from incarceration, attended the hearing and admitted to the allegations of the CHINS petition. The trial court thereafter adjudicated R.W. a CHINS and set the matter for disposition.

A dispositional hearing was held on November 1, 2007. Mother, was arrested and incarcerated the same day, however, and did not appear for the hearing. Following the hearing, the trial court issued an order formally removing R.W. from Mother's care and making her a ward of MCDCS. The trial court's dispositional order also incorporated a parent participation plan, directing Mother to successfully complete a variety of services in order to achieve reunification with R.W. Specifically, Mother was ordered to, among other things, complete a substance abuse intensive outpatient program (IOP) at the Center for Mental Health, attend Narcotics Anonymous (NA) and Alcoholic Anonymous (AA) classes and provide MCDCS with documentation of her attendance, submit to random drug screens, cooperate with home-based service providers, secure stable employment and suitable housing, and participate in supervised visits with R.W. Although Mother initially attended several supervised visits with R.W., Mother spent the majority of the next year incarcerated and did not participate in any additional services.

In June 2008, MCDCS filed a petition seeking the involuntary termination of Mother's parental rights. A fact-finding hearing on the termination petition was held in June 2009. During the termination hearing, MCDCS presented evidence that Mother had been incarcerated on multiple occasions throughout the duration of the underlying proceedings. Evidence was also introduced showing Mother had failed to successfully complete a majority of the court's dispositional goals, including an IOP, home-based services, and parenting classes. Mother had also failed to visit with or contact R.W. for approximately two years, and had lost custody of another child born during the pendency of the current proceedings pertaining to R.W. Although Mother eventually began participating in services through Drug Court following her most recent release from incarceration in January 2009, including random drug screens and NA and AA classes, by the time of the termination hearing, Mother was again incarcerated for violating Drug Court program rules by failing to submit to two random drug screens.

At the conclusion of the termination hearing, the trial court took the matter under advisement. On July 29, 2009, the trial court issued an order terminating Mother's parental rights to R.W. Mother now appeals.

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, 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 trial court's 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, cert. denied*, 534 U.S. 1161 (2002).

Here, the trial court's judgment contains 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.* A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. *D.D.*, 804 N.E.2d at 265. A judgment is clearly erroneous only if the findings do not support the juvenile court's conclusions or the conclusions do not support the judgment thereon. *Bester*, 839 N.E.2d at 147. Thus, if the evidence and inferences support the juvenile court's decision, we must affirm. *L.S.*, 717 N.E.2d at 208.

A parent's interest in the care, custody, and control of his or her children is arguably one of the oldest of our fundamental liberty interests. *Bester*, 839 N.E.2d at 147. Hence, "[t]he 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;
- (C) termination is in the best interests of the child

Ind. Code § 31-35-2-4(b)(2)(B) and (C) (2008). 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 I. C. § 31-37-14-2 (2008)). Mother challenges the sufficiency of the evidence supporting the juvenile court’s findings as to subsections 2(B) and 2(C) of the termination statute cited above. *See* I. C. § 31-35-2-4(b)(2)(B) and (C).

I. *Remedy of Conditions*

In claiming there is insufficient evidence to support the trial court’s determination that there is a reasonable probability the conditions resulting in R.W.’s removal or continued placement outside Mother’s care will not be remedied, Mother asserts a “substantial number”

of the trial court's findings are erroneous. (Appellant's Br. p. 20). Mother takes particular issue with findings numbered 11, 16, and 25, arguing that, contrary to these specific findings, she (1) has "visited or seen [R.W.] since the days prior to [R.W.'s] detention," (2) was not "involved in [d]rug [c]ourt in the past and failed to comply with said [c]ourt orders," and (3) that her job is not "in limbo." (Appellant's Br. pp. 18-19). Mother further claims that although she "may have failed to provide documentation to [MCDCS]" as reflected in the court's specific findings numbered 20 and 22, testimony from Kathy Nolle, Director of the Madison County Drug Court, indicates Mother was "complying with the important goal of getting service[s]." (Appellant's Br. p. 19). Mother therefore contends she is entitled to reversal, as the trial court's "findings do not support [its] judgment[.]" (Appellant's Br. p. 20).

We pause to observe that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. The trial court therefore needed to find only one of the two requirements of subsection 2(B) had been met before issuing an order to terminate Mother's parental rights. *See In re L.V.N.*, 799 N.E.2d 63, 69 (Ind. Ct. App. 2003). The trial court determined, however, that MCDCS presented sufficient evidence to satisfy both requirements of subsection 2(B), that is to say, that MCDCS established, by clear and convincing evidence, that there is a reasonable probability the conditions resulting in R.W.'s removal from Mother's care will not be remedied *and* that continuation of the parent-child relationship poses a threat to R.W.'s well-being. *See* I. C. § 31-35-2-4(b)(2)(B)(i) and (ii). Mother does not challenge the trial court's latter determination. In failing to do so, Mother has waived

review of this issue. *See Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005), *trans. denied* (concluding that failure to present a cogent argument or citation to authority constitutes waiver of issue for appellate review). Nevertheless, given our preference for resolving a case on its merits, we will review the sufficiency of the evidence supporting the trial court's judgment with regard to subsection (B)(i) of the termination statute.

In determining whether there is a reasonable probability that the conditions resulting in removal of the child from the family home 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*. However, the 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*. The trial court may also properly consider the services offered to the parent by the county department of child services, and the parent's response to those services, as evidence of whether conditions will be remedied. *Id.* In addition, a county department of child services (here, MCDCS) is not required to provide evidence ruling 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).

In finding there is a reasonable probability the conditions resulting in R.W.'s removal or continued placement outside of Mother's care will not be remedied, the trial court made numerous detailed findings concerning Mother's history of drug abuse, extensive criminal activity, inability to maintain a safe and suitable home for R.W., and failure to complete court-ordered services as follows:

7. [R.W.] was removed from [Mother's] care due to . . . [her] incarceration, unstable living conditions, and the fact that [R.W.] was left in the care of an elderly man who had a heart attack and subsequently died. At the time of the detention[,] there were concerns that [Mother] was abusing illegal drugs.
* * *
11. [Mother] has not visited or seen her child since the days prior to [R.W.'s] detention.
* * *
14. At the time of this fact-finding hearing, [Mother] appears incarcerated as violating the terms of [d]rug [c]ourt.
15. For the majority of the underlying [CHINS] case[], [Mother] remained incarcerated.
16. [Mother] was involved in [d]rug [c]ourt in the past and failed to comply with said court orders.
17. On or about January of 2009, [Mother] was released from prison and into the [d]rug [c]ourt program.
18. [O]n or about May 2009, [Mother] missed 2 drug screens and was violated in the [d]rug [c]ourt program.
19. As such, [Mother] had to serve a 30-day jail sentence as a sanction for said violation.
20. [Mother] has failed to provide [MCDCS] with any proof of her attending [NA/AA].
21. [Mother] was discharged from home-based services due to non-compliance.
22. [Mother] has failed to provide any documentation in regard[] to her participating in an [IOP] at Crestview Center.
23. [Mother] was discharged from the Center for Mental Health due to non-compliance.

24. [Mother] has failed to complete any of the services that were ordered of her at the time of this fact-finding hearing.
25. At the time of the [termination] hearing, [Mother] was incarcerated[,] as such the status of her employment is in limbo.
26. [Mother] has not had any contact with [] [R.W.] since [R.W.] was approximately two weeks old.

(Appellant's App. pp. 24-27). Our review of the record reveals there is ample evidence to support these findings and conclusions, which, in turn, support the trial court's ultimate decision to terminate Mother's parental rights to R.W.

The evidence most favorable to the trial court's judgment reveals that R.W. was initially removed from Mother's care due to her incarceration, unstable housing and living conditions, and suspected use of illegal substances. At the time of the termination hearing, these conditions remained largely unchanged. Mother was again incarcerated for violating the terms of her participation in drug court and was facing several felony charges. Consequently, Mother was not participating in services and was unavailable to parent R.W. In addition, Mother had failed to successfully complete a majority of the trial court's dispositional goals, including parenting classes, counseling, an IOP, and regular visitation with R.W., despite having approximately two years and a wealth of services available to her to do so.

Testimony from MCDCS family case manager Rebecca Johnson (Johnson) substantiates the trial court's findings. During the termination hearing, Johnson informed the court that although Mother participated in several visits with R.W. during the first couple of

weeks of the CHINS case in October 2007, as well as completed an intake assessment at the Center for Mental Health, Mother thereafter failed to show for five consecutively scheduled visits with R.W., and by November 2007, Mother's visitation privileges had been suspended. Johnson further testified that in March 2008, Mother was discharged from services at the Center for Mental Health for failing to return for counseling sessions and failing to participate in the IOP. Johnson also indicated Mother never completed home-based services.

When asked whether Mother had ever provided Johnson with "any type of certificates of completion or certificates of participation in any of the services that she was ordered to participate in," Johnson replied, "She has not." (Tr. p. 37). Johnson further explained that she had attempted to obtain this information from drug court personnel, but was prevented from doing so because Mother had never signed the necessary release forms, as ordered by the trial court in its 2007 dispositional order. Finally, when asked whether she believed "that the conditions that necessitated removal can be remedied at this point in time," Johnson answered, "No." (Tr. p. 42).

Mother's own testimony also supports the trial court's findings. During the termination hearing, Mother confirmed that, at the time of R.W.'s initial removal in 2007, she was "homeless" and "addicted to drugs." (Tr. p. 71). When asked if she had tried to maintain contact with R.W. during the underlying proceedings, Mother answered, "I just had sent a few cards." (Tr. p. 76). Mother also admitted that she did not sign a release form for MCDCS to obtain information regarding her participation in services, and that she did not participate in services while incarcerated or make "any attempts" to do so during any of her

brief releases from incarceration prior to January 2009. (Tr. p. 88). “[A] pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support[s] a finding that there exists no reasonable probability that the conditions will change.” *Lang*, 861 N.E.2d at 372.

Although we acknowledge that Mother did participate in some services following her most recent release from incarceration in January 2009 through the drug court program, Mother thereafter refused to submit to two consecutive drug screens, failed to show for a drug court hearing, and was re-incarcerated at the time of the termination hearing. We have previously explained that simply going through the motions of receiving services alone is not sufficient if the services do not result in the needed change, or only result in temporary change. “Where there are only temporary improvements and the pattern of conduct shows no overall progress, the court might reasonable find that under the circumstances, the problematic situation will not improve.” *In re A.H.*, 832 N.E.2d 563, 570 (Ind. Ct. App. 2005).

Mother’s specific complaints concerning findings number eleven, sixteen, and twenty-five are likewise unavailing. We agree with Mother that finding number eleven, which indicates Mother had not seen or visited with R.W. “since [R.W.’s] removal in September 2007,” is technically incorrect, as the record clearly establishes that Mother did participate in several supervised visits with R.W. in October 2007. We nevertheless find this error to be harmless, as uncontroverted evidence, including Mother’s own testimony, confirms that apart from these few initial isolated visits, Mother has not visited R.W. since her removal from

Mother's care in September 2007. Moreover, when asked during the termination hearing whether she had "tried to maintain any contact with [R.W.]," throughout the underlying CHINS and termination proceedings, Mother stated she "just had sent a few cards," and further explained she "didn't want to call and upset [her] sister and be rejected." (Tr. p. 76).

Mother's challenge concerning finding number sixteen is also unpersuasive. Finding number sixteen states that Mother was "involved in [d]rug [c]ourt in the past and failed to comply with said court orders." (*See* Appellant's App. p. 20). Our review of the record reveals that Mother admitted during the termination hearing that she was released from incarceration and ordered to participate in drug court during the early summer months of 2008, but that she refused to participate in the program and "did not even go." (Tr. p. 86). Consequently, we find Mother's assertion on appeal, that she could not have failed to comply with past drug court orders because she completely disregarded the court's order from the start by refusing to even begin the program, to be disingenuous. Finally, we consider the trial court's finding number twenty-five that "the status of [Mother's] employment is in limbo" due to Mother's current incarceration to be a reasonable inference, especially in light of the fact there were several possible felony charges pending against Mother at the time, including a class A felony fraud charge.

Based on the foregoing, we conclude that MCDACS presented ample evidence to support the trial court's determination that there is a reasonable probability the conditions resulting in R.W.'s removal from Mother's care will not be remedied. Findings of fact are not to be reviewed individually, but are reviewed in their entirety to determine if they support

the court's legal conclusions, or if they constitute an abuse of discretion. *A.F. v. Marion County Office of Family & Children*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002). Notwithstanding Mother's recent participation in services through the drug court program, significant evidence concerning Mother's unresolved substance abuse issues, ongoing criminal activity, and failure to complete a majority of the trial court's dispositional goals indicates there is a substantial probability of future neglect and deprivation of R.W. should she be returned to Mother's care.

The trial court was responsible for judging Mother's credibility and for weighing her testimony of improved conditions against the abundant evidence illustrating Mother's history of neglectful conduct, coupled with her current inability to care for R.W. and to provide her with a consistently safe, stable, and drug-free home environment. It is clear from the language of the judgment the trial court gave more weight to evidence of the latter, rather than the former, which it was permitted to do. *See Bergman v. Knox County Office of Family & Children*, 750 N.E.2d 809, 812 (Ind. Ct. App. 2001) (concluding trial court was permitted and in fact gave more weight to abundant evidence of mother's pattern of conduct in neglecting her children during several years prior to termination hearing than to mother's testimony she had changed her life to better accommodate children's needs). Mother's arguments on appeal amount to an invitation to reweigh the evidence, and this we may not do. *D.D.*, 804 N.E.2d at 264; *see also In re L.V.N.*, 799 N.E.2d 63, 68-71 (Ind. Ct. App. 2003) (concluding mother's argument conditions had changed and she was now drug-free constituted impermissible invitation to reweigh evidence).

II. *Best Interests*

We next consider Mother's assertion that termination of her parental rights is not in R.W.'s best interests. We are mindful that, in determining what is in the best interests of a child, the trial court is required to look beyond the factors identified by the Indiana Department of Child Services and to consider the totality of the evidence. *McBride*, 798 N.E.2d at 203. 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 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).

In addition to the findings set forth previously, the trial court also found that "[b]oth the family case manager and CASA agree that termination of [Mother's] parental rights is in the best interests of [R.W]." (Appellant's App. p. 25). The trial court then concluded that termination is in R.W.'s best interests noting Mother had "failed to complete any services" as of the time of the termination hearing and had "not seen her child in approximately two years." (Appellant's App. pp 25-26). These additional findings and conclusions are also supported by the evidence.

When asked if it was her "position" that termination of Mother's parental rights is "in [R.W.'s] best interest[s]," caseworker Johnson answered, "It is." (Tr. p. 44). When asked to

explain why she felt this way, Johnson explained as follows, “[R.W.] has been placed [with Aunt for] almost two years. That family is all [R.W.] knows. There is not a bond between [Mother] and [R.W.]. And just the current charges that she is facing.” (Tr. p. 44). Similarly, Aunt testified that R.W. was “doing well” in her home, and that R.W. was “very happy[,] and funny[,] and loved.” (Tr. p. 19). Also significant, at the conclusion of the termination hearing, the court-appointed special advocate (CASA) for R.W. confirmed in open court that she still agreed with her written recommendation to the court that Mother’s parental rights be terminated.

“It is undisputed that children require secure, stable, long-term continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child’s sound development as uncertainty.” *Baker v. Marion County Office of Family & Children*, 810 N.E.2d 1035, 1040 (Ind. 2004). Based on the totality of the evidence, including Mother’s failure to successfully complete a majority of the trial court’s dispositional goals, extensive criminal history, and current inability to provide R.W. with a safe and stable home environment, as well as Johnson’s and the CASA’s testimony recommending termination, we conclude that ample evidence supports the trial court’s finding that termination is in R.W.’s best interests. This finding, in turn, supports the trial court’s ultimate decision to terminate Mother’s parental rights to R.W. *See, e.g., In re A.I.*, 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of CASA and 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 termination is in child's best interests), *trans. denied*.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly terminated Mother's parental rights to her minor child.

Affirmed.

VAIDIK, J., and CRONE, J., concur.